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The problem the Supreme Court confronted in *Kaplan* was that the book contained no pictures. Could mere words be considered obscene? The Court's answer was a cautious "yes." Although it held that words alone could indeed be obscene in some cases, the Court also warned that the prosecution of text should give us greater pause than the prosecution of images. Yet, the Court's opinion was maddening in its failure to explain or justify its distinction between words and images. In a remarkably unilluminating passage, Chief Justice Burger offered the following account of the preferred status of text over image in obscenity law:

> Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. (119)

Why should it be so? Why do words have a different and preferred place in our hierarchy of values? Justice Burger offers "tradition" and emotion in place of analysis. "So it should be" is his ultimate argument. In my view, certain deep but unspoken assumptions about both the meaning of the First Amendment and the distinction between text and image underlie Burger's assertion.

First, Chief Justice Burger's comment assumes a basic, commonplace First Amendment hierarchy in which protected speech is opposed to unprotected conduct. Second, he assumes that the danger of prohibiting speech is that to do so will interfere with "the communication of ideas." This is an unsurprising assumption, given that the predominant rationale for protecting speech under the First Amendment is the fabled metaphor of "the marketplace of ideas."

What is perhaps more surprising is that Burger's statement maps the text/image dichotomy onto the speech/conduct one. His account assumes an association between text and ideas and thus, by virtue of the marketplace of ideas metaphor, an association between text and speech. In contrast, he associates images with conduct and the body. Distinguishing the lofty world of words from "obscene pictures of flagrant human conduct," Burger seems to envision the category of pictures itself as flagrant and debased. They are so closely associated with the conduct they depict that they somehow merge with it, becoming conduct-like rather than speech-like. Indeed, this is a common reaction to images, which are often perceived as if they were unmediated (Goodman 1976).[5] Burger's hierarchical associations recall what W.J.T Mitchell terms "the familiar claim that pictures cannot make statements or communicate precise ideas" (1986, 66). Embedded in Chief Justice Burger's assertion, then, are strains of the long-standing anxieties about images we saw earlier: images are lowly, sensual, and divorced from the realm of reason and ideas; they are so connected with passion, the body, and the senses that pictures become fused with what they represent. They cease to be representation.

Chief Justice Burger wrote of the preferred status of text, "So it should be." And so it was: since *Kaplan*, the preference for text over image in obscenity law has

[5] Goodman, of course, disagrees with this perception.

become the rule in contemporary obscenity prosecutions, which have focused almost exclusively on pictorial rather than textual material (Adler 2000, 210). The influential Attorney General's Commission on Pornography noted and encouraged this prosecutorial trend in 1986. Citing the *Kaplan* Court, the Attorney General's report described the "special prominence of the printed word," as compared to images, in free speech law (1986, 382). The report observed that there is "for all practical purposes, no prosecution of [purely textual] materials now" (382). With two recent notable exceptions (in cases that compensate, as I have argued, for the limits of child pornography law), this trend in obscenity law of prosecuting only visual rather than verbal material has continued unabated (Adler 2007).[6]

8.4 Catharine MacKinnon and the Feminist Critique of Pornography

Photography has something to do with resurrection.

— Roland Barthes (1982), *Camera Lucida*

The image is a kind of threat.

— David Morgan, *The Sacred Gaze*

The image is the sign that pretends not to be a sign, masquerading as (or for the believer, actually achieving) natural immediacy and presence.

— W.J.T. Mitchell, *Iconology: Image, Text, Ideology*

Antipornography feminist Catharine MacKinnon is a scathing critic of almost every facet of the Supreme Court's obscenity jurisprudence. Yet, surprisingly, MacKinnon's approach to sexual materials bears one thing in common with the Supreme Court's: she, too, assumes a hierarchy of text over image. The Court and Mackinnon disfavor images for different reasons, however. Whereas the Court distinguishes text from image in obscenity jurisprudence on the assumption that images are lowly and unimportant, MacKinnon singles out images because she views them as far more dangerous than words.

MacKinnon's basic argument against pornography is as follows: we should censor it not because it is immoral or worthless—reasoning that comes from obscenity law—but because it constructs a world of violence, subjugation, and inequality for women (Dworkin and MacKinnon 1988, 46). Pornographic images are doubly

[6] Adler describes recent trend of using obscenity law to compensate for limits of child pornography law. See also *U.S. v. Whorley*, 550 F.3d 326, 335 (4th Cir. 2008) another case in which obscenity law is applied to text. Here, defendant was convicted of receiving obscene anime cartoons and sending or receiving obscene textual emails about sexual fantasies involving children in violation of 18 U.S.C. 1462. Judge Gregory, concurring in part and dissenting in part, claimed that the text-only emails should be protected as "pure speech." Insisting on the special importance of words as opposed to images in the First Amendment, Judge Gregory cited the special "ability to consider and transmit thoughts and ideas through the medium of the written word."

harmful from MacKinnon's perspective. First, she argues, they are inseparable from the violent action that produced them: the pictures are infected with the "female sexual slavery" that she believes is required to produce them (46). She emphasizes violent acts of abuse that go into making pornography: "[W]omen are gang raped so they can be filmed…. [W]omen are hurt and penetrated, tied and gagged… so sex pictures can be made" (MacKinnon 1993, 15). But MacKinnon believes that all pornography—even that made by women who "voluntarily" pose for it—is a product of pervasive violence and inequality.[7]

The second harm MacKinnon attributes to pornography is that it constructs a world in which all women are victimized. Pornographic images, already the product of violence, harm women beyond those in the pictures: they "institutionaliz[e] a subhuman, victimized, second-class status for women" (MacKinnon 1987, 200–01). She writes: "Social inequality is substantially created and enforced" through pornography (MacKinnon 1993, 13). Arguing that pornography is therefore action, not just speech, she writes that pornography is "a practice of sexual politics, an institution of gender inequality" (MacKinnon 1989, 197). Thus, MacKinnon concludes that pornography is more "actlike than thoughtlike," and that it should no longer merit First Amendment protection (204).

Formally, MacKinnon's work addresses both pictorial and verbal pornography. The model antipornography ordinance she drafted along with feminist theorist Andrea Dworkin specifically defines pornography as "the graphic sexually explicit subordination of women through **pictures and/or words**" (MacKinnon and Dworkin 1988, 36; emphasis added). Yet, despite her formal concern for banning words as well as images, it becomes clear upon closer reading of her work that MacKinnon's main target is pornographic images, not text. As I will suggest below, a special abhorrence for visual pornography emerges in MacKinnon's work.

Why would MacKinnon reserve greater concern for images? I believe that images for her bear a kind of magical power that recalls the power of images in religious, iconoclastic literature. Indeed, the image in MacKinnon's work becomes the site of fusion between the two kinds of harms that she attributes to pornography. As described above, these two harms are temporally distinct. The first type of harm—the violence that it takes to produce pornography—precedes the existence of the picture. The second, social construction harm, occurs after the picture is made; it stems from the effect the image has on its viewers. Yet for MacKinnon these past and future harms are magically compressed in the immortal, timeless space of the photograph. The picture not only is alive with the violent action, the rape, that produced it but also affects its viewers in a way that causes this violence to reproduce itself. Thus, in Mackinnon's work, the picture is inextricable from the harm that produced it and the harm that it conjures up.

[7] She contends that when women consent to posve for pornography, such consent is tainted because "all pornography is made under conditions of inequality based on sex, overwhelmingly by poor, desperate, homeless, pimped women who were sexually abused as children" (Dworkin and MacKinnon 1988, 20).

Consider the vision of images that appears at the opening of MacKinnon's book, *Only Words*. The book begins with a harrowing passage that addresses the reader in the second person, commanding her to imagine herself as being raped and tortured. "You grow up with your father holding you down and covering your mouth so another man can make a horrible searing pain between your legs. When you are older, your husband ties you to the bed and drips hot wax on your nipples and brings in other men to watch…. You cannot tell anyone" (MacKinnon 1993, 3). After this account of sexual violation, MacKinnon then turns to the subject of photography[8]:

> In this thousand years of silence, the camera is invented and pictures are made of you while these things are being done. You hear the camera clicking or whirring as you are being hurt, keeping time to the rhythm of your pain. You always know that the pictures are out there somewhere, sold or traded or shown around or just kept in a drawer. In them, what was done to you is immortal. He has them; someone, anyone, has seen you there, that way. This is unbearable. What he felt as he watched you as he used you is always being done again and lived again and felt again through the pictures. (3–4)

Note what's going on in this passage. Pictures are so powerful it is as if they are alive with the action they document. Indeed, they are "immortal": through them your violation is "done again and lived again and felt again." Pictures are perpetual, potent, and curiously animate. Their promiscuity and permanence are part of their power—they are always "out there somewhere." The camera's click and whir is not just a soundtrack to your pain; the pictures it produces become a site of your eternal re-violation.

Indeed, pictures are so powerful, so alive with the abuse they document, that they have an uncanny, talismanic power to reproduce themselves. In a peculiar passage, MacKinnon writes about the connection between the violence that goes into making pornography and the violence that she believes pornography creates. She writes:

> I have come to think that there is a connection between these conditions of production [the force that goes into producing pornography] and the force that is so often needed to make other women perform the sex that consumers come to want as a result of viewing it. In other words, if it took these forms of force to make a woman do what was needed to make the materials, might it not take the same or other forms of force to get other women to do what is in it? (20–21)

In this passage, MacKinnon invests pictures with talismanic power, as she does at another point when she writes that "[p]ornography brings its conditions of production to the consumer" (25). The picture becomes a totem, supernaturally able to reproduce its violent origins when it is seen by future viewers.

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[8] Many of the questions I discuss here raise issues not only of images in general, but of photography in particular. I have addressed the unusual vulnerability of photography to censorship in prior scholarship. Here, I do not focus on photography as a genre but rather on photography as a subset of images more generally. Like all images, photography often raises assumptions that it is crude, dangerous, powerful, or true. Although photos often present these assumptions more forcefully than do other types of images, for purposes of this chapter, I posit that it is a difference of degree not of kind.

MacKinnon's view of images in these passages is remarkably similar to the view that permeates iconoclastic and iconophilic accounts. For her, a pornographic picture is like an icon in two ways. First, she collapses signifier and signified: the picture is somehow alive, fused with what it represents. But second, the image, like an icon, is able to work magic. As Halbertal and Margalit describe in their definitive account of the biblical prohibition on idolatry, idols typically "become the bearers of the power they represent" (1992, 52). Freedberg describes images as possessing "an effectiveness that proceeds as if the original body were present" (1989, 402). The thing represented—whether violence or a god or a powerful saint—inheres in the representation; the depiction can miraculously conjure up the power of the thing depicted.

It is no wonder that MacKinnon has insisted when writing about pornography that "representation is reality" (29). MacKinnon's definition of pornography begins with her assertion that "pornography **is** … the subordination of women" (Dworkin and MacKinnon 1988, 36) (emphasis supplied). Pornography does not represent the subordination of women—it does not cause it, it **is** it. It "is a form of forced sex" (MacKinnon 1989, 197). When the Seventh Circuit struck down MacKinnon's antipornography ordinance after it had been enacted into law by the city of Indianapolis, the Court seized on and rejected this very point in her reasoning. The Court insisted on the distinction between representation and reality, writing: "[T]he image of pain is not necessarily pain" (American Booksellers Ass'n 1985, 1986, 330). Yet for MacKinnon, the fusion between visual signifier and signified is precisely her point. She writes, for example: "The most elite denial of the harm [of pornography] is the one that holds that pornography is 'representation'" (MacKinnon 1993, 28).

By dwelling on images and not on textual pornography as her paradigm of pornographic harm, MacKinnon draws on an age-old model of visual representation. It is the model of both iconophiles and iconophobes, in which pictures bear a special power by being fused with what they depict.[9]

8.4.1 Child Pornography Law

> *[Images] were perilous in themselves, full of the destructive power of their always-suspect origins.*
>
> — John Phillips (1973), *The Reformation of Images*

The Supreme Court's child pornography jurisprudence is founded on the distinction between text and image. Child pornography law governs only "visual depictions"

[9] Although I do not discuss it here, another result of this fusion is that MacKinnon, like many others, attributes a special truth value to photography. She writes: "[T]he pictures are not so different from the words and drawings that came before, but your use for the camera gives the pictures a special credibility, a deep verisimilitude, an even stronger claim to truth…." (1993, 5).

of child sexual conduct (18 U.S.C. 2256). Words can never be child pornography, no matter how gruesome or sexually explicit they might be.[10] In child pornography law, we once again find an area of First Amendment doctrine permeated by unexplored anxieties and assumptions about visuality.

Federal law defines "child pornography" as "any visual depiction, including any photograph, film, video, picture, or computer … image or picture … of sexually explicit conduct" of a child under 18 (18 U.S.C. 2256 (8)).[11] The law tracks the Supreme Court's approach to child pornography, which it initiated in the 1982 case of *New York v. Ferber.* In *Ferber*, a unanimous Court (extremely rare in First Amendment cases) created a previously unknown exception to the First Amendment, proclaiming that "child pornography" was a new category of speech without constitutional protection. The *Ferber* Court encountered a novel First Amendment problem: whether nonobscene,[12] sexual images of children—speech not falling into any previously defined First Amendment exception—could be constitutionally restricted. The Court's answer was yes.

Although *Ferber* announced five reasons that supported the exclusion of such images from constitutional protection,[13] the primary thrust of these rationales was this: child pornography must be prohibited because of the harm done to children in its *production*. The images lack First Amendment protection because their creation requires a crime, the abuse of an actual child.

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[10] Cf. *U.S. v. Whorley*, 550 F.3d 326 (4th Cir. 2008), where verbal accounts of child sexual conduct were prosecuted as obscenity, not child pornography.

[11] Wholly computer-generated images are not child pornography, since their production does not entail the abuse of a real child. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down provisions of Child Pornography Prevention Act that treated "virtual" child pornography as if it were child pornography). This reasoning, which distinguished between "real" images and "virtual" ones, is based in my view on the faulty but common assumption that certain images, especially photographs, are unquestionably "true."

[12] The materials at issue in Ferber had been found not to be obscene according to a jury. Thus, the issue for the Court was sharply defined.

[13] *Ferber*, 458 U.S. 747, 756 (1982). The five rationales set out in *Ferber* were as follows:

1. The State has a "compelling" interest in "safeguarding the physical and psychological well-being of a minor." *Ibid.,* 756–57.
2. Child pornography is "intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the child's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed" in order to control the production of child pornography. *Ibid.,* 759 (citations omitted). The Court went on to explain that the production of child pornography is a "low-profile clandestine industry" and that the "most expeditious if not the only practical method of law enforcement may be to dry up the market for this material" by punishing its use. *Ibid.*, 760.
3. "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production" of child pornography. *Ibid.*, 761 (citations omitted).
4. The possibility that there would be any material of value that would be prohibited under the category of child pornography is "exceedingly modest, if not *de minimis*." *Ibid.,* 762.
5. Banning full categories of speech is an accepted approach in First Amendment law and is therefore appropriate in this instance. *Ibid.,* 768–69.

