

# THE IMPULSIVE SUBJECT AND THE REALIST LENS: LAW AND CONSUMER CULTURE IN FRITZ LANG'S *FURY*

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## ABSTRACT

Legal historians have paid particular attention to the Progressive revolt against legal formalism in the 1930s, on the one hand, and the growth of the administrative state on the other. Social historians have focused on the emergence of a mass culture of consumption which came to characterize twentieth century American life. In Fritz Lang's 1936 film *Fury*, these developments are portrayed as interconnected and mutually reinforcing. Indeed, *Fury* discloses the ways that the contemporaneous political and economic promotion of consumerism, reimagining of individual identity in terms of group membership, and cultural ascendancy of mass media—particularly advertising and film—shaped the modern legal subject and defined the kinds of social facts the law will recognize. Progressive lawyers and judges in the period meant to protect individuals by broadening the scope of the public's interest. But in the process the values of consumer culture were conflated with the public good. *Fury* captures this process, and its effects on individuals and law. Yet the film does not imagine that law can or should be insulated from cultural forces. Rather, in *Fury*, law itself is revealed to be a system of cultural representation: legal representational practices and other representational practices inform one another and combine to produce social facts.

## I. INTRODUCTION

Films made in the mid to late 1930s tend to reflect the populist turn in American culture during the Great Depression.<sup>1</sup> At the end of Frank Capra's 1936 film *Mr. Deeds Goes to Town*, for example, a judge declares that Deeds, who has decided to give his twenty million dollar inheritance to dispossessed farmers, is "the sanest man that ever walked into this courtroom."<sup>2</sup> At the end of John Ford's 1940 film version of *The Grapes of Wrath*, the longsuffering Ma Joad says she is not going to be afraid

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<sup>1</sup> MORRIS DICKSTEIN, *DANCING IN THE DARK: A CULTURAL HISTORY OF THE GREAT DEPRESSION* 447 (2009).

<sup>2</sup> *MR. DEEDS GOES TO TOWN* (Columbia Pictures Corp. 1936).

anymore because “the people” can survive anything.<sup>3</sup> Legal failure, if it is represented at all in the films of the 1930s, is remedied through the righteous intervention of the hero.<sup>4</sup>

Fritz Lang’s 1936 film *Fury* stands as a striking exception.<sup>5</sup> At the beginning of the film, Joe Wilson embodies traditional working class values like honesty, delayed gratification, and common sense fairness.<sup>6</sup> He lectures his brother about running with gangsters even though, as his brother points out, Joe’s legitimate job doesn’t pay enough money for him to marry the “swell gal” who loves him. He takes in a cold and hungry stray dog because it looks like he feels. But when a series of coincidences lead to Joe’s arrest, a lynch mob forms and sets fire to the jail in an attempt to kill him. Members of the mob are then tried and convicted of murder even though Joe has survived. And by the end of the film, Joe’s “belief in justice,” his idea “that men were civilized,” and his “pride that this country of mine was different from all others” are irrecoverably lost. So even though *Fury* ends with the familiar kiss between the hero and the girl, that kiss doesn’t evoke the familiar feeling of reassurance that goes with it.

*Fury* was the first film that Lang made in Hollywood after emigrating from Germany, by way of France, in 1934.<sup>7</sup> By his own account, Lang spent his first eighteen months in the States making a study of what he called the “American atmosphere.”<sup>8</sup> That the result of this study was the portrayal of the collapse of working class values into something new and unfamiliar is not surprising.<sup>9</sup> In the early years of the Depression, the breakdown of the economic order had precipitated a crisis in the rule of law.<sup>10</sup> Moreover, the conviction that material success corresponds to individual desert had been substantially discredited. In 1933, nearly half of

<sup>3</sup> THE GRAPES OF WRATH (Twentieth Century Fox Film Corp. 1940). The ending of the John Steinbeck novel from which the film was adapted is far less optimistic.

<sup>4</sup> Peter Roffman and Jim Purdy describe these films. See PETER ROFFMAN & JIM PURDY, THE HOLLYWOOD SOCIAL PROBLEM FILM: MADNESS, DESPAIR, AND POLITICS FROM THE DEPRESSION TO THE FIFTIES 32–35 (1981).

<sup>5</sup> FURY (Metro-Goldwyn-Mayer 1936).

<sup>6</sup> The fact that Joe is played by Spencer Tracy only heightens this association.

<sup>7</sup> PARTICK MCGILLIGAN, FRITZ LANG: THE NATURE OF THE BEAST 189–239 (1997). Films Lang had made in Germany, including METROPOLIS (UFA 1927) and M (Nero-Film AG 1931), had already established him as one of a handful of directors who defined twentieth century cinema. Lang’s work would continue to exert profound influence on American film, particularly film noir.

<sup>8</sup> He did so by reading “a lot of newspapers” and comics, watching films, traveling widely and talking to “everybody,” including “cab driver[s]” and “gas station attendant[s].” PETER BOGDANOVICH, FRITZ LANG IN AMERICA 15 (1969).

<sup>9</sup> Lang not only directed but co-wrote *Fury*. See *id.* at 16–20. Other successful films released in 1936 were escapist or optimistic, including the screwball comedy MY MAN GODFREY (Universal Pictures 1936), A TALE OF TWO CITIES (MGM 1935), ROMEO AND JULIET (Metro-Goldwyn-Mayer 1936), and biopics THE STORY OF LOUIS PASTEUR (First National Prod. 1936) and THE GREAT ZIEGFELD (MGM 1936).