Ferber introduced a novel theory into First Amendment law: the theory that a visual representation can be banned because of the underlying illegal act that produced it. This was a remarkable aberration in First Amendment jurisprudence. Indeed, outside of child pornography law, the First Amendment aggressively polices the distinction between a representation and the thing represented. The normal First Amendment rule thus recognizes that a photograph of a criminal act is not the same thing as a crime. If a news photographer captures a picture of a bank robber in the act, for example, we might publish his photograph on the front page of the newspaper, not ban it. As Thomas Emerson wrote: "[T]he basic principles of a system of freedom of expression would require that society deal directly with the [illegal] action and leave the expression alone" (Emerson 1970, 494).

Of course, it is still possible to prosecute the photographer of a crime for any involvement he may have had with the crime itself. The picture does not protect him.[14] Suppose someone took a picture of a murder. Perhaps, if the photographer had merely happened upon the act and had been unable to intervene, we would laud his journalistic coup. If he had participated in the murder, we would prosecute him for murder. In the most extreme case, if he committed the murder in order to photograph it, we might consider it a particularly perverse murder. But in any of these events, the First Amendment would make it exceedingly difficult to criminalize the photograph of the murder.[15] We would prosecute the photographer for the act, not the picture. And although some might hope that notions of journalistic taste would prevent a newspaper from publishing the picture, First Amendment law would almost certainly protect the newspaper's right to do so.

But consider the law of child pornography: it is the only place in First Amendment law where the Supreme Court has accepted the idea that we can constitutionally criminalize the *depiction* of a crime in addition to the crime itself. The Court in *Ferber* recognized that it was already a crime to abuse a child in order to produce child pornography. It observed that producing such materials is "an activity illegal

[14] This is contrary to what MacKinnon intimates in the opening of *Only Words*, where she appears to suggest that taking pictures decriminalizes the underlying crime of rape (MacKinnon 1993, 4). For a statement of the conventional First Amendment rule, see, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

[15] See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 102 (1979) ("[State action to punish the publication of truthful information seldom can satisfy constitutional standards]."); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (upholding the newspaper's right to publish accurate information about confidential judicial proceedings); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (allowing publication of so-called Pentagon Papers despite the fact that the papers had been stolen from the Pentagon); *Food Lion, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that torts committed while newsgathering may be actionable, but news that is obtained as a result of those torts is protected expression); *Bartnicki v. Vopper*, 532 U.S. 514, 529–30 (2001) (distinguishing Ferber and noting that outside of child pornography law "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.").

throughout the Nation" (Ferber 1982, 761). But the Court consciously chose to permit criminalization of the pictures too. And in doing so, it introduced into its jurisprudence an entirely new rationale for banning speech.

In my view, *Ferber* made this leap in large part because of the visual nature of speech at issue. Of course, as I have previously argued, the particularly horrifying subject matter of the speech involved—depictions of the molestation of children—explains in part the Court's decision to depart from its normal First Amendment rules. But I believe the Court also made this unusual departure in *Ferber* because the speech involved was visual rather than verbal. When it comes to verbal representations, we insist on the distinction between signifier and signified (Peirce 1958); when it comes to visual representations, we are tempted to overlook the distinction. Child pornography law thus represents yet another place in First Amendment doctrine where we see the persistence of the age-old tendency to elide visual images with what they represent.

Child pornography law conflates act and image on a rhetorical as well as a legal level. First, we ban the pictures because of the criminality of the underlying act, which is already a peculiar move in First Amendment law. Then, the rhetoric of the law replicates this compression. The connection between the underlying child abuse and the picture is so strong that courts and legislators often speak of them as if they were one and the same thing, as if the criminality of the act now resides in the picture itself. Courts and legislatures continually repeat the mantra: "Child pornography is child abuse" (Attorney General's Commission on Pornography 1986, 406). The abuse inheres in the image.

Indeed, as in MacKinnon's work, images in child pornography law take on a peculiarly animate quality. Just as MacKinnon sees the image as "immortal," so the Supreme Court views images of child pornography as bearing the power to "haunt the [the child] in future years" (Ferber 1982, 759*n*10). The photograph's timelessness gives it a kind of life; its harm persists "long after the original misdeed took place" (759*n*10). The photographs possess an uncanny autonomy, as if they were somehow quickened by the abuse they captured.[16]

The image no longer merely depicts an act but becomes itself a powerful actor. When the Supreme Court approvingly quoted an article claiming that images of child sexual abuse were more harmful than the actual abuse itself, it seemed to endorse this view of images. The Court wrote: "[P]ornography poses an even greater threat to the child victim than does sexual abuse" (759*n*10). In this formulation, the image becomes even more powerful than a physical act of violation.[17]

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[16] The visual nature of the speech at issue explains the Court's novel reasoning on two levels, not only the Court's treatment of the image as if it were the crime itself, explained above, but also the assumption that a photograph is indisputably "true." See supra note 9 (describing assumption that images have a deeper connection to truth).

[17] This view of images may explain a puzzling recent discrepancy that critics have observed in sentencing law. Sentences for people who download (but do not produce) child pornography are at times so lengthy that they exceed the sentences given to people who commit physical crimes of molestation against children.

8.5 Flags

The Supreme Court's flag jurisprudence also bears traces of the religious suspicion about images. Yet oddly, in this realm, the Court shows strains of both an iconoclastic and an idolatrous view of the visual.[18] In *West Virginia Board of Education v. Barnette* (1943), the Supreme Court struck down a regulation that required children in public schools to salute the flag. The plaintiffs were parents who brought suit to restrain enforcement of this regulation against their children who were Jehovah's Witnesses. Why didn't the Jehovah's Witnesses want to salute the flag? Fittingly for this discussion, their religious beliefs led them to consider the flag a graven image within the prohibition of the Ten Commandments. Saluting the flag was idolatry, as wrong as fetishizing the Golden Calf. Indeed, the Supreme Court in *Barnette* quoted the Ten Commandments' prohibition on graven images to explain why the Jehovah's Witnesses would not salute the flag.[19]

The issue in *Barnette* was the expressive meaning of saluting the flag, which the Court considered a "form of utterance" (624). Nonetheless, the Court lingered at some length over the meaning of the flag itself as speech. Here, the Court gives us a glimpse of its thinking about the strange power of visual speech. In a curious passage, the Court talks about the nature of visual symbols. Justice Jackson writes for the Court: "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag… is a short cut from mind to mind…." (632). Note what's going on in these lines. Visual images are double edged; they are both "primitive but effective." When Justice Jackson says that an image works as a "short cut from mind to mind," he portrays images as forceful, but crude. They're a cheat, a shortcut.

Furthermore, there is a certain treachery to images. The Court's opinion reveals a nagging uncertainty about how to account for the flag's meaning. Consider what Justice Jackson says next: "A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn" (632–33). This passage portrays visual symbols as a potentially hazardous form of communication. If the meaning of a visual symbol rests in the mind of the person who sees it, then a speaker who uses a symbol to convey a message runs a risk that the symbol will mean something other than what he intended. Thus, alongside the great power of the visual symbol as speech—it is a primitive and effective shortcut—runs the possibility of betrayal or treachery. The visual symbol is so powerful it may overpower the speaker. He may not be able to control its meaning.

[18] Of course, as I have claimed, both views share a common vision of images as possessing special power.

[19] See *Barnette*, 319 U.S. 624, 629 (1943) ("Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.'").

This same ambivalence about the power and the danger of visual images resurfaces in the Court's later flag-burning cases. In the 1989 case of *Texas v. Johnson* (1989), the Court considered the conviction of a man who burned a flag at a political protest held outside the 1984 Republican convention in Texas (1989, 399–400). The Court struck down the defendant's conviction under a Texas statute that prohibited "desecration" of the American flag.[20]

On First Amendment grounds, *Texas v. Johnson* should have been an easy case. The statute at issue fell well within precedents prohibiting content discrimination. But emotionally this case was very difficult for the Court. Both the majority and the dissent in *Johnson* seemed struck by the strange force of the flag as a visual symbol.

The majority in *Johnson* focused on the special multivalent quality of the flag as a visual image. Just as the Court in *Barnette* had discussed the way in which the meaning of a visual image would fluctuate dramatically depending on who was viewing it and what his attitude was, to the *Texas v. Johnson* Court, the special quality of the flag was its capacity to convey multiple meanings. In fact, according to the majority, it was this quality of the flag that explained why the statute at issue was unconstitutional. The majority reasoned that the problem with the Texas statute was that it said you can only use the flag in one way, to express patriotism. But to limit the flag in this manner was to cut off precisely what is unique and powerful about the symbol: that numerous meanings inhere within it. The Court held that you can't impoverish the cultural realm by confining the flag to only one meaning when by its nature it is capable of so many different interpretations (1989, 417). Visual images by their nature cannot be confined.[21] In short, you can't capture the flag.

What is the dissent's response to this? Yes the majority is right. Yes the Texas law is an example of content discrimination. Yes it is even viewpoint discrimination. But this is the *flag*. And because it's the flag, content discrimination, even viewpoint discrimination, is acceptable. The flag is so important that it should be an exception to all First Amendment principles.

Why? What is it about the flag that should cause us to ignore clear First Amendment precedent? Isn't the flag after all just a piece of cloth? Not according to Justice Rehnquist. In his dissent, he writes about the "mystical reverence" with which people regard the flag, the "uniquely deep awe and respect" that we hold for it (429, 434). When Justice Rehnquist says the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas" (429), it is as if he is saying that the flag is so powerful, so mystical and awe-inspiring that it is no longer an idea, no longer speech. In fact, Justice Rehnquist attributes a religious

[20] *Ibid.*, 400 (quoting Texas Penal Code Ann. § 42.09 (1989)).

[21] Compare the Court's recent statement in Pleasant Grove v. Summum about the greater variation in meaning produced by visual as opposed to text-based monuments: "[T]ext-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable" 129 S. Ct. 1125, 1135 (2009).

quality to the flag. He mocks the majority opinion for telling us that the First Amendment prohibits the government from insisting on one correct meaning for the flag. When he says the government has not "established" our feeling for the flag, that 200 years of history have done that, he puts the word "established" in quotes, conjuring up the religious establishment cases (434).

Remember that the Jehovah's Witnesses in *Barnette* thought about the flag as a graven image. One danger of a graven image of course is that it may inspire idolatry. People may worship the image of God rather than God himself. And speaking of idolatry, there is a strange, wonderfully understandable slippage in Justice Rehnquist's opinion. At the close of his rhetorically stirring argument, he writes that the majority's ruling means that men "must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case" (1989, 435).

Do people really die for the flag? Don't people actually die for what it represents? There is a confusion here between the image and reality. This confusion is of course understandable. To soldiers on a battlefield in the heat of terror and violence, the sight of the flag may become so fused with what it represents—their side; living vs. dying—that they might feel that they are indeed fighting for the flag. It is a rich and powerful symbol. But here and at another point where Rehnquist says the flag "embodies" our nation, I think his slippage between the image and what it stands for reveals something deeper about images. They are so strong, such a plain "shortcut" to our minds, that they tempt us to conflate representation with reality.

There is an irrationality to Justice Rehnquist's opinion, as if he is caught in the grip of the symbol himself, as if the emotional, mystical, and religious power of a visual image has overwhelmed him and made him take an easy case and struggle with it. It is as if the danger of visual images, their primitive force, has manifested itself in this opinion. For a brief moment, Justice Rehnquist has given way to idolatry.

8.6 Conclusion

As I have suggested, our free speech preference for text over image rests on a theory of visual representation that is rooted in the second commandment of the Bible rather than the supposedly rational confines of First Amendment jurisprudence. What are the implications of this argument? I am making a claim not only about visuality and the persistence of historical, magical attitudes toward the visual, I am also making an implicit claim about the nature of First Amendment law more generally.

This chapter continues to build what I call a "cultural theory of the First Amendment" (Adler 2005, 2009). Normally, we presume that First Amendment law is rational and objective, based on a continually evolving, often contested, set of legal principles. When we question these assumptions, we often limit our discussion to whether "politics" is a force that could undermine claims to law's neutrality.

In this chapter, however, I suggest a very different vision of the First Amendment, as a body of law that is surprisingly irrational and contingent. This vision invites us to consider the ways in which legal rules, especially when related to speech, are steeped in cultural anxieties and fantasies. Free speech law governs culture, yet in surprising ways, culture also governs free speech law.

References

Adler, A. 2000. The art of censorship. *West Virginia Law Review* 103(2): 205–217.

Adler, A. 2001. Inverting the first amendment. *University of Pennsylvania Law Review* 149(4): 921–1002.

Adler, A. 2005. Girls! Girls! Girls!: The Supreme Court confronts the G-String. *New York University Law Review* 80(4): 101–146.

Adler, A. 2007. All porn all the time. *N.Y.U. Review of Law and Social Change* 31(4): 695–710.

Adler, A. 2009. Performance anxiety: Medusa, sex, and the first amendment. *Yale Journal of Law & The Humanities* 21(2): 227–250.

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), affirmed, 475 U.S. 1001 (1986).

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

Attorney General's Commission on Pornography. 1986. U.S. Department of Justice, Final Report Washington, DC.

Barthes, R. 1982. *Camera Lucida*. New York: Hill & Wang.

Bartnicki v. Vopper, 532 U.S. 514 (2001).

Belting, H. 1994. *Likeness and presence*. Trans. E. Jephcott. Chicago: University of Chicago Press.

Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

Dworkin, A., and C.A. MacKinnon. 1988. *Pornography and civil rights: A new day for women's equality*. Minneapolis: Organizing Against Pornography.

Emerson, T.I. 1970. *The system of freedom of expression*. New York: Vintage.

Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999).

Frazer, J.G. 1996. *The golden bough: A study in magic and religion, Part II: Taboo and the perils of the soul*. New York: Simon & Schuster, first published 1922 by Macmillan.

Freedberg, D. 1989. *The power of images: Studies in the history and theory of response*. Chicago: University of Chicago Press.

Gombrich, E.W. 1956. *Art and illusion*. Princeton: Princeton University Press.

Goodman, N. 1976. *Languages of art*. Indianapolis: Hackett.

Halbertal, M., and A. Margalit. 1992. *Idolatry.* Trans. N. Goldblum. Cambridge: Harvard University Press.

Kaplan v. California, 413 U.S. 115 (1973).

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

MacKinnon, C.A. 1987. *Feminism unmodified: Discourses on life and law*. Cambridge: Harvard University Press.

MacKinnon, C.A. 1989. *Toward a feminist theory of the state*. Cambridge: Harvard University Press.

MacKinnon, C.A. 1993. *Only words*. Cambridge: Harvard University Press.

Mitchell, W.J.T. 1986. *Iconology: Image, text, ideology*. Chicago: University of Chicago Press.

Mitchell, W.J.T. 1994. *Picture theory*. Chicago: University of Chicago Press.

Mitchell, W.J.T. 2004. *What do pictures want?* Chicago: University of Chicago Press.

Morgan, D. 2005. *The sacred gaze*. Berkeley: University of California Press.

Moxey, K. 2008. Visual studies and the iconic turn. *Journal of Visual Culture* 7(2): 131–146.

New York Times Co. v. United States, 403 U.S. 713 (1971).