<sup>10</sup> RONALD EDSFORTH, THE NEW DEAL: AMERICA’S RESPONSE TO THE GREAT DEPRESSION 8 (2000). This breakdown took various forms, including “[d]aily theft and looting of stores for food, farm strikes, anti-eviction and anti-foreclosure riots, Communist-led hunger marches, seizures of public buildings, police gassing and shooting of unemployed workers, attempted assassinations of public officials, lynch mobs and vigilante violence . . .” *Id.* at 8–9. Protesting farmers threatened the lives not only of bankers but of the sheriffs and judges who enforced foreclosures. *Id.* at 104–05. In the cities, unemployed and homeless protestors openly and sometimes violently clashed with the police. *Id.* Gangsters, bank robbers, and other outlaws joined the celebrities that had replaced politicians and businessmen on the front pages of the nation’s most widely read newspapers and magazines. *Id.* at 40.

the population was living hand-to-mouth and most Americans were “plainly unable to protect themselves against losses and hardships . . . for which they bore no individual responsibility.”<sup>11</sup> Responsibility rested instead with “complex and impersonal forces.”<sup>12</sup>

By 1936 the worst of the Depression was over but it was not at all clear how something like normalcy would be restored or what that normalcy would look like.<sup>13</sup> The boundary between the public and the private had fundamentally shifted as Americans looked to the vast expansion of government regulation and the establishment of a social safety net for recovery. But there was no single economic theory guiding the piecemeal policies of the New Deal and the long-term economic consequences of those policies were still unknown.<sup>14</sup> Against this backdrop of uncertainty, a new emphasis on consumption held the promise of stimulating economic recovery as well as providing a new basis for the relationship between property, the government, and its citizens. Anticipating this “fundamental change in our popular economic thought” in 1932, presidential candidate Franklin Delano Roosevelt predicted that “in the future we are going to think less about the producer and more about the consumer.”<sup>15</sup> At the end of *Fury*, the Joe Wilson kissing the girl is a consumer in an emerging mass culture.

In contrast with the anodyne contemporary accounts of this fundamental change, however, *Fury* associates it with violence and lawlessness.<sup>16</sup> *Fury* does so, this Article argues, because Lang is concerned with three contemporaneous developments in the 1930s that are too rarely considered together: the political and economic promotion of consumerism, the refashioning of legal subjects in terms of group membership, and the cultural ascendancy of mass media—particularly modern advertising and film. In *Fury*, these developments combine to introduce an unstable element of desire into the construction of the modern legal subject.

The lynching in *Fury* begins with mistaken identity. Joe is arrested for the kidnapping of a girl outside a fictional California town called Strand. Joe is innocent. The audience knows that he is on his way to marry his sweetheart Katherine, from whom he has been separated for almost a year while they both worked to earn enough money to get married. But the people of Strand assume he is guilty and quickly form a lynch mob. The mob has a variety of sources—gossiping women, an attention-hungry

<sup>11</sup> Benjamin M. Friedman, *FDR and the Depression: The Big Debate*, N.Y. REV. BOOKS, Nov. 8, 2007, at 26.

<sup>12</sup> EDSFORTH, *supra* note 10 at 53.

<sup>13</sup> See, e.g., HERBERT AGAR, *WHO OWNS AMERICA? A NEW DECLARATION OF INDEPENDENCE* (1936); KAREN HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937); HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

<sup>14</sup> As one contemporary political scientist observed, “[i]t cannot be convincingly demonstrated that economic stability and economic liberty are compatible.” Paul T. Homan, *The Pattern of the New Deal*, 51 *POL. SCI. Q.* 161, 180 (1936).

<sup>15</sup> Franklin D. Roosevelt, Address at Oglethorpe University (May 22, 1932) (on file with author).

<sup>16</sup> In 1912, for example, the economist and journalist Walter Weyl had proposed that the solidarity of citizens as consumers offered the most potent antidote to the undemocratic power of big business. See WALTER WEYL, *NEW DEMOCRACY* (1912). See also MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 211–27 (1996) (discussing Weyl’s proposal).

deputy sheriff, a bar full of men who seem to have no work, an instigating strikebuster from out of town, Strand's resident rabble-rouser, and finally a fresh-faced boy who shouts "let's have some fun." The local sheriff makes an earnest attempt to protect Joe at the jailhouse steps. But when the wife of one of his deputies states before the crowd that her husband might as well not come home if he protects the prisoner, Joe's fate is sealed.

Self-interested politicians prevent the National Guard from reaching Strand in time to stop the lynching, but newsreel cameramen arrive so quickly, as the bus driver in the film observes, they seem to have known about the mob before it even formed. Unable to reach the prisoner (the jail keeper has thrown the keys where even he can't reach them), the mob sets fire to the jail and watches as Joe apparently burns to death. Katherine arrives in Strand just in time to see Joe's face through the bars of the jail's window as it disappears into flames.

But Joe survives. Dynamite thrown into the burning building blows the hinges off his cell door and he climbs out a drainpipe without anyone seeing. For the rest of the film, Joe is consumed by the desire for revenge. This desire takes a very specific form: he wants his would-be lynchers to have a "legal trial" and a "legal death." So, without publicly revealing himself, Joe orchestrates the trial of twenty-two citizens of Strand for his murder.

In his opening statement, the district attorney asserts that "American democracy and its system of fair play for the rights of individuals under the law is on trial here." And the trial in *Fury* shows the legal system working exactly as we would want it to. The district attorney resists political pressure from the state attorney general not to prosecute. And he cleverly confounds the town's conspiracy to protect the members of the mob by allowing numerous witnesses to perjure themselves before introducing newsreel footage to impeach their testimony and positively identify the defendants as having participated in the violence. It is exactly the kind of performance on the part of a heroic lawyer that usually redeems law in film. The judge asserts and maintains control over members of the Strand community in the audience (turning the mob back into law-abiding individuals); the defense attorney properly insists on the impossibility of proving murder without a body. The jury convicts only the defendants it believes have been proven guilty. But we know that Joe is still alive. So instead of restoring our faith in law, the mob's "legal trial" turns out to be lawless, too—a legal lynching. Joe Wilson is a lynch mob of one, manipulating the legal system to exact his personal revenge. And there is nothing in law's process to stop him. Indeed, the legal system is revealed to be a kind of machine, as indifferent to actual guilt or innocence as the newsreel and the lynch mob.

At the end of the film, Joe must choose. He can allow the execution of the convicted members of the mob but it will mean hiding his survival forever. As Katherine observes, "I couldn't marry you now, Joe. I couldn't marry a dead man." Or he can reveal his survival, but this means his would-be lynchers will go unpunished. He chooses to save his own life,

even though it will also save theirs. Katherine forgives him on the spot. But it is hard to view this as an entirely happy ending.<sup>17</sup> After all, Joe “has been turned into a completely different person.”<sup>18</sup> As one contemporary reviewer of the film observed, “[h]is final appearance in court to save his would-be lynchers from hanging suggest [sic] a man saved from a physical but not a spiritual grave.”<sup>19</sup> Preventing the wrongful execution neither vindicates Joe’s individual rights nor recovers his civic identity. Instead, Joe’s choice is motivated by his desire to get married and live in a third floor apartment with a kitchenette: participation in a mass culture of consumption will form the new basis of his citizenship.

Later films like Alfred Hitchcock’s *The Wrong Man* (1956)<sup>20</sup> and Robert Wise’s *I Want to Live!* (1958)<sup>21</sup> exploit the documentary quality of filmic representation to produce a reassuring alternative to law in their critique of legal failure. Put simply, the law gets it wrong but film gets it right. Lang, however, anticipates and rejects the possibility that filmic representation can provide the kind of truth we associate with justice. Newsreel footage positively identifies the members of the lynch mob as guilty of a crime they did not commit; Joe watches his own death over and over again in a movie theater. In *Fury*, there is no getting it right. The legal values flouted by the lynching and the trial are supplanted rather than restored. In this way, *Fury* provides a rare glimpse of the “‘amazing trick’ . . . by which the law rebuilds itself in mid-air without ever touching down.”<sup>22</sup> And it is no accident we catch that glimpse through film.

This Article argues that *Fury* makes visible the interaction of legal and other cultural practices that is usually hidden.<sup>23</sup> Lang posits a nexus between the representational forms of law, film and advertising in the 1930s: the existence of newsreels and the technology that makes their screening possible influences the prosecutor’s strategy and the scope of legally admissible evidence; the consumerist values promoted by advertizing inform the behavior and expectations of citizens; group-oriented New Deal policy affects the cinematic portrayal of personal identity.<sup>24</sup> And in the account of legal and social change that emerges, not

<sup>17</sup> Indeed, Lang disagreed with the studio’s decision to end the film with Joe and Katherine kissing. He wanted the film to end with Joe’s speech in the courtroom describing his disillusionment. See BOGDANOVICH, *supra* note 8, at 26, 28.

<sup>18</sup> LOTTE H. EISNER, FRITZ LANG 176 (1976).

<sup>19</sup> Review, *New Films in London*, TIMES (London), June 29, 1936, at 12.

<sup>20</sup> THE WRONG MAN (Warner Brothers 1956).

<sup>21</sup> I WANT TO LIVE! (Figaro 1958).

<sup>22</sup> Stanley Fish, *The Law Wishes to Have a Formal Existence*, in THE FATE OF LAW 159, 196 (Austin Sarat & Thomas R. Kearns eds., 1993) (quoting Harry Schriber).

<sup>23</sup> The difficulty of observing this interaction is one of the reasons law and film scholars have struggled to define the field, despite the widespread intuition that important connections between law and film exist. For thoughtful attempts to theorize these connections, see DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION (1999); Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J. L. & ARTS 91 (2005); Amnon Reichman, *The Production of Law (and Cinema): Preliminary Comments on an Emerging Discourse*, 17 S. CAL. INTERDISC. L. J. 457 (2008).

<sup>24</sup> To the extent that law and film are both produced—in the sense that that what we see depends on practices “behind the scenes” that produce the final cut, or the statute, or the Supreme Court ruling—the interaction of legal and cinematic practices will influence not merely how law and film are produced but what the end products will be. See Reichman, *supra* note 23, at 487.

only are the burgeoning administrative state and mass consumer culture inextricably linked, but legal representational practices reproduce the values of consumer culture.

The following sections offer a synthetic reading of *Fury* in its historical, legal and social context. This context includes the transition from formalist to realist legal theory, the role of photographic technology in the development of mass culture, the collectivism of New Deal policies, the shift in emphasis in political and economic theory from production to consumption, the logic of modern advertising, and the phenomenon of spectacle lynching. None of these elements of 1930s culture existed in isolation, and none of them operates in isolation in *Fury*.<sup>25</sup> Rather, it is their complex interaction that discloses (some of) the ways in which legal and other cultural practices combine to produce social facts.

## II. THE EXPERTISE OF THE CAMERA AND SOCIAL FACTS

There was ample evidence by the early 1930s that legal theory had lost touch with lived experience. Law in its various forms had been complicit with, if not directly responsible for, much of the anxiety, suffering and uncertainty of the Depression: the state had failed to protect workers in particular and the economy in general from the business practices that contributed to the crash; local law enforcement found itself pitted against citizens driven to extremity by need and frustration; the government's response consisted of an unproven and unprecedented expansion of the administrative state; and New Deal legislation was profoundly altering social life as well as economic practices.<sup>26</sup> Decades of intensifying disagreement on the Supreme Court over the scope of the police powers of the state had convinced Justice Holmes by 1930 that there was "hardly any limit but the sky to the invalidating of [the constitutional rights of the States] if they happen to strike a majority of this Court as for any reason