New York v. Ferber, 458 U.S. 747 (1982).
Phillips, J. 1973. *The reformation of images: Destruction of art in England 1535–1660*. Berkeley: University of California Press.
Pierce, C.S. 1958. *Collected papers*, vol. 8, ed. A. Burks. Cambridge: Harvard University Press.
Pleasant Grove v. Summum, 129 S. Ct. 1125 (2009).
Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).
Texas v. Johnson, 491 U.S. 397 (1989).
United States v. Whorley, 550 F.3d 326 (4th Cir. 2008).
West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

Chapter 9
The Semiotics of Film in US Supreme Court Cases

Jessica Silbey and Meghan Hayes Slack

Abstract This chapter explores the treatment of film as a cultural object among varied legal subject matter in US Supreme Court jurisprudence. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law – even the highest level of US appellate law – is similarly varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). This chapter traces the discussion of film in US Supreme Court cases in order to map the wide-ranging and diverse relations of film to law – a semiotics of film in the high court's jurisprudence – to decouple the notion of film with entertainment or visual truth.

This chapter discerns the many ways in which the court perceives the role of film in legal disputes and social life. It also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film and film spectatorship as an interactive public for film in society. As such, this project contributes to the work on the legal construction of social life, exploring how court cases constitute social reality through their legal discourse. It also speaks to film enthusiasts and critics who understand that film is much more than entertainment and is, in practice, a conduit of information and a mechanism for lived experience. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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9.1 Introduction

This chapter explores the treatment of film as a cultural object among varied legal subject matter. Film is significant as an object or industry well beyond its incarnation as popular media. Its role in law is also varied and goes well beyond the subject of a copyright case (as a moving picture) or as an evidentiary proffer (as a video of a criminal confession). My interest in tracing the discussion of film in Supreme Court cases is to map the wide-ranging and diverse relations of film to law – a semiotics of film in the highest US court's jurisprudence – to decouple the notion of film with entertainment or visual truth (Silbey 2004).

Usually, the interdisciplinary study of law and film takes one of three paths. One path is a "law-in-film" approach, which is primarily concerned with the ways in which law and legal processes are represented in film (Chase 1996, 2002).[1] The "law-in-film" approach considers film as a jurisprudential text by asking how law should or should not regulate and order our worlds by critiquing the way it does so in the film (Kamir 2006). The second path is a "film-as-law" approach, which asks how films about law constitute a legal culture beyond the film.[2] This approach pays special attention to film's unique qualities as a medium and asks how its particular ways of world-making shape our expectations of law and justice in our world at large (Silbey 2001; Johnson 2000). Writings in the "film-as-law" vein explore the rhetorical power of film to affect popular legal consciousness (Silbey 2001). They also may look closely at film's capacity to persuade us of a particular view of the world, to convince us that certain people are good or bad or guilty or innocent by positioning the film audience as judge or jury (Silbey 2007a, b). This "film-as-law" scholarship explains "how viewers are actively positioned by film to identify with certain points of view; to see some groups of people as trustworthy, dangerous, disgusting, laughable; to experience some kinds of violence as normal; to see some lives as lightly expendable" (Buchanan and Johnson 2008, 33–34; Lucia 2005). In this latter approach, film and law are compared as epistemological systems, formidable social practices that, when combined, are exceptionally effective in defining what we think we know, what we believe we should expect, and what we dare hope for in a society that promises ordered liberty (Silbey 2007a, b).

A third approach to film and law explores the many ways film can be used as a legal tool. Increasingly, film is used to enhance policing and investigations (think surveillance cameras, filmed crime scenes, interrogations, and confessions) (Id). Film is also used as a species of legal advocacy to augment trial tactics (opening and closing statements or evidentiary proffers) (Sherwin 2011), settlement conferences, or administrative hearings (e.g., clemency videos) (Austin 2006). The study of film

[1] Both of these books are most akin to the law-in-literature approach. Jessica Silbey, *What We Do When We Do Law And Popular Culture*, 27 Law & Soc. Inquiry 139, 141–42 (2002) (describing the law and literature movement).

[2] I deliberately reverse the nouns here. Where law-as-literature or law-as-film is a study of law as a rhetoric (be it linguistic or visual rhetoric), film-as-law is a study of filmic practices that are as pervasive and effective as legal ones in the ways in which they influence and inspire social order.

in this area of law connects the understanding of film as a complex visual rhetoric with the practice of law as an authoritative and persuasive adjudicative mechanism.

This chapter begins a new path of law and film study. As a semiotics of film in law, it explores how film (the linguistic term and cultural object) is meaningful among Supreme Court cases. Quite literally, this chapter explores the system of meaning that is produced by a data set of Supreme Court cases that discuss film. Following Saussurean linguistics, the chapter asserts that "film" does not correspond to a preexisting concept or object outside of the legal case. To the contrary, "film" is understood only in terms of its relation to the discussion of the legal matter in the case and other like cases and, importantly, in terms of its difference from other issues and items discussed in this body of law that are "not film."[3] When analyzed this way, these cases help constitute that which is film in Supreme Court jurisprudence.

One cannot understand film, of course, without contemplating its audience. By definition, film is meaningful because of the manner in which it is experienced. Insofar as the following discussion delineates film as relating to multiple practices and objects in social life, the discussion also draws attention to the ways in which that delineation depends more or less on the court's construction of a film audience. Thus, as much as the below analysis discerns the many ways in which the court perceives the role of film in legal disputes and social life, it also illuminates how the court imagines and reconstitutes through its decisions the evolving forms and significances of film spectatorship – an interactive public for film in society.

This project contributes to the work on the legal construction of social life and should be interesting to those who wonder how court cases constitute social reality through their legal discourse.[4] It might also be interesting to those film enthusiasts and critics who understand that film is much more than entertainment and perhaps, as such, may also be a problematic conduit of information. Enmeshed in the fabric of society, film is political, commercial, expressive, violent, technologically sophisticated, economically valuable, uniquely persuasive, and, as these cases demonstrate, constantly evolving.

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[3] For a much more thorough discussion of semiotic analysis and a specific area of law, *see* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. Rev. 621, 629–633 (2004).

> In a given language, all the words which express neighbouring ideas help define one another's meaning. Each of a set of synonyms like *redouter* ("to dread"), *craindre* ("to fear"), *avoir peur* ("to be afraid") has its particular value only because they stand in contrast with one another. If *redouter* did not exist, its content would be shared out among its competitors.… So the value of any given word is determined by what other words there are in that particular area of the vocabulary.… No word has a value that can be identified independently of what else there is in the vicinity.

Beebe, 640 (quoting Ferdinand de Saussure, *Course in General Linguistics*, ed. Charles Bally and Albert Sechehaye in collaboration with Albert Reidlinger, trans. Roy Harris (Peru: Open Court, 1990), 114).

[4] See, for example, Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 Iowa L. Rev. 1253 (2009) (describing how formal law – statutes and cases – constructs and constitutes notions of intimacy).

9.2 Process

The cases for this project were found by searching the Westlaw US Supreme Court database (SCT) for terms that included "film," "video," or "moving picture." This initial search yielded roughly 885 unique results that dated from 1894.[5] In more than half of these cases, the search term occurs solely in the case caption or in a quotation in the case and was not otherwise relevant to the legal issue being adjudicated. These cases were deleted from the data set. Approximately 300 cases remained after this initial filtering process was complete.

After reviewing these hundreds of cases, 153 of them contained a discussion of film in which film is relevant as film (and not as something else).[6] These 153 cases were divided into seven categories. Some cases fit in more than one category. The categories are also porous, overlapping in legal doctrine and citing one another for similar legal principles. The largest two categories concern (1) First Amendment freedoms as they relate to censorship (33 cases) and (2) the interrelation of obscenity law and privacy (44 cases). These two categories contain more than half of the 153 cases. The other categories are (3) search and seizure (14 cases), (4) publicity (6 cases), (5) evidence (11 cases), (6) antitrust (26 cases), and (7) intellectual property (19 cases). Considering these categories as whole, it would be fair to say that film becomes relevant to law and law to film when courts evaluate (1) the contours and importance of First Amendment protections at its margins, (2) the fairness and accuracy of judgments about criminal liability, and (3) the structure of economic relations in terms of an optimal efficiency in market regulation.

The remainder of this chapter will discuss each of these categories in further detail and describe the treatment of film within each category to discern the variations in the significance of film as a cultural object as well as in the resulting constitution of film audiences.

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[5] The data set is on file with the author and is available for review upon request.

[6] Several other categories were created but subsequently removed from the data set because they did not relate sufficiently to the question at issue. For example, a category regarding the Federal Communications Commission (FCC) was created but not considered for this essay because they involved regulation of radio and television programming far more than "film" in any sense of the word. The cases in that category concerned interpreting FCC regulations and the extent of the FCC's power. *See FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *U.S. v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Schreiber*, 381 U.S. 279 (1965). A group of cases focusing on religious freedom mentioned film and film equipment but not to any extent that would illuminate the meaning of film beyond that it is communicative. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Morches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Meek v. Pittenger*, 421 U.S. 349 (1975). Other categories excluded include a miscellaneous criminal category, labor law, civil rights, tax law, jurisdiction, and federal court procedure.

9.3 Categories of Analysis

9.3.1 First Amendment: Freedom of Expression and Censorship

Between 1915 and 1952, film was not protected as speech under the First Amendment. "It seems not to have occurred to anybody … that freedom of opinion was repressed in the exertion of power [via the censorship of films] …. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded … we think, as part of the press of the country, or as organs of public opinion" (*Mut. Film Corp. v. Indus. Comm'n of Ohio* 1915, 236 U.S. 230, 244). *Mutual Film Corporation* begins this line of legal analysis in 1915, in which the Supreme Court upholds an Ohio statute that created a board of censors for motion picture films. Recognizing that film is a lucrative and popular business, the court also recognizes that films may be "useful, interesting, amusing, educational and moral" (Id, 241). Indeed, the court acknowledges film's "power of amusement" that might appeal to "a prurient interest" (Id, 242), that film is "[v]ivid, useful, and entertaining, no doubt, but … [also] capable of evil" (Id, 244). The court concludes, therefore, that states are within their police powers to "supervise moving picture exhibitions" when "in the interest of public morals" (Id, 242).

The court does not deny that film is a "medium[] of thought," but it says "so are many things … [like] theater, the circus, and all other shows and spectacles" (Id, 243). The argument comparing the right to exhibit films free from a censor board's approval with right to publish a newspaper article or speak at a political rally "is wrong or strained" the court says (*Mut. Film Corp. v. Indus. Comm'n of Ohio*). The court refuses to "extend[] the guaranties of free opinion and speech to the multitudinous shows which are advertised on the billboards of our cities and towns" (Id). Motion pictures and "other spectacle" are not of a "legal similitude to a free press and liberty of opinion" (Id, 243–244).

In the early years of film, it was not unheard of to compare film to the theater or a circus (*Gibson v. Gunn* 1923, 202). Film's unruly and unpredictable effect on its audience worried courts, who were charged with controlling the legal proceedings to ensure fairness and stability and applying the law to achieve the same ends. Attempting to discipline the medium of film through censor boards also made sense, given the inherent conservative nature of courts as the last place where innovative technology and cultural revolution would be embraced (Mnookin 1998).

It is nonetheless surprising to consider that the Supreme Court thought film was not sufficiently expressive – in the way that print media or public speaking could be – such that burdening it with censorship boards would not frustrate the goal of deliberative democracy that the First Amendment was intended to foster. It is fair to say that the Supreme Court, until it changed its mind in 1952 with *Burstyn v. Wilson* (1952, 343), paradoxically thought film pathetically empty in terms of its content and potentially dangerous in terms of its form.

In 1952, the court overrules *Mutual Film* declaring "motions pictures … an organ of public opinion … designed to entertain as well as inform" (Id, 501). The court has not changed its mind on the force or content of film. The Supreme Court acknowledges that "motion pictures [may] possess a greater capacity for evil," but that "the line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine" (Id, 501–502).

What has changed? The court mentions the incorporation of the First Amendment to the states through the Fourteenth Amendment and the advent of sound film in 1926. It does not mention the popular cinematic movements – film noir and classical Hollywood – both well developed and appreciated by 1952. Nor does it mention the newsreel films covering wartime events that were shown before feature films, by that time regular occurrences. Indeed, the court seems to accept without analysis what it rejected in *Mutual Film*: that "motion pictures are a significant medium for the communication of ideas" (Id, 501). The court may be adopting (albeit silently) the anticensorship arguments in lower courts and culture that raged against state censorship prior to *Burstyn*.[7] Certainly, there was a rich debate in the years between *Mutual Film* and *Burstyn* in the First Amendment realm outside the film context, in libel and privacy law, incitement, obscenity, and commercial speech.[8] Indeed, from 1915 to 1952, the Supreme Court decided several major cases in the First Amendment area, changing the doctrine significantly.[9] For example, by midcentury, commercial speech – one seemingly discrediting aspect about film in *Mutual Film* – does not

[7] *See Dennis v. U.S.*, 341 U.S. 494, 579 (1951) (Douglas, J., dissenting) (arguing organizing Communist Party organization protected by First Amendment); *Lederman v. Bd. of Educ. of the City of N.Y.*, 95 N.Y.S. 2d 114 (N.Y. App. Div. 1949) (discussing importance of free speech in schools); *Robert v. City of Norfolk*, 188 Va. 413, 426 (1948) (stating license taxes are form of censorship that infringe on freedom of the press).

[8] *Schenk v. U.S.*, 249 U.S. 47 (1919) (upholding violation of Espionage Act on the basis of distribution of anticonscription flier); *Abrams v. U.S.*, 250 U.S. 616 (1919) (upholding violation of Espionage Act on basis of distribution of perceived pro-Bolshevik pamphlets); *Near v. Minn.*, 283 U.S. 697 (1931) (invalidating state law that restricted freedom of press as applied to circumstances where paper critical of Chief of Police was perceived by state as malicious or scandalous); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating state law that restricted public from distributing handbills in streets and on sidewalks); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (adding commercial speech to list of unprotected expression); *Martins v. City of Struthers*, 319 U.S. 141 (1943) (invalidating anti-leafleting law as applied to Jehovah's Witnesses who were distributing fliers door to door); Saia v. New York, 334 U.S. 558, 562 (1948) (constraints on First Amendment freedoms should be narrowly tailored); Kunz v. New York, 340 U.S. 290, 294 (1951) (licensing systems must have standards; otherwise, they are overbroad and unconstitutional); *Beauharnais v. Ill.*, 343 U.S. 250 (1952) (upholding by 5–4 decision state libel law as applied to hate speech); *Roth v. U.S.*, 354 U.S. 476 (1957) (established obscenity as unprotected speech).

[9] *Kunz v. New York*, 340 U.S. 290, 294 (1951) (declaring licensing systems must have standards or are otherwise unconstitutionally overbroad); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713–14 (1931) (explaining different effect of restraints preventing publication versus effect of punishment following publication of illegal or improper statements and the court's preference for the latter); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the Due Process Clause of the 14 Amendment protects freedom of expression against infringement by states).

necessarily deprive it of constitutional protection (Stone et al. 1996, 1226–27).[10] These and other influences can be read into *Burstyn* to explain the overruling of *Mutual Film* and *Burstyn*'s recharacterization of film as unprotected because it is a mere "medium of thought" resembling a circus to protected speech because it is a "significant medium for communication of ideas." This may seem like a too subtle shift in language on which to lay much emphasis, but the transformation in effect cannot be overstated. Where in the first decades of the twentieth century the transformative power of film was cause to censor, that same power in the middle of the century was reason the government could not control film unless exceptional circumstances were present (Stone, 504). What changed appears not to be film's qualities (in both cases film can be trivial and profound, dangerous and useful). The court was broadening the First Amendment's protective reach, discussing its application more frequently in the context of national security, complex commercial relations, and a diversifying cultural milieu. Film benefited from this lively debate. What changed was the perception that judges (or state censor boards) were not always the optimal evaluators of whether or not a film's content (or other expressive speech) is worthy of dissemination. Film being a subcategory of a growing volume of valuable and public speech, what changed was an appreciation for the acumen of (film) audiences and their capacity to judge for themselves.[11]

9.3.2 Obscenity and Privacy Concerns

The obscenity and privacy cases turn this analysis on its head. Obscenity is not protected speech under the First Amendment. This branch of US constitutional law is notoriously vague. Applying the standards for obscenity consistently is challenging and the reasons for the low protection (if any protection) debated. Nonetheless, the cases that evaluate allegedly obscene film – pornographic films – are consistent in the manner they treat and discuss the filmic nature of the speech. Whereas in the above section, film evolves into an expressive medium worthy of First Amendment protection, it can too easily be categorized as obscene to lose protection altogether. This is potentially the case because film's peculiar mechanism – its indexicality and exceptional capacity for verisimilitude – renders obscene films more like actions than speech (and thus outside the ambit of the First Amendment's protection of speech).

At first, reading through the obscenity cases, it seems that most state laws restricting pornographic films are upheld and those restricting other forms of alleged pornography (print media) fair worse under constitutional scrutiny. Digging deeper,

[10] "Despite *Chrestensen* and *Breard*, … [t]he mere presence of a commercial motive, for example, was not deemed dispositive, as evidence by Court's continued protection of books, movies, newspapers, and other forms of expression produced and sold for profit."

[11] I am indebted to Peter DeCherney and Simon Stern for several of the ideas contained in this section. Any errors are my own.

this is not true. But there is something about pornographic films that encourages the court to take a closer look at the state's regulation and assess it in light of the facts. There is a sense from these cases that film does something different than other media. In contrast to allegedly pornographic novels that require elucidation and interpretation (and therefore are less likely to be low-value speech), the court speaks of the films as "the best evidence of what they represent" (*Paris Adult Theater v. Slaton* 1973, 413) such that their value should be obvious upon viewing.[12] Consider Justice Stewart's famous quote: "I know [hard core pornography] when I see it, and the motion picture involved in this case is not that" (*Jacobellis v. Ohio* 1964, 378); or the much ridiculed job for the justices of taking the pornographic films into their chambers for a feature-length viewing. Experiencing the film is necessary to an evaluation, but even then, the evaluation is instinctive. The court goes on to say that expert testimony is usually unnecessary because "hard core pornography … can and does speak for itself" (Id, 197). The court nonetheless seems to think that films do not speak all that much – at least not in the "expressive speech" kind of way. Instead, films; they intrude – especially obscene films. This is the very reason obscenity is left unprotected in the first place. If "'speech' for First Amendment purposes is defined by the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process … [and] hard core pornography is designed to produce a purely physical effect, … a pornographic item is in a real sense a sexual surrogate…. [Thus] hardcore pornography is sex, [not speech]" (Schauer 1979). If film is the most direct transposition of that which it represents, no wonder pornographic films are more highly scrutinized. Courts see themselves as evaluating acts not expression and, therefore, more free to uphold the state restriction.

Indeed, most of the obscene film cases deal with the intrusion of the film in the community: whether if played at a drive in, offended community members could easily avert their eyes (*Erznozik v. City of Jacksonville* 1975, 422), or whether the adult-only theater could be shuttered because of the exogenous effects of the theater on the otherwise non-consenting community (*Paris Adult Theaters v. Slaton* 1973). Much of the debate over pornographic films since the World War I concerned the possible correlation between obscene material and crime. The famous Hill-Link Minority Report of the Commission on Obscenity and Pornography was cited frequently by the court in these cases as a justification for states to regulate commercial obscenity (Id, 58). As early as 1920, there was public concern at the growing number of pornographic films (*U.S. v. Alpers* 1950, 338)[13]:

> It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there…. We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places … with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.

[12] This is precisely what the court says about film evidence that is relevant to the case but not the subject of the case itself. *See* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

[13] Citing to *The Motion Picture Industry*, vol. 254 of *Annals of the American Academy of Political and Social Science* (1947) 7–9, 140, 155, 157.

> Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not. (*Paris Adult Theaters v. Slaton* 1973, 59)[14]

These films intrude only because they are in public – movie houses being places of public accommodation. And of course speech seeking protection is by its very nature public as well. Only when the film is brought into the privacy of one's home do the scales tip in favor of protection because it has become, by nature of the private space, unobtrusive. Even then, however, the film does not magically become protected speech. The private space merely adds a layer of protection from scrutiny because, presumably, it protects the community from any harm.

Privacy is the counterpoint to obscenity. When the issue is the showing of an allegedly obscene film in a movie house or drive-in, or even when it is being transported as an article of commerce (*U.S. v. Orito* 1973, 413), the judges feel free to evaluate the filmic expression as obscene or not. When the film is shown privately, the focus shifts from whether the speech is of the intellect or prurient to whether a state, in controlling this speech (whether or not of value), is intolerably intruding into a person's fundamental privacy. In *Stanley v. Georgia* (1969), the defendant was convicted of possessing obscene films under a state law that prohibited the possession of all obscene matter. In this case, the court famously quotes the origins of the right to privacy in one's home, the right "as against the government … to be let alone," "to protect Americans in their beliefs, their thoughts, their emotions and their sensations" (Id, 564).[15] Whereas Brandeis in this quote from *Olmstead* may or may not have been thinking of the newest visual technology as safeguarding a "man's spiritual nature," the *Stanley* Court must be so thinking as they affirm the defendant's right to possess obscene films that are otherwise illegal to manufacture and distribute. The court does so, however, by elevating the status of the film to "the contents of [a] library" (Id, 565) and by accusing the state of Georgia of attempting "to control the moral content of a person's thoughts." "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds" (Id). Whereas in public, films are acts – they can intrude on our person, our serenity – in private, they are great books, or, at least, they are enough like great books that while potentially unconventional or objectionable are nonetheless off limits to the court's judgment.[16]

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[14] Quoting Alexander Bickel, *Dissenting and Concurring Opinions*, 22 The Public Interest 25–26 (1971).

[15] Quoting *Olmstead v. U.S.*, 277 US 438, 478 (1928) (Brandeis, J. dissenting).

[16] The court goes on to say that the Constitution's "guarantee is not confined to the expression of ideas that are conventional or shared by a majority.… And in the realm of ideas it protects expression which is eloquent no less than which it is unconvincing. Nor is it relevant that … the particular films before the Court are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Ga.*, 566.

This does not apply to cases of the possession of child pornography where the film is again seen as an "act" rather than "expression" because of what it has done to the child. *U.S. v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

Here again, we see a shift from the court as protector of a public by regulating acts to the court recognizing the capacity of the public – here in private – to decide for itself.[17] Necessarily, the court's construction of the film audience evolves. As the century progresses and film (and pornography) becomes disseminated more widely, the court appears to be tolerating more of it by trusting audiences to do the same. The court does so, while still reserving the power to control the most severe form of pornography by declaring those film renditions acts not speech, but not without close scrutiny of the film itself. As we will see later, this correlates to twenty-first century thinking about film as evidence in criminal cases (such as filmed confessions or surveillance film), where the act caught on film is not expressive or subject to interpretation but more like the thing itself. It therefore speaks for itself, unmediated by representational frames.[18]

9.3.3 Search and Seizure

The category of cases concerning the lawful search and seizure of films is an iteration of the above themes but distinguishes film as a cultural object in yet another way. Obscene film is categorically unlike other kinds of contraband – such as narcotics or a weapon – which the court says are "dangerous in themselves" (*Roaden v. Ky,* 1973). This makes sense only, however, if we understand film to have two components: a physical embodiment and an expressive existence.[19] Otherwise, what would distinguish one form of contraband, cocaine, from another kind of contraband, hard-core pornography? Both may be illegal; both may be harmful. But films are expressive in ways that narcotics are not. So we have in these cases a repetition of the notion of film as expressive and, therefore, specially treated by courts because they fall within the First Amendment ambit. But we also have in these cases, as we did in the obscenity cases, a concern about how to properly police the line between legal and illegal (constitutionally protected speech and unprotected *speech acts*) and concerns over who does that policing, how, and when.

[17] Where previously film acts were akin to circus entertainment, here pornographic film is akin to sex acts.

[18] As one Supreme Court justice has said recently about the believability of a film of a car chase, "I see with my eyes … what happened…." Transcript of Oral Argument at 45, *Scott v. Harris*, 550 U.S. 372 (2007) (No. 05–1631) [hereinafter Transcript of Oral Argument].

[19] This is the essence of much intellectual property – there is a tangible form (a book) and the intangible aspect (the expression). Law protects the two components differently, the former under real property statutes and the latter under intellectual property statutes. *See* 17 U.S.C. § 109 (2006) (first sale doctrine in copyright law drawing the distinction between selling a copy and thereby losing control over it, but retaining ownership rights over the original expression and preventing others from reproducing it).

The divisibility of film into a physical object and intangible expression is particularly clever in the search and seizure cases (to say nothing about the fact that it is true as a matter of intellectual property).[20] The court draws on national history to remind us that the "use by the government of power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new" (*Walter v. U.S* 1980).[21] In this way, lawful possession of an object (the film reel) must be distinct from the possession of its contents (the images on the reel or the story told by it). Otherwise, the government could use its police powers to control the dissemination of expression with which it disagreed under the auspices of emergency seizure of tangible goods. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression" (*Marcus v. Search Warrant*, 729).

The duality of film (as a tangible object and an intangible expression) manifests in the search and seizure cases in terms of the warrant requirement. "When contents of the package are books or other materials arguably protected by the First amendment and when the basis of the seizure is disapproval of the message contained therein, it is especially important that [the warrant] requirement be scrupulously observed" (*Walter v. U.S* 1980*,* 655). What does this mean? It means more than that a warrant must issue before a search can be effectuated. It means that the warrant must include both the film itself and the reason for viewing it, viewing being an independent search for which probable cause must exist (Id, 655). It means that a warrant must be supported by particular facts setting forth the basis of searching the contents of the film in addition to possessing the film itself (*Lee Art Theater Inc. v. Va.* 1968). Moreover, where the seizure of the film includes both the tangible item and the intangible expression (i.e., a copy of the film and a viewing of it), seizure must be for the basis of preserving evidence for trial and accompanied by an opportunity for prompt post-seizure judicial determination of obscenity (or other basis for illegality).[22] That is to say, the court requires a preliminary assessment of the content of the film – the nature of its expressivity and whether it is likely protected speech or not – before a warrant may issue at all. All of these requirements safeguard the evil of a prior restraint on speech.

Because there is no exigency exception to the Fourth Amendment when seizing allegedly obscene material (in contrast to the case of seizing weapons or narcotics) (*Roaden v. Ky*, 505–06), the method by which the determination that a warrant is necessary is much debated by the court. Here, the above-described aspects of the obscenity cases come to the fore. Except in the case of a large-scale seizure, an

[20] *See supra* note 19 and the discussion *infra* of intellectual property cases in the main text.

[21] Citing *Marcus v. Search Warrant*, 367 U.S. 717, 724.

[22] *Heller v. N.Y.*, 413 U.S. 483 (1973). "Seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particular where … there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." *Lo-Ji Sales, Inc. v. N.Y.*, 442 U.S. 319, 328 (1979) (citations omitted).

adversary proceeding to determine probable cause for the search and seizure of the film is not necessary (*N.Y v. P.J. Video* 1986). But the determination of probable cause for that search must be made by a neutral, independent, and detached judge (*Heller v. N.Y,* 488). The determination can be based on having viewed the film in a theater before issuing warrant (Id, 488–89, n. 4) or after reviewing particularized factual assertions on the warrant request, which are not conclusory and provide the judge with adequate reasons for finding probable cause to declare the films illegal (*Walter v. U.S,* 656–57). The goal here is to enable the judge "to focus searchingly on the question of obscenity" (*Heller v. N.Y,* 489).

These cases tell us, then, that the viewing of a film is a kind of search. This in itself is an interesting proposition. Viewing a film is both a search of a possession and a search of a mind; at least this must be true if we understand these cases to be about protecting freedom of thought and freedom of one's person (the intangible and the tangible). Viewing becomes a kind of personal intrusion (another interesting proposition) one against which the Constitution protects under certain circumstances.

These cases also tell us that a judge's viewing is not as harmful or intrusive as an FBI or police search because of the focus and independence the judge brings to the task. The court explicitly says that a judge's review of a film for purposes of probable cause is less troubling than an FBI or police viewing of the film, calling the latter inherently harmful (*Walter v. U.S,* 657).[23] It is as if the judge is a doctor viewing the patient's naked body – detached and impersonal – and the police officer is a voyeur or interloper – lewd and unrestrained. Judges, here, are the best kind of critic, necessary and fair.[24] Given the instinctive mode by which judges have been known to interpret expression as obscene or not (behind closed doors, "I know it when I see it") and the fact that judges are unlike the mass of popular audiences in their moving-going ways (Silbey 2008), this aspect of the search and seizure cases distinguishing judges from other kinds of law enforcement officers is puzzling. It nonetheless comports with other lines of cases in which judges are deemed the most appropriate gatekeeper for evaluating the extent of the state's use of force.

As much as these search and seizure cases redefine the nature of film (as an object and an expression) and of search (as a physical and mental intrusion), they are also about the nature of the viewer and searcher (the judge, police, or other state actor). Here again, film audiences are inseparable from the construction of film as a cultural object with political and social significance. Given the narrowed focus of the film audience here – judge or police – as opposed to the more diverse public from previous categories above, these cases affirm judges' conceit in their ability to interpret film astutely. Whether there is an alternative to judges as film critics, "Who else would decide whether the film was lawfully seized?" is a question I have

[23] *See also Wilson v. Lane*, 526 U.S. 603 (1999) (determining that media accompanying a search is unlawful intrusion in suspect's Fourth Amendment rights).

[24] *But see* Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*.

discussed elsewhere (Silbey 2004). Suffice it to say, there are alternatives. The court's default in these cases to preferring themselves over other decision-makers or institutions speaks to their belief in film's exceptionality as well as to their own.[25]

9.3.4 Publicity

Courts are often called to determine whether the press' use of film to titillate rather than to inform violates due process. The cases about restrictions on pretrial publicity conceive of film first as a conduit of information – about the accused, about the crime, about the proceedings that will judge both – and second as a game changer, an ostensible neutral observer that nevertheless effects what is being observed.