<sup>25</sup> This complexity may help explain why film studies and law and film scholars have either avoided the film altogether or failed to offer satisfying accounts of the film's legal themes. See, e.g., TOM GUNNING, *THE FILMS OF FRITZ LANG: ALLEGORIES OF VISION AND MODERNITY* 233 (2000) (reading the end of the film as a vindication of the rule of law); Anton Kaes, *A Stranger in the House: Fritz Lang's Fury and the Cinema of Exile*, 89 *NEW GERMAN CRITIQUE* 33, 46 (2003) (arguing that in *Fury*, "[h]umanitarian ethics and the rule of law triumph over self-destructive impulses and demonic omnipotence"); Theodore Rippey, *By a Thread: Civilization in Fritz Lang's Fury*, 60 *J. FILM & VIDEO* 72, 88 (2008) (reading *Fury* as demonstrating the process of breakdown and restoration in civilization); Nick Smedley, *Fritz Lang's Trilogy: The Rise and Fall of a European Social Commentator*, 5 *FILM HIST.* 1, 4 (1993) (reading the film as a critique of populism). *Fury* has received relatively little attention from law and film scholars with the noteworthy exception of Norman Rosenberg. See Norman Rosenberg, *Hollywood on Trials: Courts and Films, 1930-1960*, 12 *LAW & HIST. REV.* 341 (1994) [hereinafter Rosenberg, *Hollywood on Trials*]; Norman Rosenberg, *Law Noir*, in *LEGAL REELISM: MOVIES AS LEGAL TEXTS* 280 (John Denvir ed., 1996) [hereinafter Rosenberg, *Law Noir*]. In Rosenberg's reading, *Fury* offers a critique of the "trial system" by highlighting "the indeterminacy of language and the problematics of legal translation." See Rosenberg, *Hollywood on Trials*, *supra*, at 357, 354. But Rosenberg misreads Lang's rejection of the idea that newsreel footage is "thoroughly empirical evidence." Rosenberg, *Hollywood on Trials*, *supra*, at 355.

<sup>26</sup> In 1934, Harlan Stone observed the profession's complicity with much that had gone wrong. See Harlan Stone, *The Public Influence of the Bar*, 48 *HARV. L. REV.* 1, 7, 9 (1934). See also EDSFORTH, *supra* note 10, at 19-33; JOHN KENNETH GALBRAITH, *THE GREAT CRASH* (1961); DAVID E. KYVIG, *DAILY LIFE IN THE UNITED STATES, 1920-1940*, at 209-57 (2004).

undesirable.”<sup>27</sup> These developments inspired a handful of judges and legal academics to attempt to bring legal theory into closer alignment with social conditions.<sup>28</sup> The result was legal realism.<sup>29</sup>

A generation earlier, William Dean Howells had championed realism in American fiction, which was, by his account, then the dominant form of popular culture. Let fiction “cease to lie about life,” Howells exhorted:

[L]et it portray men and women as they are, actuated by the motives and the passions in the measure that we all know; let it leave off painting dolls and working them by springs and wires; let it show the different interests in their true proportions; . . . let it speak the dialect, the language, that most Americans know . . . .<sup>30</sup>

For legal realists, it was judicial opinions delivered in “the language of transcendental nonsense” that lied about life by obscuring the “social forces which mold the law and the social ideals by which the law is to be judged.”<sup>31</sup> Against the orthodox account of law as abstract principles articulated through perdurable precedents, legal realists insisted that the law is actually comprised of instrumental decisions made by particular and diverse judges in concrete and specific cases.<sup>32</sup> For realists, judicial interpretation required “inquiry into the social policies intended to be served by legal rules and the practical social consequences of a court’s decisions.”<sup>33</sup> If law did and should take account of the social world as it is, legal questions had to be analyzed in the context of social facts.<sup>34</sup>

By the early 1930s, however, the representation of social facts was increasingly a matter of images. In the second half of the nineteenth

<sup>27</sup> *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting). See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915). See also SAMUEL J. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS: A STUDY IN THE INFLUENCE OF IDEAS* 93–240 (1974).

<sup>28</sup> Of course, Louis Brandeis, as both a lawyer and later a Supreme Court Justice, and Roscoe Pound, the influential Harvard Law School dean, had each in his own way already advocated for what Pound described as “sociological jurisprudence”—legal theory informed by philosophical pragmatism and the empirical social sciences. See WILFORD RUMBLE, JR., *AMERICAN LEGAL REALISM* 548 (1968). See also EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969) [hereinafter Purcell, *American Jurisprudence*].

<sup>29</sup> Karl Llewellyn famously announced the realist project in 1930. See Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *A Realistic Jurisprudence*]. Along with fellow realists Felix Cohen and Jerome Frank, Llewellyn compiled a list of realists in 1931. See KARL LLEWELLYN, *JURISPRUDENCE* 74–79 (1931). But the term “legal realism” captures a wide variety of positions and methodologies. See, e.g., RUMBLE, *supra* note 28, at 547. See generally WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1985) (discussing a number of different variants of “legal realism”).

<sup>30</sup> WILLIAM DEAN HOWELLS, *CRITICISM AND FICTION* 104 (1891).

<sup>31</sup> Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

<sup>32</sup> See Purcell, *American Jurisprudence*, *supra* note 28, at 427. See also Llewellyn, *A Realistic Jurisprudence*, *supra* note 29, at 439–45.

<sup>33</sup> Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 278 (1978).

<sup>34</sup> See Purcell, *American Jurisprudence*, *supra* note 28, at 435.

century, emerging photographic technology held the promise of objective knowledge of photographed events.<sup>35</sup> By the 1880s, photographs had become commonplace in both newspapers and courtrooms.<sup>36</sup> And as filmic technology advanced over the course of the early twentieth century, newsreels and movies began to eclipse traditional print media as the public's source of information about the social world.<sup>37</sup> By 1930, movies played a dominant role in mainstream American culture.<sup>38</sup>

As moving pictures took over the work of representing reality, the psychological aspects of film's documentary effect became increasingly apparent.<sup>39</sup> For example, the journalist Walter Lippmann observed in 1922 that moving pictures were "steadily building up imagery" through which individuals understood the world around them.<sup>40</sup> This imagery served as a particularly powerful force upon public opinion, he argued, because "on the screen, the whole process of observing, describing, reporting, and then imagining, has been accomplished for you."<sup>41</sup> Film does not merely select the images it makes familiar; it presents them in an already interpreted form.