The films in these publicity cases start out being made and distributed to expose a problem or solve a crime. In *Wiseman v. Massachusetts* (1970), the documentary filmmaker Frederick Wiseman appealed to the Supreme Court a judgment from the Massachusetts Supreme Judicial Court (SJC) that enjoined the commercial distribution to general audiences of his film *Titicut Follies* about life in the Bridgewater State Hospital for the criminally insane. The Massachusetts SJC enjoined the film's distribution ostensibly to protect the privacy of the inmates, despite the very obvious benefit that would ensue from a public airing of the inhumane conditions at the prison. The Supreme Court denied certiorari, but Justice Harlan dissented from that denial, and, joined by Justice Brennan, wrote that because "the conditions in public institutions are matters which are of great interest to the public generally," "there is the necessity for keeping the public informed as a means of developing responsible suggestions for improvement and of avoiding abuse of inmates who for the most part are unable intelligently to voice any effective suggestion or protest" (*Wiseman v. Mass* 1970*,* 961). They argued that the informational quality of the film far outweighed any privacy harm its exposure would cause the inmates. Indeed, neither court doubted the accuracy of the film as a conduit for factual information.

There are other cases that affirm this perception of film as conduit. In *Chandler v. Florida* (1981), the court affirmed a criminal conviction despite the public broadcast of the trial. In this case, the court highlighted the state of Florida's implementing guidelines for film coverage of a judicial proceeding. Film equipment "must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed"

[25] Whether film is in fact exceptional as a representational medium is of course one of the questions this essay and others I have published explore. Film is not uniquely truthful or transparent, despite its treatment as such in law. And it is certainly not necessarily the "best evidence" of what happened. *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in *Scott v. Harris*).

(*Chandler v. Fla* 1981, 566). In this case, the film is welcomed *because* it would be a conduit of information and not a distorting influence.

The *Chandler* Court explicitly contrasted the methodical and unobtrusive filming of the criminal trial in its case with the "Roman circus" or "Yankee Stadium" atmosphere admonished in *Estes v. Texas* (1965, 532), where due process was found to have been denied. In *Estes*, a "mass of wires" and "at least 12 camera men with their equipment" and "photographers roaming at will" turned the courtroom into a "forest of equipment" (Id, 553). At one point, the court pointed out that the rebroadcasting of a hearing from the case was in place of the "late movie" (Id, 537). The *Estes* Court accuses the filming as being an "insidious influence" that runs counter to the solemn purpose of the trial which is to ascertain the truth (Id, 540–41). In a case 10 years earlier, *Rideau v. Louisiana*, a filmed jailhouse confession that aired on television three times prior to the trial rendered the subsequent judicial proceeding "a hollow formality" (*Rideau v. LA* 1963, 373). The filmed confession became the de facto trial by which the accused was judged. In both *Estes* and *Rideau*, the filming was transformative – it failed in its role as conduit – and frustrated justice.

Chandler reiterates that filming a trial does not inherently deny due process. Cases before and since *Estes* confirm that the film may render the judicial proceedings an uncontrolled "carnival" (*Murphy v. Fla* 1975, 421) or "spectacle" (*Rideau v. La,* 725) and, as such, the jury may be poisoned against the accused. As with *Wiseman*, where the court was asked to assess the extent of the intrusion by the film into its subject's private lives, in the case of filmed judicial proceedings, the court is charged with assessing the "extent and degree of saturation of the public mind with the TV films" to determine whether pretrial publicity such as filmed interviews with the defendant, victim, attorneys, or politicians rendered the subsequent trial unfair (*Whitney v. Fla* 1967, 389). Additionally, courts must determine based on the orderliness and invisibility of the camera crew whether the filming had an undue influence on witnesses, the defendant, or the jury (*Chandler v. Fla,* 575–76). In *Chandler*, the court discusses studies and amici briefs that discuss the potential adverse psychological impact on trial participants that are associated with filming the proceedings (Id, 576–78). It also praises the safeguards Florida put in place to minimize negative impact and to amplify the public good that flows from broadcasting criminal trials (improving confidence in the judicial system). Concluding that there is no inherent violation of due process in the filming of a criminal trial because film itself is not inherently harmful, courts must nonetheless assess where on the line the particular film at issue falls – mere conduit or injurious meddler.

Of course film is neither, just like language is neither. Film, like language, is constitutive of the social situation. Nonetheless, in these cases on publicity, the court seems to worry mostly about film's physical embodiment – the space it takes up or intrudes upon – and not about its expressive or constitutive force. When it becomes physically more tangled in the proceeding (with wires, lighting, or camera crew) or when it physically dominates the proceeding's representation in the media (with repetitious playbacks of dramatic moments of the case), the court flinches at film's presence. Otherwise, it is like a conveyor belt, neutrally moving information from speaker to listener, broadcaster to audience member.

9.3.5 Evidence

Judges are not necessarily the best judges of film. We know this because of the naïve realism judges inject into their opinions assessing the truth or transparency of film content despite the history of film as an art that counsels otherwise (Silbey 2005). And yet, courts are called to interpret films regularly, most often as either obscene speech or as evidentiary proffers: a criminal confession, an interrogation, a crime scene, a surveillance film, an FMRI, or a filmed deposition (Silbey 2008). The Supreme Court decides cases about this latter kind of evidence less frequently, but it has addressed film evidence enough over the past 100 years to raise alarm bells.[26] How does the court consider film evidence when it has to decide whether it was properly admitted into the trial? This is different from the obscenity cases where the film is the object to be assessed – its relevance undisputed – the determination being whether the film is obscene or not. In the evidence cases, the court assesses the film precisely for its relevance (Is it probative of a fact at issue?) and for its potential prejudice (Does it affect the jurors emotionally and, therefore, degrade their rational deliberation?). The evidence cases are therefore like the publicity cases in which the film has the potential to be a heckler out to spoil the fairness of the game.

But these evidence cases share something with the obscenity cases as well. Recall from the obscenity cases that the court understands film to act on us when it is less expressive (less open to interpretation) and more prurient (arousing). In these instances, it is less protected and can be regulated without violating the First Amendment. With the cases on film evidence, the court also worries that the film will act on us, will trigger emotional responses rather than rational ones, and will therefore cloud our judgment. Unlike the obscenity cases, however, in the cases on film evidence, the court provides a basis for its judgment that film evidence may prejudice the proceeding. Because the film is so much like real life, so traumatizing with its "in your face" quality, the court fears that audiences will see film representations of pain or violence, experience it as if live before their very eyes, and will seek vengeance, whether or not punishment is warranted under the law.[27]

The court holds inconsistent positions on film evidence. At times, the court appears capable of recognizing filmic conventions, its manipulative effect, and its need for interpretation. At other times, the court appears seduced by film's reality effect despite its inherent partiality and ambiguity (Silbey 2005). Most recently, in *Scott v. Harris*, the court fell for a trick that has seduced moviegoers for more than a century: it treated film as a depiction of reality. The court held that a Georgia police officer did not violate a fleeing suspect's Fourth Amendment rights when the

[26] *See* Jessica Silbey, *Cross-Examining Film* (criticizing Justice Scalia's interpretation of the film in the 2007 case *Scott v. Harris*). *See also* Dan M. Kahan et al. (2009).

[27] *Kelly v. Cal.*, 129 S.Ct. 567 (2008) (J. Breyer, dissenting from denial of certiorari). *Yamashita v. Styer*, 327 U.S. 1, 54 n. 20 (1946) (J. Murphy, dissenting partially on grounds of prejudicial documentary film purporting to show the war crimes at issue in the case).

officer intentionally caused a car crash, rendering the suspect a quadriplegic (*Scott v. Harris*, 550 U.S. 372 (2007)). The court's decision relied almost entirely on the film of the high-speed police chase taken from a "dash cam," a video camera mounted on the dashboard of the pursuing police cruiser (Id, 379). Although obviously not the first time the Supreme Court has acted as film critic,[28] *Scott v. Harris* may be the first time the Supreme Court disregards all other evidence and declares the film version of the disputed event *as the unassailable truth* for the purposes of summary judgment. Indeed, the Supreme Court said that, despite the contrary stories told by the opposing parties in the lawsuit, the only story to be believed was the one the video told: "We are happy to allow the videotape to speak for itself" (Id, 393, n. 5). And then, for the first time in history, the Supreme Court linked video evidence to the slip opinion on its website to encourage people to "see" for themselves.[29] In *Scott v. Harris*, the court fell victim to the widespread and dangerous belief – to the degree of enshrining this belief in our national jurisprudence – that film captures reality.[30] As Justice Breyer stated at oral argument, seemingly flabbergasted by the contrary findings below: "I see with my eyes … what happened, what am I supposed to do?"[31]

Here, the worries the court expressed about film's undue influence for other fact finders haunt its own assessment of film. There are other ironies in the court's jurisprudence on film evidence: the perception of film as potentially misleading and prejudicial, on the one hand, and as the conveyor of the most accurate account of the truth, on the other. What happened to film being expressive and creative, like a deep thought (whether despicable or not)? What happened to the film having a dual existence – real and intangible – where form and function intertwine but may be analyzed independently? Is film the epitome of reality and truth or is it so raw that it is for a judge's eyes only? According to these cases on film evidence, it may be both. And yet this is not what we understand about film according to its development as an art form. In these cases where film is assessed as evidence under the more prejudicial than probative standard of Federal Rule of Evidence 403, unlike other evidence such as testimony or business records, film is divorced from its context and history and is either assessed as a street sign that needs no interpretation or as a weapon that is safe only in certain hands. As should be clear by now, however, film

[28] *See supra* discussions in main text, particularly those assessing allegedly obscene films to determine whether they conflict with contemporary community standards. *See also Miller v. Cal.*, 413 U.S. 15, 18–30 (1973) (discussing the evolution of the standards that the court employs when reviewing obscenity cases).

[29] *See Scott v. Harris*, 550 U.S. 372 (2007). The video is available at http://www.supremecourt.gov/media/media.aspx

[30] This was not the first time the court was taken in by film despite other evidence at trial. *See* C*ox v. State of La.*, 379 U.S. 536, 547 (1965).

[31] Transcript of Oral Argument, 45. Justice Stevens was the lone dissenter in the 8–1 decision and the only Justice who recognized that the film was not the whole story. *Scott v. Harris*, 550 U.S. at 389–97 (Stevens, J., dissenting).

is much more than a sign, and it is hardly a lethal weapon. The very meaning of film as a cultural object is contested in the court's *own* jurisprudence. Why the film's message would be so unambiguous in this particular case is therefore perplexing, to say the least.

9.3.6 Antitrust

Even in the cases where film is considered primarily for its commercial element, film's character takes on complex dimensions. Upon first read, the cases in the antitrust category discuss film and the film industry in light of its substantial contributor to the national economy. It is no surprise, then, that film (as a cultural object and practice) is largely considered an "item of commerce" in a large number of Supreme Court cases in this category for the purpose of determining anticompetitive practices. One of the earliest antitrust cases that concerns "motion picture films" equates filmmaking and distribution with the "manufacturing [of a] commodity" (*Binderup v. Pathe Exchange* 1923, 291, 309). At the conclusion of the case, in comparing the film industry to other growing or developed national industries, the court says the "transactions here are essentially the same as those involved in the foregoing cases, substituting the word 'film' for the word 'live stock,' or 'cattle,' or 'meat.' Whatever difference exists is of degree and not in character" (Id, 311). After so many cases in which film is considered a thing apart – exceptional as a medium of communication or cultural object – it is a relief to see the court considers film like so many other kinds of everyday practices.

This characterization of film as an article of commerce does not change, but rather is augmented approximately 20 years later when the courts start to consider the copyrightability of film in their antitrust analyses. More will be said about the relationship between film and intellectual property below, but suffice to say that in the antitrust context, the fact that films are copyrighted – and therefore are monopolies of a sort – can raise the scrutiny (or at least alter the analysis) over the reasonableness of the restraint of trade and the concern for anticompetitive business relationships (*Interstate Circuit v. U.S., Paramount Pictures Distrib.* 1939, 208, 230). In most of these cases, the copyrightability of film only furthers the argument that the film and the film industry are well propertied and commercially and socially valuable. Restraint of trade in the film business, no more so in the livestock business, may run afoul of the Sherman Act. "An agreement [found to be] illegal because it suppresses competition is not any less so because the competitive article is copyrighted" (Id, 230).

But then a kind of film exceptionalism eventually does rear its head, as it did in other categories of cases. In the antitrust cases, film is accorded a special kind of economic status because of the fluctuation in ticket price depending on whether it is a first-run or second-run film. Complicated licensing arrangements attempting to restrict first-run films to specific, noncompeting geographic regions and venues and to restrict the prices of tickets for first-run and second-run shows were met with

disapproval.[32] The combination of the drawing power of a new film (akin to the drawing power of a live prize fight) (*U.S. v. Int'l Boxing Club of N.Y* 1955, 236) combined with its "legal and economic uniqueness" as a copyrighted object made for a distinct analysis under antitrust law (*U.S. v. Loews* 1962, 38, 48). Whether in a theater or on television, the presentation of a film to a live audience garnered "sufficient economic power" that imposing a restraint on the competition in the film product became per se suspect (Id, 48). As one case reads, "forcing a television station that wants 'Gone with the Wind' to take 'Getting Gertie's Garter' as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one 'Gone with the Wind'" (Id, 48). This per se rule based on the patented or copyrighted nature of the tying product was not abrogated until 2006 (*See Ill. Tool Works v. Indep. Ink* 2006, 28). For nearly all of the twentieth century, film held a special status in antitrust law as a particularly economically powerful product.

This film exceptionalism continues further in the antitrust cases in terms of the Sherman Act's reach over the film industry. When analyzing film as an article of commerce, the court discusses film as both a local and interstate phenomenon. The Sherman Act regulates only interstate commerce. Some film industry players seeking exemption from antitrust regulations therefore argued that film is "a local affair" (*U.S. v. Crescent Amusement Co* 1945, 348).[33] Sometimes the defendants also argued that film is like a sports event or a theatrical attraction, "intangible and evanescent" and, therefore, cannot be regulated under Congress' commerce power (*U.S. v. Shubert*, 227 n. 9). In both situations, the court rejected defendants' arguments concluding that the object of film cannot be divorced from its industry, which is highly complex and nationwide in scope (*U.S. v. Crescent Amusement Co.*, 184–85). In so doing, the court drew an intriguing distinction between the professional baseball industry (which was left unregulated) and vaudeville theater business (which was subject to the Sherman Act). Where the business of baseball was granted immunity despite the interstate travel of players because travel was "a mere incident, not the essential thing" in baseball, for vaudeville, traveling theatrical productions was "more important" to the business (*U.S. v. Shubert*, 228–29). In other words, film was more like vaudeville than baseball. "This court has never held that the theatrical business is not subject to the Sherman Act" and with that held that unlike major league baseball, the film industry would not be categorically exempt from antitrust laws (Id, 230). The film industry's complicated structure and film's unique combination of a mass popular appeal with its reproducible embodiment made it a focal point of antitrust analysis.

[32] See, for example, *U.S. v. Paramount Pictures*, 334 U.S. 131 (1948); *Shine Chain Theaters v. U.S.*, 334 U.S. 110 (1948).

[33] *See also U.S. v. Shubert*, 348 U.S. 222, 227 (1955).