One effect of this already accomplished process is that "a different nature speaks to the camera than opens to the naked eye."<sup>42</sup> In 1935, the critic Walter Benjamin began to theorize this difference.<sup>43</sup> Not merely does film, "with the resources of its lowerings and liftings, its interruptions and isolations, its extensions and accelerations, its enlargements and reductions," disclose new aspects of familiar objects and actions, but in its "thoroughgoing permeation of reality with mechanical equipment," the camera seems to capture "an aspect of reality free of all equipment."<sup>44</sup> Under these conditions, "filmed behavior lends itself more readily to analysis" because it can be "isolated more easily" and with greater

<sup>35</sup> MILES ORVELL, *THE REAL THING: IMITATION AND AUTHENTICITY IN AMERICAN CULTURE, 1880-1940*, 100 (1989). Eadward Muybridge's late nineteenth century stop-action photographs of horses moving provide an excellent example of this phenomenon: "The arrangement of that motion against a grid background . . . gave an aura of scientific discovery to the visible increments of movement, and had a startling effect upon people's confidence in their unaided vision. No one had ever *seen* what Muybridge revealed; our notions had been approximate, and often incorrect; the artists had been wrong." *Id.* at 100-01.

<sup>36</sup> See DAN SCHILLER, *OBJECTIVITY AND THE NEWS: THE PUBLIC AND THE RISE OF COMMERCIAL JOURNALISM* (1981); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *YALE J. L. & HUMAN.* 1, 13 (1998).

<sup>37</sup> ROBERT SKLAR, *MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES 195* (2nd ed. 1994).

<sup>38</sup> See J. F. Steiner, *Recreation and Leisure Time Activities*, in *RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS* 912, 940 (1933) (noting that in 1930, despite a collapsing economy, motion picture receipts amounted to one and a half billion dollars).

<sup>39</sup> As photographs become "standard evidence for historical occurrences," Walter Benjamin observed, they "acquire a hidden political significance." See Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS* 791, 798 (Leo Braudy & Marshall Cohen eds., 6th ed. 2004).

<sup>40</sup> WALTER LIPPMANN, *PUBLIC OPINION* 91 (1922).

<sup>41</sup> *Id.* at 92.

<sup>42</sup> Benjamin, *supra* note 39, at 806.

<sup>43</sup> Benjamin's *The Work of Art in the Age of Mechanical Reproduction* was published by the Institute for Social Research, home of the Frankfurt School, which had relocated to Columbia University. See MARTIN JAY, *THE DIALECTICAL IMAGINATION* 205-06 (1973).

<sup>44</sup> Benjamin, *supra* note 39, at 806, 804.



precision.<sup>45</sup> But, as Benjamin emphasized, the film viewer identifies with the camera instead of the person or object on the screen.<sup>46</sup> The result is a particular kind of expertise in which “unconsciously penetrated space is substituted for a space consciously explored by man.”<sup>47</sup> In this way, the expertise of the camera “introduces us to unconscious optics as does psychoanalysis to unconscious impulses.”<sup>48</sup>

The legal realism of the 1930s aspired to a similar kind of expertise.<sup>49</sup> Some legal realists engaged in empirical social science research.<sup>50</sup> Many looked to the developing discipline of psychology for “a scientific framework” within which to document legal practices and their effects.<sup>51</sup> In his now-famous 1930 call for realistic jurisprudence, Karl Llewellyn asserted that “the trend of the most fruitful thinking about law has run steadily toward regarding law as an engine (a heterogeneous multitude of engines) having purposes, not values in itself . . .”<sup>52</sup> Realism, on this account, should work like a camera, documenting legal outcomes for analysis. “[C]learer visualization of the problems involved,” Llewellyn continued, “moves toward ever-decreasing emphasis on words, and ever increasing emphasis on observable behavior (in which any demonstrably probable attitudes and thought-patterns should be included).”<sup>53</sup>

In their insistence that law respond to social facts, however, realists tended to miss the way that law, as an “engine” of representation, produces the very subjects it describes, but does so invisibly.<sup>54</sup> The realism of the camera obscures the artificiality of the image. Between “objective reality” and the filmic representation “are situated certain operations, a work which has as its result a finished product,” but that product “does not allow us to see the transformation which has taken place.”<sup>55</sup> As with film, the realist visualization of social facts is achieved through the processes of an

<sup>45</sup> *Id.* at 806.

<sup>46</sup> *Id.* at 800. Film theorist Christian Metz has since argued that the viewer identifies with himself looking. See CHRISTIAN METZ, *THE IMAGINARY SIGNIFIER: PSYCHOANALYSIS AND THE CINEMA* 49 (Celia Britton & Annwyl Williams trans., Ind. Univ. Press 1982) (1977).

<sup>47</sup> Benjamin, *supra* note 39, at 806. “For the first time,” Andre Bazin explains, “an image of the world is formed automatically, without the creative intervention of man.” Andre Bazin, *The Ontology of the Photographic Image*, in *FILM THEORY AND CRITICISM: INTRODUCTORY READINGS*, *supra* note 39, at 166, 168.

<sup>48</sup> Benjamin, *supra* note 39, at 806. Judith Mayne explains that “the various narrative codes of film . . . give the spectator a privileged vantage point from which to understand, evaluate, and comprehend what occurs on screen.” JUDITH MAYNE, *CINEMA AND SPECTATORSHIP* 25 (1993).

<sup>49</sup> Jerome Frank’s self-consciously Freudian work is the most obvious example. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

<sup>50</sup> See generally JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995) (describing the social science projects carried out by several legal realists).

<sup>51</sup> See Purcell, *American Jurisprudence*, *supra* note 28, at 428. Realists hoped that modern psychology could provide the basis for a “natural science” of law as well as society. Purcell, *American Jurisprudence*, *supra* note 28, at 425.

<sup>52</sup> Llewellyn, *A Realistic Jurisprudence*, *supra* note 29, at 464.

<sup>53</sup> Llewellyn, *A Realistic Jurisprudence*, *supra* note 29, at 464.