9.3.7 Intellectual Property

Overlap exists between the treatment of film in antitrust cases and in the intellectual property cases. This is because some of the cases are simply the same. But it is also because the commercial aspect of intellectual property directly engages the concern with commercial competition in antitrust law. In many of the intellectual property cases, film is either a stand-alone species of intangible property (as a copyrighted work) or is restricted to being played on a patented machine. Either way, film facilitates a revenue stream, and policy dictates its protection as intangible personal property.[34] In *Dowling v. United States*, the Supreme Court distinguished film as a physical object (which may or may not be owned lawfully) from film as intellectual property (whose legal status is altogether different from that of the physical object) (*Dowling v. U.S.* 1985, 207). In that case, the court had to determine whether the National Stolen Property Act would reach the interstate transportation of infringing copies of Elvis films, among other items. The court held that unauthorized copies (infringing copies) were not "stolen, converted or taken by fraud" as required by the Act, which has heretofore involved only "physical goods, wares or merchandise" (Id, 217). The Copyright Act codifies its own criminal penalties in light of the specific nature of copyright and the particularized harms that flow from infringement. To be sure, the court recognized the physical nature of film as film,[35] but in this category of cases regarding intellectual property, the focus on film's value concerns its copyrighted nature or its tie to a patented machine.

There are several cases in this category in which film is discussed specifically in light of the right to make derivative works under copyright law. Under the Copyright Act, copyright owners enjoy the exclusive right to "recast, transform, or adapt" their work to make a new "derivative" work. Traditionally, derivative works include translations from one language to another or adaptations of the original expression for a new media (e.g., a novel to a film). Cases of this sort span the entire 100 years of cases contained in the current film data set. As early as 1911, when moving pictures were only 16 years old, the Supreme Court decided a case concerning the filmic dramatization of *Ben Hur*:

> The appellant and defendant, the Kalem company, is engaged in the production of moving-picture films, the operation and effect of which are too well known to require description. By means of them anything of general interest from a coronation to a prize fight is presented to the public with almost the illusion of reality …. The defendant employed a man to read

[34] *Eldred v. Ashcroft*, 537 U.S. 186 (2002) (Appendix to Opinion of Breyer, J. at B) (discussing how films account for dominant share of export revenues earned by new copyrighted works of potential lasting commercial value); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985); *Sony Corp of America v. Univ. City Studios*, 464 U.S. 417 (1984); *Teleprompter Corp. v. Columbia Broad. Sys.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968); *Educ. Films Corp. of America v. Ward*, 282 U.S. 379 (1931); *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923); *Motion Picture Patents Co. v. Universal Film Mfg.*, 243 U.S. 502 (1917).

[35] *See Eldred v. Ashcroft*, 239–40 (Stevens, J. dissenting) (discussing the interest in preserving perishable copies of old copyrighted films).

> *Ben Hur* and to write out such a description or scenario of certain portions that it could be followed in action …. It then caused the described action to be performed, and took negatives for moving pictures of the scenes, from which it produced films suitable for exhibition. These films it expected and intended to sell for use as moving pictures in the way in which such pictures commonly are used. It advertised them under the title "Ben Hur." (*Kalem Co. v. Harper Bros.* 1911, 22)

Holding for copyright owner, the court decided in *Kalem* that the new film *Ben Hur* was an infringing derivative work of the book *Ben Hur*. We see similar discussions in other cases from the same period, one discussing the film version of a poem (*Fox Film Corp. v. Knowles* 1923) and another discussing the film version of a play (*Manners v. Morosco* 1920), and in later cases when film versions of books or short stories become particularly lucrative.[36]

In these cases, analyzing film as a derivative work, the court discusses the derivative film as a distinct expressive form, one that the author of the original work would have wanted to avoid or control. Again, we see the idea of film's exceptionalism structuring the court's analysis. The special features of film – its illusion of reality, its mass produced and mass performed nature – significantly enhance (or change) the underlying work (*Kalem Co v. Harper Bros.* 1911, 60; *Manners v. Morosco*, 327). For these reasons, it made sense to the court that the author of the original work would like the right to control film versions of it. These cases also evidence a suspicion and awe of film as it grows both in mass appeal and as a national industry with its increasing specialization. Combined with the early cases discussing the patented machines on which film was played where the court marveled at the power of "talkies" (*Paramount Publix Corp. v. American Tri-Ergon Corp.* 1935, 464; *Altoona Public Theaters v. American Tri-Ergon Corp.,* 1935, 477), the court's cases in the derivative work area paint a compelling picture of film's emergent cultural and economic dominance as mass entertainment.

Despite film's forceful presence in culture as a medium of expression and national commerce, throughout these cases about intellectual property, film retains its nature as personal property. It is alienable at will and can be exploited only with permission of the owner. Despite its obvious expressive function and the benefit derived from disseminating expression, "any copyright owner has the capacity arbitrarily to refuse to license one who seeks to exploit the work" (*Stewart v. Abend*, 229). This is another way of saying that the property aspect of film dominates over its intellectual aspect. In some instances, the court refuses to limit the monopoly that putative film owners claim over the dissemination of their work despite the personal nature of the property right (*Sony Corp. of America v. Univ. City Studios* 1984, 417). But it has done so only because property lines as drawn by statute are clear and not because of film's expressive value. In the recent case of *Dastar v. Twentieth Century Fox Film Corporation*, the Supreme Court declared that Fox Film, despite making the film at issue, was not entitled to control its subsequent distribution under either copyright

[36] *Steward v. Abend*, 495 U.S. 207 (1990) (evaluating whether the blockbuster Orson Wells film *Rear Window* is an authorized derivative work of the short story "It Had to Be Murder"); *Mills Music v. Snyder*, 469 U.S. 153, 176–177 (1985).

or trademark law because the copyright had fallen into the public domain (*Dastar v. Twentieth Century Fox Film Corp*. 2003, 23, 35). The court recognized that the public owed the existence of an important film to a genealogical line of filmmakers and contributors, but once the copyright in the filmic expression expired, no one had a legal claim to control it. There was nothing left to protect as property, even if the full value of the copyright had not been realized by its originators. The film was relinquished to the public domain for no other reason than its owner was derelict and let the copyright lapse.

These cases on intellectual property and film are interesting inasmuch as they discuss less the intellectual aspect than they do the property aspect of film. Even in the famous case of *Sony Corp of America v. University City Studios*, in which the court was closely divided over whether home recording of television shows and films was fair use under the Copyright Act, the court focused more on the potential harm to the market in television and film as an economic matter than whether it was in the public interest to facilitate building private film libraries (*Sony Corp. of America v. Univ. City Studios* 1984, 417). Ironically enough, in the category of cases in which film could be analyzed most intricately as both intellectual expression and a tangible good, the court's focus is on the latter, leaving the discussion of film's expressivity to other categories of cases.

9.4 Conclusion

This chapter represents a preliminary foray into a semiotics of film and law. It goes without saying that more elaborate analysis can and should be done following this brief exegesis on the assorted treatment of film in US Supreme Court cases. Recently, the Supreme Court decided two new cases in which its discussion manifests many of the varied relationships discussed above between film and commerce, expressive and dangerous speech, truthful evidence and invasive action.[37]

One of those cases is *Citizens United v. Federal Election Commission* (2010, 876). At the center of this controversial case is a film called *Hillary: The Movie*, which described itself as a documentary about then-Senator Hillary Clinton. The film aimed to expose Senator Clinton's flaws and dissuade voters from electing her to the Presidency (*Citizens United v. Fed. Election Comm'n* 2010, 887). One question presented by the case was whether a film such as *Hillary* was "electioneering communication" and "express advocacy or its functional equivalent." Another question presented was whether the kind of speech here – a film made by a political action committee (PAC) and a nonprofit corporation and one that would be shown

[37] *U.S. v. Stevens*, 130 S.Ct. 1577 (2010) (invalidating as overbroad a criminal statute that prohibits the depiction of animal cruelty, which would include films of animal sacrifice, mutilation, and maiming); *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010) (invalidating portions of campaign finance law that banned certain corporate-sponsored speech within several weeks of an election).

shortly before an election – could be regulated as the FEC sought under the Bipartisan Campaign Reform Act of 2002 (as it amended 2 USC §441b).

In deciding that *Hillary* was political speech that deserved the maximum protection under the First Amendment, the court recognized the film's diverse characteristics as "more suggestion and arguments than facts." It also said, however, that "there is little doubt that the thesis of the film is that she [Hillary Clinton] is unfit for the Presidency," and that "there is no reasonable interpretation of [the film] other than as an appeal to vote against Senator Clinton" (Id, 890). The court determined that the film "qualifies as the functional equivalent of express advocacy" and rejected its classification as a documentary (Id). It also said that the film required some interpretation but not in any sophisticated manner; reasonable people could *not* differ as to its message, albeit as argument rather than facts.

Later in the opinion, however, the court considered that some people "might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates" (Id, 918). And so although the film's message may be clear, the import of that message remains up for grabs. This is not very different from the court's reasoning in *Burstyn* half a century earlier. In 2010, as in 1952, the court prefers to trust the public with the film's reception. In 1952, the court said "what is one man's amusement, teaches another's doctrine." In 2010, the court says "[o]ur Nation's speech dynamic is changing…. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-h news cycle" (Id, 912). In both cases, the court accepts the affective quality of film – be it fictional or factual – and then trusts the public to do the work of filtering and processing it on its own. The 2010 court says, "[t]hose choices and assessments … are not for the Government to make" (Id, 917). And then in a remarkable conclusion whereby the court compares *Hillary: A Documentary* to the 1939 Hollywood film *Mr. Smith Goes to Washington*, the court said "it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force" (Id). With this, it seems the court's view on the roles and capacities of film as First Amendment speech over 50 years has not evolved. The court concludes that film, like so much other revered and mythical speech – such as that of "the individual on a soap box and the lonely pamphleteer" (Id, Roberts, J., concurring) – deserves protection for the purposes of deliberative democracy (Id, 915–17).

But so much *has* changed in 50 years. We need only look to the Internet and e-mail, Facebook, YouTube, and the decentralization of video and filmmaking by amateurs who reach a worldwide audience in a short time at low cost.[38] These social

[38] The court mentions these changes but does not discuss whether they merit a new application of First Amendment principles. *See Citizens United v. Fed. Election Comm'n*, 917. Indeed, the court lumps all speech together as undifferentiated. This seems odd given how in other contexts film's exceptionalism sets it apart.

facts make film potentially even more powerful as a medium. It is not necessarily film that has changed, but the world and manner in which the film is made and distributed. The dissent, written by Justice Stevens and joined by three other colleagues, recognizes this. Justice Stevens does not say that the film should be restricted within weeks of an election, only that for it to be shown up to and on the day of an election for maximum impact it need to "abjure business contributions or use of the funds in its PAC" (Id, 944, Stevens, J., dissenting). Stevens goes on to say:

> Let us be clear: [our precedent does not] impl[y] that corporations may be silenced; the FEC is not a 'censor,' and in the years since these cases, corporations have continued to play a major role in national dialogue. Laws such as [those at issue here] target a class of communications that is especially likely to corrupt the political process,… and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter demanding careful scrutiny. But the majority's incessant talk of a 'ban' aims at a straw man…. The Government routinely places special restrictions on the speech rights of students, prisoners, members of the Armed Forces, foreigners and its own employees. When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. (Id)

Stevens' dissent recognizes the various degrees of "free" that are part of First Amendment jurisprudence. And he does not differentiate film among them, but instead distinguishes the person or entity who speaks through the film (here a corporation). Calling the majority's application of the First Amendment "wooden" (Id), Stevens recognizes that the First Amendment has come far, expanded in application, and that this is good. But he also cautions that what is at issue here is not the film per se but the wholesale protection of "general treasury electioneering expenditures by corporations" (Id). To him, the film at issue was the output of corporate power and not of individual speech that the majority's First Amendment mythologizes. To Stevens, and the others who signed on to his dissent, the twenty-first century is vastly different from the early to mid-twentieth century precisely because of the magnitude of corporate influence over daily life; corporate entities are not simply aggregates of individual will or ideas. "Films" are not the issue, it is their authors.

Interestingly enough, in this most recent of cases discussing film and speech, the dissent and the majority do not disagree about the film's message or about its forceful way of making meaning. Instead, they disagree because of *who* is speaking through the film. Both sides agree that film may be uniquely powerful as speech, even exceptionally so. But the court remains divided as to the import of the film's authorship. The majority romanticizes the film as the product of a single entity, with a voice worthy of protecting in a democratic society. The dissent sees the film as a product of a corporation composed of diverse actors and thus as impossibly claiming to represent the unified voices of the company's shareholders. In *Citizens United*, film spans the distance between a soapbox speech and a corporate prospectus. The film at issue, *Hillary: A Documentary*, is of course very much like *both* of these things. And perhaps this variable and malleable nature of film as a complex speech act accounts for the irreconcilable positions taken by the justices in the case.

These cases, taken as a whole, are full of contradictions and puzzles such as this one. They describe a Supreme Court that asserts that it (and other courts) is uniquely capable of evaluating film content but also that film is best left to its audience to interpret. These cases demonstrate that the court recognizes film's diverse and strong economic hold on the national economy because of its mass appeal and complex industry, but also that these facts should not disqualify film from First Amendment protection. Finally, these cases describe an exceptionalism whereby film, although like other ubiquitous market goods and other forms of protected speech, should nonetheless be handled with care, as if it is still not entirely understood in terms of its social and cultural influences. This final point recalls the prescient statement of Vladimir Lenin that "of all the arts, for us the cinema is the most important."[39] To be sure, these cases from the US Supreme Court recognize the extraordinary influence of film on politics, culture, and economic life in the United States. It is not mere fringe entertainment, but deeply part of the fabric of our everyday life. It will be interesting to see whether in the next 100 years of cinema the court's special care of film is replaced, and if so, with what.

References

Austin, Regina. 2006. The next "New Wave": Law-genre documentaries, lawyering in support of the creative process, and visual legal advocacy. *Fordham Intellectual Property Media & Entertainment Law Journal* 16: 809–868.

Beebe, Barton. 2004. The semiotic analysis of trademark law. *UCLA Law Review* 51: 621, 629–633.

Buchanan, Ruth, Rebecca Johnson. 2008. Strange encounters: Exploring law and film in the affective register. *Law, Politics & Society,* 46: 33, 33–34. See also Elizabeth Carolyn Miller. 2008. *Framed: The new woman criminal in British culture at the Fin de Siècle*. Ann Arbor: University of Michigan Press.

Chase, Anthony. 2002. *Movies on trial: The legal system on the silver screen*. New York: The New Press.

Chase, Anthony. 1996. *Legal reelism: Film as legal texts*, ed. John Denvir. Urbana: University of Illinois Press.

Johnson, Rebecca. 2000. Leaving normal: Constructing the family at the movies in law. In *New perspectives on deviance: The construction of deviance in everyday life*, ed. Lori G. Beaman, 163–179. Scarborough: Prentice-Hall.

Kahan, Dan M., David A. Hoffman, and Donald Braman. 2009. Whose eyes are you going to believe: Scott v. Harris and the perils of cognitive illiberalism. *Harvard Law Review* 122: 837–906.

Kamir, Orit. 2006. *Framed: Women in law and film*. Durham: Duke University Press.

Leyda, Jay. 1973. *Kino: A history of the Russian and Soviet film*, 161. Princeton: Princeton University Press.