<sup>54</sup> As Austin Sarat and Thomas Kearns explain, “because law is constitutive of the very forms that social relations and practices take, it is embodied in them, so much so that it is virtually invisible to those involved.” See Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 51 (Austin Sarat & Thomas R. Kearns eds., 1993).

<sup>55</sup> Jean-Louis Baudry, *Ideological Effects of the Basic Cinematographic Apparatus*, in *NARRATIVE, APPARATUS, IDEOLOGY* 286, 287 (Philip Rosen ed., 1986).

apparatus.<sup>56</sup> And what any apparatus makes visible is always affected by the values encoded in its hidden operations.<sup>57</sup> In *Fury*, the values represented by law bear striking resemblance to the values represented in mass consumer culture.

### III. GROUP IDENTITY AND THE CONSUMER CITIZEN

The series of policy and legislative initiatives that would come to be known as the New Deal did not so much restore as replace the rule of law that had broken down in the early years of the Depression. On the orthodox, pre-realist account, law ordered a society “composed of individual men and women, who made and remade their world through contract.”<sup>58</sup> If, as the 1929 crash seemed to prove, the concentration of economic power in the hands of business meant that individual liberty could no longer guarantee personal security, the government would need to intervene to rebalance the interests of liberty and security.<sup>59</sup> But this intervention fundamentally transformed the relationship between individuals and the law.<sup>60</sup> In order to compensate for unequal bargaining power between individuals and corporations, many New Deal policies redefined society as a “confederation of collectivities” in which the individual was understood to be a member of a group.<sup>61</sup> The underlying premise was that in “a complex modern society, the individual was not an appropriate unit.”<sup>62</sup> Instead, the administrative state would safeguard equality and democracy by protecting and empowering aggregates of individuals. If “freedom seems abridged individually,” Attorney General Homer Cummings explained in 1934, “it is ultimately increased by being enlarged collectively.”<sup>63</sup> But in the process, “the individual ceased to matter

<sup>56</sup> Film theory tends to theorize the filmic apparatus in the terms suggested by Louis Althusser. See Louis Althusser, *Ideology and the Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY* 85, 109 (Ben Brewster trans., 2001) (1970). But a more flat-footed understanding of the way the photographer’s and viewer’s values inform the selection and arrangement of the photographic shot—the size of the object in the representational field, the lighting, the focus, etc.—affect the image produced by the apparatus suffices to explain this effect here.

<sup>57</sup> As Guyora Binder and Robert Weisberg argue, “law neither reflects nor distorts a social world of subjects that exists independent of it. Instead, law helps compose the social world: It is implicated both in degrading and commodifying once-sacred spheres of cultural value, and in making new values.” Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 *STAN. L. REV.* 1149, 1152 (1997).

<sup>58</sup> Lawrence M. Friedman, *The Welfare and Regulatory State*, in *THE NEW DEAL LEGACY AND THE CONSTITUTION: A HALF-CENTURY RETROSPECT, 1933–83: PROCEEDINGS OF A CONFERENCE AT BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, BERKELEY, APRIL 16, 1983*, at 11, 15 (1984).

<sup>59</sup> Fostering “institutional arrangements” that assured “security was the leitmotif of virtually everything the New Deal attempted.” David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945*, 9 *OXFORD HISTORY OF THE UNITED STATES* 365 (C. Vann Woodward gen. ed., 1999).

<sup>60</sup> Before the New Deal, most Americans had virtually no contact with the government in their daily lives. “In the nineteenth century the only federal service directly reaching people was the U. S. mail.” See KYVIG, *supra* note 26, at 231. Even individuals who did not come into direct contact with the rapidly expanding administrative state would have felt the effects. As Sarat and Kearns observe, “because people usually go along with legal prescriptions, law’s vision becomes ordinary practice. Law establishes its moral, political, and cultural values as conventional.” Sarat & Kearns, *supra* note 54, at 51.

<sup>61</sup> Friedman, *supra* note 58, at 15.

<sup>62</sup> *Id.*

<sup>63</sup> HOMER CUMMINGS, *LIBERTY UNDER LAW AND ADMINISTRATION* 20 (1934).

very much legally.”<sup>64</sup> If any particular individual’s interests ran counter to that of newly institutionalized groups, the “individual was basically powerless, and it was naïve to pretend otherwise.”<sup>65</sup>

The argument for collectivism as a means of economic recovery, while contested, was relatively easy to support under the conditions of the early 1930s. The argument for the constitutionality of government sponsored collectivism was considerably less so.<sup>66</sup> New Deal legislation met with immediate legal challenges and the first cases to reach the Supreme Court in 1935 exacerbated the brewing crisis in legal theory.<sup>67</sup> The Court’s invalidation of a series of New Deal measures in 1936, suggesting the imminent peril of the newly passed National Labor Relations (Wagner) Act, finally provoked the standoff between President Roosevelt and the Court that resulted in a dramatic shift of power toward realist jurisprudence.<sup>68</sup> Where the Fuller, White and Taft Courts had understood their charge to be the protection of the individual’s right to property and liberty of contract against the police powers of the state, by the late 1930s the Court was concerned with “discrete and insular minorities” and “governmental interventions that restricted participatory political processes . . . .”<sup>69</sup> The classical liberal legal subject imagined as a universalized individual economic actor gave way to legal subjects conceived in terms of “group membership and particularized group histories.”<sup>70</sup>

Like their New Dealer counterparts, progressive judges did not intend to redefine the relationship between the citizen and the state, so much as to salvage traditional liberal conceptions of that relationship from the wreck of industrial capitalism.<sup>71</sup> Conceiving legal subjects in terms of group membership “raised the prospect of a more affirmative, equalizing

<sup>64</sup> Friedman, *supra* note 58, at 15. Even legislation designed to protect workers, for example, jettisoned the idea of individual autonomy for those workers: “workers could vote against a union; but if the majority chose a union, and the union insisted on a closed shop, then the workers *had* to join, like it or not.” *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Homer Cummings’ *LIBERTY UNDER LAW AND ADMINISTRATION* provides a good example of the difficulty. Cummings asserts that evolving economic and social conditions “call upon the law for different interpretations.” CUMMINGS, *supra* note 63, at 85.

<sup>67</sup> See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

<sup>68</sup> Robert Jackson discusses these rulings in his book *THE STRUGGLE FOR JUDICIAL SUPREMACY* 181 (1941). Roosevelt responded to the rulings with a proposal to increase the size of the Court with justices he would appoint. This proposal failed, but the Court backed down and the controversy forced key retirements. Between 1937 and 1940, Roosevelt named five justices to the Supreme Court: Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas and Frank Murphy. See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932–1940*, at 231–38 (1963).

<sup>69</sup> Kathryn Abrams, *The Legal Subject in Exile*, 51 *DUKE L. J.* 27, 44 (2001) (quoting *United States v. Carolene Products*, 304 U.S. 144, 152–53 n.4 (1938)).

<sup>70</sup> *Id.* In *West Coast Hotel v. Parrish*, for example, the Court upheld Washington state legislation setting a minimum wage for women, finding that the state had a legitimate interest in preventing the “exploitation of a class of workers.” 300 U.S. 379, 399–400 (1937).

<sup>71</sup> Homan described the inconsistency at the time:

In some aspects [the New Deal] seems to share President Wilson’s adherence to the traditional American philosophy of relative equalitarianism and his nostalgia for the old America of small proprietors. But elsewhere it presents a philosophy of economic planning implying a world of highly organized groups and a government engaged in shepherding the groups in collective forms of action.

Homan, *supra* note 14, at 180.

governmental role” and entailed “a broader, participatory notion of citizenship” than that endorsed by previous courts.<sup>72</sup> But it also described individual citizens as more or less powerless. Thus, for individuals, this new account of the legal subject was potentially merely a new kind of “symbolic” or “formal” representation, in which robust personal identity is sacrificed to the generalized interests of the group.<sup>73</sup>

In *Fury*, Joe’s experience tracks this transformation. At the beginning of the film, Joe’s identity is discrete and robust. From the moment of his arrest, however, the law treats him as a member of a suspect class, not as a particularized individual, stripping him of the ability to prove his innocence. And not only does the lynch mob share this indifference to individual identity, but membership in the mob strips individual members of their identities as well—together they do things no one of them would have done alone.<sup>74</sup> In this way, *Fury* registers the potential consequences of substituting group identity for the traditional liberal subject.<sup>75</sup> In contrast with contemporary critics who worried that this revision of the legal subject would lead to communism or totalitarianism, however, the danger in *Fury* lies in the convergence of collectivism with consumerism.

Between 1880 and 1920, industrialization transformed American life.<sup>76</sup> New forms of work required people to leave long established local communities and live in burgeoning cities in unprecedented numbers. The result struck contemporary observers as a new form of mass society, which had “no social organization, no body of custom and tradition, no established set of rules or rituals, no organized group of sentiments, no structure of status roles and no established leadership.”<sup>77</sup> Class conflict increased as Americans increasingly found themselves “dependent on others . . . for their wages and well-being.”<sup>78</sup> And traditional liberal

<sup>72</sup> Abrams, *supra* note 69, at 44. Abrams’s point here is that this new legal subject is “particularized” as opposed to “universalized.” Lang’s concern is that the effect of being “particularized” as a member of a group is different than being “particularized” as an individual.

<sup>73</sup> See Barton J. Bernstein, *The New Deal: The Conservative Achievement of Liberal Reform*, in TOWARDS A NEW PAST: DISSENTING ESSAYS IN AMERICAN HISTORY 263, 281 (Barton J. Bernstein ed., 1968).

<sup>74</sup> The perjury conspiracy—making it impossible to identify the individual members of the mob in court—highlights this transformation. As the attorney general in the film observes, “you can’t bring a town full of John Does to trial.”

<sup>75</sup> It would have been difficult to represent the transformation of the legal subject in the unprecedented situations created by the burgeoning of administrative law under the New Deal. Administrative proceedings are—by their very nature—more or less invisible. Criminal acts and criminal law are, by contrast, inherently dramatic, and therefore serve as an effective proxy for cultural representations of law more generally. Crime and criminal law have long borne a synecdochial relationship to law more generally in the American imagination. As Roosevelt observed in 1934, “crime is a symptom of social disorder.” HOMER CUMMINGS, PROCEEDINGS OF THE ATTORNEY GENERAL’S CONFERENCE ON CRIME: HELD DECEMBER 10–13, 1934 IN MEMORIAL CONTINENTAL HALL, WASHINGTON, D.C. 18 (1936).

<sup>76</sup> See ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877–1920*, at 11–75 (1967). Underlying these changes was the massive reorganization of American industry under the corporate form between the 1890s and the 1920s. See ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); MARTIN J. SKLAR, *THE CORPORATE RESTRUCTURING OF AMERICAN CAPITALISM, 1890–1916* (1988).

<sup>77</sup> Herbert Blumer, *The Mass, the Public and Public Opinion*, in *NEW OUTLINE OF THE PRINCIPLES OF SOCIOLOGY* (Alfred McLung Lee ed., 1946), reprinted in *PUBLIC OPINION AND COMMUNICATION* 43, 44 (Bernard Berelson & Morris Janowitz eds., 1953).