[39] This recalls Lenin's prediction that "of all the arts, for us the cinema is the most important." Jay Leyda, *Kino: A History of the Russian and Soviet Film* (Princeton: Princeton University Press, 1973), 161.

Lucia, Cynthia. 2005. *Framing female lawyers: Women on trial in film*. Austin: University of Texas Press.
Mnookin, Jennifer. 1998. The image of truth: Photographic evidence and the power of analogy. *Yale Journal Law & Humanities* 10: 1.
Murray, Melissa. 2009. Strange bedfellows: Criminal Law, family law, and the legal construction of intimate life. *Iowa Law Review* 94: 1253–1314.
Schauer, Fred. 1979. Speech and "Speech" – Obscenity and "Obscenity": An exercise in the interpretation of constitutional language. *Georgetown Law Journal* 67: 899, 906, 922, 923, 926.
Sherwin, Richard. 2011. *The visual persuasion project at New York Law School*. http://www.nyls.edu/centers/projects/visual_persuasion. Accessed 28 Jan 2011.
Silbey, Jessica. 2001. Patterns of courtroom justice. *Journal of Law Society* 28: 97–116.
Silbey, Jessica. 2002. What we do when we do law and popular culture. *Law & Society Inquiry* 27: 139, 141–142.
Silbey, Jessica. 2004. Judges as film critics: New approaches to filmic evidence. *University of Michigan Journal of Law Reform* 37: 493–572.
Silbey, Jessica. 2005. Filmmaking in the precinct house and the genre of documentary film. *Columbia Journal of Law & the Arts* 29: 107–108.
Silbey, Jessica. 2007a. A history of representations of justice: Coincident preoccupations of law and film. In *Representations of justice*, ed. Masson Antoine and O'Connor Kevin, 131–152. New York: P.I.E. – Peter Lang.
Silbey, Jessica. 2007b. Criminal performances: Film, autobiography, and confession. *New Mexico Law Review* 37: 189–243.
Silbey, Jessica. 2008. Cross-examining film. *University Maryland Law Journal Race, Religion Gender & Class* 8: 17.
Stone, Geoffrey, et al. 1996. *Constitutional law*, 3rd ed, 1226–1227. Gaithersburg: Aspen.

Chapter 10
Looking Again at Photographs and Privacy: Theoretical Perspectives on Law's Treatment of Photographs as Invasions of Privacy

David Rolph

Abstract Courts in the United Kingdom, Australia and New Zealand are increasingly entertaining claims for invasions of privacy. Many of these cases involve the publication of photographs by a media outlet. In the United Kingdom in particular, the means of protecting personal privacy has been the adaptation of the existing, information-based cause of action for breach of confidence. This has entailed treating photographs as a form of information. This chapter analyses the imposition of liability for the publication of intrusive photographs, as it is developing in the United Kingdom. It applies critical insights from leading theorists on photography, such as Barthes, Berger and Sontag, to suggest that the judicial treatment of photography is underdeveloped.

> …the age of Photography corresponds precisely to the explosion of the private into the public, or rather into the creation of a new social value, which is the publicity of the private: the private is consumed as such, publicly. The incessant aggression of the Press against the privacy of stars and the growing difficulties of legislation to govern them testify to this movement.
>
> Roland Barthes, *Camera Lucida*, p. 98

> Still, there is something predatory in the act of taking a picture. To photograph people is to violate them, by seeing them as they never see themselves, by having knowledge of them they can never have; it turns people into objects that can be symbolically possessed.
>
> Susan Sontag, *On Photography*, p. 14

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10.1 Introduction

Photographic technologies have been in existence for over 150 years. In that time, photographs have become a pervasive part of everyday life (Berger 1972, 129; Sontag 1977, 3). Unsurprisingly, the law has readily embraced photographs, particularly because photographs could usefully serve as evidence. However, the law's acceptance of photographs has been largely uncritical. In her book, *Captive Images: Race, Crime, Photography*, Katherine Biber acknowledges this and identifies the need for 'a critical and rigorous jurisprudence of the visual' (Biber 2007, xi). Through a close analysis of the prosecution of Mundarra Smith for bank robbery (*Smith v. R* 2001), Biber explores, in part, the unsatisfactory and unreflective approach of courts to photography and photographs, particularly in their use in evidence in criminal trials. She cogently argues that judges ignore the extensive critical scholarship which has developed around photography and instead treat photographs as unproblematic and capable of straightforward interpretation (Biber 2007, 5).

Biber's concern is with the law's instrumental use of photographs to support a finding of guilt and the imposition of criminal sanctions (Biber 2007, 26). In the criminal law, photographs are items of evidence deployed to prove or disprove the larger issue of the guilt of the accused. The interaction between law and photography considered in this chapter is different. In the cases to be discussed, the photograph itself is the subject matter of the proceedings. It is the source of the dispute and the central focus of the trial. The live issue in each of the cases discussed is whether or not it was acceptable to publish the photograph. The plaintiff complains that the photograph is an invasion of privacy; the media outlet contends that it was not or that there was a countervailing public interest in the publication of the photograph. How judges deal with these competing claims turns upon their approach to the photographs at issue. Therefore, judicial approaches to the photographs and to photography more broadly are vital to the outcome of these cases.

Given the constraints of space and the vastness and diversity of critical theory on photography, it is not possible to undertake a detailed consideration of the interaction between the law on invasion of privacy and photographic theory. Rather, this chapter necessarily has a more limited aim. It seeks to contribute to the development of the 'jurisprudence of the visual' by applying critical insights from leading theorists on photography – Barthes, Berger, Sontag – to recent UK cases involving invasions of privacy committed by the publication of photographs – in order to explore the assumptions underpinning the law of privacy as it developing and to assess their validity in light of photographic theory. It focuses principally on two decisions of the House of Lords – *Douglas v Hello!* and *Campbell v M.G.N. Ltd*. Both cases involve celebrities objecting to the publication of photographs – film stars, Michael Douglas and Catherine Zeta-Jones, in the former case; supermodel, Naomi Campbell, in the latter case. In *Douglas v Hello!*, in one of the judgments which was handed down in this complex, protracted litigation, the English Court of Appeal provided an exegesis on law, photography and privacy. In *Campbell v M.G.N. Ltd*, the House of Lords

decided a case which turned crucially upon what a photograph meant and what information it conveyed. This chapter also refers to other recent UK cases dealing with privacy and photography.

The application of insights from selected writings on photographic theory to the legal treatment of photography in these cases can usefully expose the judicial assumptions underpinning the legal treatment of photography, as it relates to invasion of privacy, as well as, more importantly, the limitations of such an understanding. It highlights the underdevelopment of judicial attitudes towards photography. This chapter contends that Biber's thesis that judges ignore the critical scholarship which has developed around photography and instead approach photographs as unproblematic and straightforward is borne out by recent case law on privacy and photography. It argues that the theoretical literature surrounding photography, particularly semiotic approaches, can enrich legal understandings of photographs as a form of invasion of privacy, in part by providing judges with a discourse and a method to apply to photographs.

10.2 The Protection of Privacy in Anglo-Australian Law

Until recently, Anglo-Australian law refused to recognise a legally enforceable right to privacy (*Victoria Park Racing and Recreation Grounds Pty Ltd v. Taylor* 1937, 496; *Cruise v Southdown Press Pty Ltd.* 1993, 125; *Australian Consolidated Press Ltd v Ettingshausen* 1993, 15; *GS v News Ltd* 1998 64, 913–64, 915). Whilst privacy was widely accepted as an important value, it was not afforded legal protection (*Wainwright v. Home Office* 2004). The most frequently cited reason for this consistent refusal to protect personal privacy directly was the difficulty of defining privacy as a legal interest (*Kaye v. Robertson* 1991; *Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd.* 2001; Australian Law Reform Commission 2008). One of the corollaries of the non-recognition of a legal right to privacy was that 'as a general rule, what one can see one can photograph without it being actionable' (*Raciti v. Hughes* 1995; *Bernstein v. Skyviews & General Ltd.* 1978; *Bathurst City Council v. Saban* 1985; *Lincoln Hunt Pty Ltd. v. Willesee* 1986). Just as Lord Camden LCJ evocatively stated in *Entick v Carrington*, 'the eye cannot by the laws of England be guilty of a trespass' (*Entick v. Carrington* 1765), so, by extension, the camera could not trespass either. The treatment of the human eye and the camera as equivalent was deeply problematic but remarkably persistent in the Anglo-Australian legal imagination (Rolph 2010).

The historically entrenched position that there is no common law right to privacy has recently begun to shift. In the United Kingdom, the impetus has been the introduction into domestic law of the *European Convention on Human Rights*, which includes a right to respect for private life (Art. 8). In Australia, the impetus has been a growing recognition of the deficiency of the common law's protection of privacy and the developments in other cognate legal systems, such as the United Kingdom

and New Zealand. Over the course of the last decade, a substantial jurisprudence on privacy has developed in the United Kingdom in particular. A significant proportion of these cases involve the publication of photographs which the plaintiffs claim invade their privacy.

One of the notable features of the UK privacy jurisprudence as it has developed is that it has adapted an existing cause of action to protect privacy, rather than creating a new cause of action (*A v. B plc* 2003; *Campbell v. MGN Ltd*. 2004; *OBG Ltd v. Allan* 2008). The cause of action selected is telling – breach of confidence. Breach of confidence is an equitable cause of action which protects against the detrimental disclosure of confidential information. It is an information-based cause of action (*Coco v. A N Clark* 1969; *Attorney-General v. Guardian Newspapers Ltd* 1990). The UK courts have taken the view that the adaptation of this existing cause of action is the most effective means of providing adequate protection of personal privacy, consistent with the obligation imposed under the *European Convention on Human Rights* (*A v. B plc* 2003; *Campbell v. MGN Ltd*. 2004; *Douglas v. Hello! Ltd* 2006; *OBG Ltd v. Allan* 2008) (although there has been some judicial concern expressed that this involves the 'shoehorning' of a claim for privacy into a cause of action for breach of confidence) (*Douglas v. Hello! Ltd* 2006). There is some support in Australia for a similar development of breach of confidence (*Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd* 2001; *Seven Network (Australia) Operations Ltd. v. Australian Broadcasting Corp*. 2007; *Giller v. Procopets* 2008).

In order for breach of confidence to provide a remedy for invasion of privacy by means of taking and publishing intrusive photographs, UK courts have had to treat photographs as a form of confidential information. This has only been a comparatively recent development, capable of being traced back to the *dicta* of Laws J in *Hellewell v Chief Constable of Derbyshire*, in which his Lordship stated:

> If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. (*Hellewell v. Chief Constable of Derbyshire* 1995)[1]

The jurisprudence on privacy now developing in the United Kingdom already includes a number of cases arising out of the actual or threatened publication of photographs (*Theakston v. MGN Ltd.* 2002; *John v. Associated Newspapers Ltd*. 2006; *Murray v. Express Newspapers plc* 2009; *Mosley v. News Group Newspapers Ltd*. 2008). The two most significant cases in the United Kingdom, both of which reached the House of Lords, form the principal case studies in this chapter: *Douglas v Hello!* and *Campbell v MGN Ltd*.

[1] See also *Creation Records Ltd v News Group Newspapers Ltd* (1997).

10.3 *Douglas v Hello! Ltd*

In mid-November 2000, film stars, Michael Douglas and Catherine Zeta-Jones, were married at the Plaza Hotel in New York (*OBG Ltd. v. Allan* 2008). The announcement of their engagement led to a bidding war between rival magazines, *OK!* and *Hello!*, for the exclusive rights to publish photographs of the wedding reception. *OK!* prevailed, signing contracts with Douglas and Zeta-Jones worth £500,000 each. Under the terms of their contracts, Douglas and Zeta-Jones had to hire their own photographer to take photographs of the event and then had to use their best efforts to restrict access by third party media outlets and to prevent guests from taking and publishing their own photographs. The invitations sent to guests clearly stated that the taking of photographs was not permitted. Security was hired to prevent unauthorised entry and guests were also sent coded entry cards for the same purpose. However, a *paparazzo*, Rupert Thorpe, managed to gain entry to the reception and surreptitiously took a number of photographs. Through intermediaries, these photographs were ultimately sold to *Hello!* magazine. *OK!*, Douglas and Zeta-Jones became aware that *Hello!* had the photographs and intended to expedite their publication. They obtained an ex parte injunction from Buckley J, restraining *Hello!* from publishing. *Hello!* appealed to the Court of Appeal, which set aside the injunction (*Douglas v. Hello* 2001).

In order to minimise the damage flowing from the loss of exclusivity, *OK!* also had to expedite its publication. *OK!*, Douglas and Zeta-Jones then pursued an award of damages against *Hello!* At the trial as to liability, Lindsay J found, inter alia, that Douglas and Zeta-Jones were entitled to an award of damages and the grant of a perpetual injunction against *Hello!* on the basis that the publication of the unauthorised photographs amounted to a breach of confidence. In a separate judgment on the remedies to be granted, his Lordship awarded the couple £14,600 damages, reflecting the distress caused by the publication of the photographs and the cost and inconvenience caused by having to select authorised photographs hastily for publication in *OK!* (*Douglas v. Hello* 2004). *Hello!* appealed against Lindsay J's judgment to the Court of Appeal.

Giving the judgment of the Court of Appeal, Lord Phillips of Worth Matravers MR first reviewed the development of breach of confidence under English law so as to provide protection for personal privacy. Having doing that, his Lordship proceeded to make some observations about the extension of breach of confidence to invasions of privacy committed by the publication of photographs. Under the heading, '*Photographic information*', he observed:

> This action is about photographs. Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances a voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive.

> This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public. (*Douglas v. Hello* 2006, 157)

Lord Phillips of Worth Matravers MR then proceeded to review recent authorities dealing with breach of confidence committed by means of the publication of intrusive photographs (*Douglas v. Hello* 2006, 157–159), concluding that a cause of action in breach of confidence could protect Douglas' and Zeta-Jones' interests in this case (*Douglas v. Hello* 2006, 160). His Lordship then considered the effect of their contract with *OK!* magazine, particularly whether, by placing information about the wedding into the public domain, it had deprived that information of the quality of confidence, which is essential for the cause of action being pursued (*Douglas v. Hello* 2006, 161–162). In this context, Lord Phillips of Worth Matravers MR observed that

> Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. In so far as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it…
>
> Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary event in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph. It is quite wrong to suppose that a person who authorised publication of selected personal photographs taken on a private occasion, will not reasonably feel distress at the publication of unauthorised photographs taken on the same occasion.

His Lordship found that Douglas and Zeta-Jones were not precluded by their contract with *OK!* from obtaining damages for distress for breach of confidence. There was no basis upon which to interfere with the modest award of damages of £3,750 to each claimant under this head (*Douglas v. Hello* 2006, 163). Nor did Lord Phillips of Worth Matravers MR find that there was any basis upon which to interfere the award of £7,000 damages to both claimants for the labour and expense of selecting the photographs for expedited publication (*Douglas v. Hello* 2006, 163–166).

There was a subsequent appeal to the House of Lords by *OK!* magazine in respect of its claim but Douglas and Zeta-Jones did not participate in the appeal (*OBG Ltd. v. Allan* 2008, 46). The issue before the House of Lords was whether the obligation of confidence created by Douglas and Zeta-Jones in respect of the wedding photographs could be imposed for the benefit of *OK!* magazine, such that *OK!* could also sue for breach of confidence. By a bare majority (Lord Hoffmann, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe dissenting), the House of Lords found that *OK!* could recover damages for breach of confidence as well as Douglas and Zeta-Jones (*OBG Ltd. v. Allan* 2008, 47–49, 93–94).

10.4 *Campbell v MGN Ltd*

In early February 2001, *The Daily Mirror* newspaper published a front-page story under the headline, 'Naomi: I am a drug addict'. The story, which continued inside the newspaper over several pages, was accompanied by a number of photographs of supermodel Naomi Campbell on a London street (*Campbell v. MGN Ltd*. 2004, 462–463). Lord Nicholls of Birkenhead characterised the tone of the initial publication as 'sympathetic and supportive with, perhaps, the barest undertone of smugness' (*Campbell v. MGN Ltd*. 2004, 463). Campbell immediately commenced proceedings against the newspaper's publisher, MGN Ltd, for breach of confidence and compensation under the *Data Protection Act* 1998 (UK) (*Campbell v. MGN Ltd*. 2004, 463–464, 471, 494). After that, the tone of *The Daily Mirror*'s subsequent publications changed decisively to one of open hostility (*Campbell v. MGN Ltd*. 2004, 463–464).

At first instance, Morland J found in favour of Campbell, awarding her £3,500 damages, including a component of aggravated damages. On appeal, the English Court of Appeal found in favour of MGN Ltd. Campbell appealed to the House of Lords.

Before the House of Lords, Campbell claimed that there were five categories of information impermissibly disclosed by *The Daily Mirror*. Four of these were conveyed in words – the fact of Campbell's drug addiction, the fact of Campbell's treatment, the fact of Campbell's treatment at Narcotics Anonymous and the details of Campbell's treatment at Narcotics Anonymous. The fifth category of information comprised the photographs themselves (*Campbell v. MGN Ltd*. 2004, 467).

During the course of argument, Campbell conceded that, given her repeated public statements that she did not take drugs, the fact of her drug addiction and her treatment for it were no longer capable of being regarded as private information. The issue then resolved itself as to whether the mere fact, as well as the details, of Campbell's treatment at Narcotics Anonymous and the photographs supporting the story constituted confidential or private information.

Significantly, there was a consensus amongst the Law Lords as to the principles to be applied. The division of opinion turned upon the application of those principles to the facts of the case (*Campbell v. MGN Ltd*. 2004, 469–470, 480, 495).

In their respective speeches, the majority, comprised of Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell, held that the facts and details of Campbell's treatment at Narcotics Anonymous, as well as the accompanying photographs, constituted private information (*Campbell v. MGN Ltd*. 2004, 493, 500–502, 505).

Lord Hope of Craighead reasoned that, had *The Daily Mirror* merely published a written account of the private information, the competing interests between Campbell's right to privacy and the newspaper's freedom of expression would have been evenly balanced. For his Lordship, *The Daily Mirror*'s publication of the photographs was the decisive factor in favour of Campbell (*Campbell v. MGN Ltd*.

2004, 492–493). Lord Hope of Craighead characterised the photographs and their impact on his finding of liability thus:

> Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. The reader only had the editor's word as to the truth of these details. (*Campbell v. MGN Ltd*. 2004, 492)

In her speech, Baroness Hale of Richmond concluded that the photographs in isolation were unobjectionable. However, in context, and particularly having regard to the accompanying text, the publication of the photographs added to the private health information about Campbell being disclosed and the harm being done to her by such revelation. Her Ladyship held that it was unnecessary for *The Daily Mirror* to publish the photographs in order to report the story (*Campbell v. MGN Ltd*. 2004, 501).

In his speech, Lord Carswell agreed with the outcome reached by Lord Hope of Craighead and Baroness Hale of Richmond. In relation to the photographs, Lord Carswell described them as 'a powerful prop to a written article and a much valued part of newspaper reporting, especially in the tabloid or popular press' (*Campbell v. MGN Ltd*. 2004, 504).

In his dissent, Lord Nicholls of Birkenhead reasoned that the information about Campbell's treatment at Narcotics Anonymous was not private because such therapy was 'well known, widely used and much respected' (*Campbell v. MGN Ltd*. 2004, 467). For his Lordship, the proper analogy was as follows:

> Disclosure that Miss Campbell had opted for this form of treatment was not a disclosure of any more significance than saying that a person who fractured a limb has his limb in plaster or that a person suffering from cancer is undergoing a course of chemotherapy. (*Campbell v. MGN Ltd*. 2004, 467)

By extension, Lord Nicholls of Birkenhead found that the accompanying photographs were not a breach of confidence, reasoning thus:

> But the pictorial information in the photographs, illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article…. There was nothing undignified or distrait about her appearance. (*Campbell v. MGN Ltd*. 2004, 468)

In his dissent, Lord Hoffmann emphasised the public interest in publishing information which would otherwise be considered private, which arose because Campbell herself made her non-use of illegal drugs a public issue and purported to cultivate a false public image of herself as a drug-free supermodel (*Campbell v. MGN Ltd*. 2004, 469–470, 477). This then entitled the media to publish material exposing Campbell's lies and correcting the public record (*Campbell v. MGN Ltd*. 2004, 474). Lord Hoffmann was of the view that *The Daily Mirror* was not limited

to the publication of the bare facts but could include circumstantial details and, importantly, the photographs (*Campbell v. MGN Ltd*. 2004, 474–475) because media outlets ought to be granted some latitude as to how they present their stories (*Campbell v. MGN Ltd*. 2004, 474–476). As his Lordship pithily observed, 'judges are not newspaper editors' (*Campbell v. MGN Ltd*. 2004, 474). In relation to the photographs, Lord Hoffmann characterised them thus:

> In the present case, however, there was nothing embarrassing about the picture, which showed Ms Campbell neatly dressed and smiling among a number of other people. Nor did the taking of the picture involve an intrusion into private space. Hundreds of such 'candid' pictures of Ms Campbell, taken perhaps on more glamorous occasions, must have been published in the past without objection. (*Campbell v. MGN Ltd*. 2004, 478)

10.5 Photographs as Information

The developing law on privacy in the United Kingdom adapts an existing, information-based cause of action – breach of confidence. In order for breach of confidence to provide protection against the unauthorised publication of photographs depicting private matters, courts have had to treat photographs as information. This equivalence first manifests itself in Laws J's *dicta* in *Hellewell v Chief Constable of Derbyshire*. It has been accepted and applied, as is made clear in the judgments in *Douglas v Hello! Ltd* and *Campbell v MGN Ltd*. Although some judicial reservations have been expressed about treating photographs as information (*Douglas v Hello!* 2006, 150), the preponderant view in the UK case law appears readily to accept this approach is unproblematic. In the first Court of Appeal decision in *Douglas v Hello!*, Sedley LJ flatly dismissed the argument made by Hello! that the photographs were not information, asserting that such a submission was 'plainly wrong' (*Douglas v Hello!* 2001, 1005), and Keene LJ characterised it as 'unsustainable' (*Douglas v Hello!* 2001, 1011). In the decision of the House of Lords in the same litigation, Lord Hoffmann posed his own question on this issue and then answered it:

> Is there any conceptual problem about the fact that the obligation of confidence was imposed only in respect of a particular form of information, namely photographic images? I do not see why there should be. (*OBG Ltd. v. Allan* 2008, 48)

(By way of contrast, in *Von Hannover v Germany* – a case concerning the publication of photographs of Princess Caroline of Monaco in tabloid magazines – the European Court of Human Rights suggested some reservations, stating that '[t]he present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual' (*Von Hannover v. Germany* 2005, 29). The quotation marks are telling.) Not only are photographs treated as information, there are assertions that photographs are a superior form of information. For example, in the House of Lords decision in *Douglas v Hello!*, Lord Nicholls of Birkenhead expressed the view that '[i]nformation communicated in other ways, in sketches of descriptive writing or by word of mouth, cannot be so

complete and accurate' as a photograph (*OBG Ltd. v. Allan* 2008, 71). Yet, theorists of photography raise legitimate questions about whether it is possible to treat photographs as information and, if it is, whether photographs are reliable or accurate (Silbey 2010, 1262–1272).

In her essay, 'In Plato's Cave', from her influential collection of essays, *On Photography*, Susan Sontag canvasses, then problematises, the diverse ways in which photographs can be used. Photographs can, *inter alia*, capture experience (Sontag 1977, 3–4), can appropriate the subject being photographed (Sontag 1977, 4), can furnish evidence (Sontag 1977, 5) and can provide information (Sontag 1977, 22). In relation to the latter, Sontag observes that '[p]hotographs are valued because they give information' (Sontag 1977, 22). However, Sontag queries the extent to which one can rely upon the informational value of photographs. Sontag asserts that

> [t]o spies, meteorologists, coroners, archaeologists, and other information professionals, their value is inestimable. But in the situations in which most people use photographs, their value as information is of the same order as fiction. (Sontag 1977, 22)

Sontag takes her analysis further, suggesting that '[a] new sense of the notion of information has been constructed around the photographic image' (Sontag 1977, 22). The photograph captures a specific moment and space in time. What is captured is framed by the photographer. Sontag suggests that that which is captured in a photograph can only ever be 'a thin slice' of space and time and that the way in which it is framed is 'arbitrary' (Sontag 1977, 22). Rather than being continuous with reality, the photograph is in fact marked by its discontinuity with reality (Berger 1971; Berger and Mohr 1982). The framing of a photograph marks out what is included in the photograph and, necessarily, what is excluded from the photograph. Although what is represented in the photograph existed in front of the camera lens, what is photographed and how it is framed are choices made by the photographer. The reality of the photograph and the 'information' it thereby embodies is mediated not only through the lens of the camera but also through the mind of the photographer.

In one of his analyses of the photograph, Roland Barthes draws a profound distinction between the photograph and the written word, observing that

> …the Photograph is pure contingency and can be nothing else (it is always *something* that is represented) – contrary to the text which, by the sudden action of a single word, can shift a sentence from description to reflection. (Barthes 1982, 28)

Rather than stressing the similarity between the photograph and the written word, Barthes emphasises the difference. He suggests that the photograph has a highly specific function and capacity for representation, whereas the written word has broader, more flexible functions and capabilities. Acknowledging that this might be so does not allow the law of privacy's ready acceptance of photographs as another form of information, similar to verbal information.

The judicial treatment of the photograph as a form of information presupposes that the photograph is an object, a passive and neutral embodiment of reality. The photograph then mediates to the viewer, in a pure form, information. According to

this account of the photograph, there is a confluence or an elision between the photograph and its subject, as if the photograph is a close and unproblematic approximation of reality. Yet, Sontag's reflections on the nature of photography invite reconsideration of such views. She problematises the notion that photographs are information in the straightforward manner in which the developing law on privacy has assumed. The judicial treatment of the photograph also presupposes that the capacity of the photograph and the written word to embody and to communicate information is equivalent. For the purposes of imposing legal liability, there is an obvious advantage to stressing the similarities. However, Barthes' observations as to the dissimilarities between photographic and written information suggest that any ready equation of these types of 'information' is problematic. These assumptions, however, are not the only difficulty the law's treatment of photography encounters when subject to the scrutiny of theory.

10.6 Photographs as Information Different from Verbal Information

The law of privacy, as it is evolving in the United Kingdom, not only treats photographs as information but, for certain purposes, treats them as a distinct category of information. It purports to establish a dichotomy between photographic information and verbal information. Not only does it posit this dichotomy, it suggests that photographic information is additional (*Douglas v. Hello! Ltd*. 2001, 1011; *Campbell v. MGN Ltd*. 2004, 468) and more importantly superior to verbal information (*Douglas v. Hello! Ltd*. 2001, 1011; *OBG Ltd. v. Allan* 2008, 71). Photographs provide access to information which is inaccessible by mere words (*Douglas v. Hello! Ltd*. 2001). Recourse is had to the adage that 'a picture is worth a thousand words' (*Campbell v. MGN Ltd*. 2004, 467, 477, 501). The developing law of privacy then proceeds to contend explicitly that photographs as information can be more intrusive upon, and more injurious of, personal privacy than mere verbal description. Thus, the publication of a photographic representation is repeatedly asserted to be more offensive than a verbal description of the same private phenomenon (*Theakston v. MGN Ltd*. 2002, 423–424). It justifies the application of differential remedies, providing a principled basis for a court to restrain the publication of photographs but to allow the publication of a written account of the same matter.

This emerges clearly from the decision of Ouseley J in *Theakston v MGN Ltd*. In this case, the television presenter, Jamie Theakston, sought an injunction to restrain the publication of a story, accompanied by photographs, in the tabloid newspaper, the *Sunday People*. The story concerned Theakston's conduct in a Mayfair brothel. In mid-December 2001, Theakston was drinking with friends in London. In the early hours of the morning, Theakston was taken to what he thought was a strip joint. A woman led him into a private room and 'performed a sex act' on him. More women entered the room and eventually Theakston became aware of the presence of a person taking photographs. Theakston realised he was in a brothel and left shortly thereafter.

In the following days, Theakston received telephone calls, demanding money for the sexual services provided and threatening the disclosure of the photographs to a newspaper if such payment were not made. He refused to pay, so the prostitute approached the *Sunday People* with her story and, importantly, her photographs (*Theakston v. MGN Ltd*. 2002, 402–403). Theakston became aware of the impending publication and sought an injunction. Ouseley J's approach is telling. His Lordship concluded that Theakston was entitled to an injunction to restrain the publication of the photographs of what happened inside the brothel but not the publication of a written account of the evening in question. On the one hand, Ouseley J concluded that a written account of Theakston's presence at the brothel and of the sexual activity he engaged in whilst there could be published. His Lordship reasoned that the information about sexual activity in the context of a transitory, commercial relationship was not confidential; that the brothel was not a private place; that Theakston had placed his private life, particularly his sexual conduct, in the public domain; that, given that Theakston was a television presenter of programmes directed towards children and teenagers, there was a public interest in the publication, even if Theakston could not be considered a role model as such; and that the freedom of expression of the prostitute and the *Sunday People* newspaper had to be respected, notwithstanding the somewhat unsavoury conduct in which they had engaged (*Theakston v. MGN Ltd*. 2002, 417–423). On the other hand, Ouseley J concluded that the photographs could not be published. His Lordship reasoned thus:

> The authorities cited to me showed that the Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars. I concluded that this part of the injunction involved no particular extension of the law of confidentiality and that the publication of such photographs would be particularly intrusive into the Claimant's own individual personality. I considered that even though the fact that the Claimant went on to the brothel and the details as to what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way. It did not seem to me remotely inherent in going to a brothel that what was done inside would be photographed, let alone that any photographs would be published. (*Theakston v. MGN Ltd*. 2002, 423–424)

In relation to the photographs, Ouseley J could identify no public interest supporting their publication (*Theakston v. MGN Ltd*. 2002, 424). In terms of the freedom of expression of the unidentified photographer and the *Sunday People*, his Lordship found that such rights had to yield to the superior right of Theakston to his private life (*Theakston v. MGN Ltd*. 2002, 424). The distinction drawn between photographic and written information is therefore important not only in principle but also in practice, leading as it does to differential remedies being granted for different categories of information.