<sup>78</sup> WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 5–6 (1993).

understandings of the basis for democracy lost their salience as individual ownership was supplanted by the concentration of wealth in corporate capital.<sup>79</sup> The necessity of a new account of the good life—providing bedrock for a democracy comprised of owners and workers—quickly became clear. “We have got to get a *modus vivendi* in America for happiness,” future president Woodrow Wilson observed in 1912, “and that is our new problem.”<sup>80</sup>

The requisite “newer” and “better” grounds for “economic and political freedom” were supplied in no small part by the growing market for mass-produced items.<sup>81</sup> In urban spaces, working for wages, surrounded by advertising that “characterized goods as within everyone’s reach and essential to a good and fulfilled life,” newly fashioned consumer citizens shared a common desire for personal satisfaction.<sup>82</sup> Between 1890 and 1929, the idea of consumption as the “domain of freedom, self-expression, and self-fulfillment” was absorbed into political discourse.<sup>83</sup> Thus, long before the New Deal, the “federal government, alongside the large financial intermediaries and corporations,” had become “a decisive agent in the making of the new American mass consumer economy and culture.”<sup>84</sup> The result was the formation of what William Leach has called a democracy of desire.<sup>85</sup>

The material deprivations of the Depression only bolstered consumer values, both in the choices that people made with what little income they had and in the way New Deal relief policies—focused on creating jobs and lowering prices—relied on consumption as an important part of recovery.<sup>86</sup> “Only as policy is determined in the interest of the consumer,” law professor and New Deal economic advisor Gardiner Means asserted in 1934, “will the potentialities of our economy be realized.”<sup>87</sup> The sociologist

<sup>79</sup> See SKLAR, *supra* note 76, at 397.

<sup>80</sup> *Id.* See also HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (Transaction Publishers 1993) (1909); SIMON NELSON PATTEN, *NEW BASIS FOR CIVILIZATION* (1907); WOODROW WILSON, *THE NEW FREEDOM* (1913).

<sup>81</sup> See LEACH, *supra* note 78, at 6.

<sup>82</sup> KYVIG, *supra* note 26, at 189.

<sup>83</sup> LEACH, *supra* note 78, at 386. See also SKLAR, *supra* note 76, at 431–39. This is not to say that there was no resistance to the conversion to consumer citizenship. See generally SKLAR, *supra* note 76, at 179–332.

<sup>84</sup> LEACH, *supra* note 78, at 351. The practice of consumption in a mass economy is well suited to this role, Jean Baudrillard explains, because it provides “a system which assures the regulation of signs and the integration of the group: it is simultaneously a morality (a system of ideological values) and a system of communication, a structure of exchange.” Jean Baudrillard, *Consumer Society*, in JEAN BAUDRILLARD: *SELECTED WRITINGS* (Mark Poster ed., 1988), reprinted in *CONSUMER SOCIETY IN AMERICAN HISTORY: A READER* 33, 47 (Lawrence Glickman ed., 1999).

<sup>85</sup> See LEACH, *supra* note 78, at 5.

<sup>86</sup> See DANIEL HOROWITZ, *THE MORALITY OF SPENDING* 135, 160–61 (1985). See also PERSIA CAMPBELL, *CONSUMER REPRESENTATION IN THE NEW DEAL* (1940).

<sup>87</sup> Gardiner Means, *The Consumer and the New Deal*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, May 1934, at 7, 13. Roosevelt and his economic advisers were deeply influenced by the economic thought of John Maynard Keynes, who rejected classical liberal assumptions in favor of an understanding of “the relationship between the community’s income and what it can be expected to spend on consumption.” See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* 28 (1936). See also PEARCE KELLEY, *CONSUMER ECONOMICS* (1953); WARREN C. WAITE & RALPH CASSADY, JR., *THE CONSUMER AND THE ECONOMIC ORDER* (2nd ed. 1949); CHARLES S. WYAND, *THE ECONOMICS OF CONSUMPTION* (1937).

Robert Lynd stated the case even more bluntly: "The only way that democracy can survive is through the quality of living it can help the rank-and-file of its citizens to achieve."<sup>88</sup>

Democracy may have survived the 1930s, but the new consumer citizen forged by the combined emphasis on collectivism and consumption in the New Deal was an altogether new kind of citizen. Since the founding, the political economy of citizenship had rested on freedom conceived in terms of "economic independence" assured by the "ownership of productive property—not as an end in itself primarily, but because such independence was essential to participating freely in the public realm."<sup>89</sup> The producer citizen, as the Progressive economist and journalist Walter Weyl noted in 1912, is "highly differentiated": "He is banker, lawyer, soldier, tailor, farmer, shoeblick, messenger boy. He is capitalist, workman, money lender, money borrower, urban worker, rural worker."<sup>90</sup> But like the group member legal subject of the New Deal, the mass consumer is undifferentiated.<sup>91</sup> Indeed, the advertising campaigns of the 1930s emphasized the generic appeal of products ranging from Pond's cold cream to Goodyear tires.<sup>92</sup> It was the spending of "consumers in the aggregate" as opposed to the protection of individual consumers that economists and government officials hoped "would bring the United States out of depression and ensure its survival as a democratic nation."<sup>93</sup> And in striking contrast to the pre-industrial experience of consumption as an essentially social practice, modern consumption is disconnected from any sense of community interdependence or civic well-being.<sup>94</sup>

The consumer citizen of the 1930s was, in this way, more or less the creature of mass culture, and movies and advertising substantially determined what the mass consumer wanted. Motion Picture Producers and Distributors Association president Will Hays observed in 1930 that motion pictures "exert a profound influence upon the buying habits of mankind. Hardly a day passes that we do not receive confirmation of new trends in purchasing which have arisen as a result of the subtle power of suggestion emanating from the screen."<sup>95</sup> This influence was so great in part because

<sup>88</sup> LIZABETH COHEN, *A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 19 (2003).

<sup>89</sup> William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 774–75.

<sup>90</sup> SANDEL, *supra* note 16, at 224 (quoting Walter Weyl).

<sup>91</sup> *Id.*

<sup>92</sup> See ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940*, at 291–95 (1985).

<sup>93</sup> See COHEN, *supra* note 88, at 20.

<sup>94</sup> See, e.g., Colin Campbell, *Consuming Goods and the Good of Consuming*, in *CRITICAL REV.* 8 (Fall 1994), reprinted in *CONSUMER SOCIETY IN AMERICAN HISTORY* *supra* note 84, at 19, 26; LEACH, *supra* note 78, at 6. This important difference was masked, however, by the contemporaneously ascendant idea that "the ordinary conduct of men is determined by economic motives" rather than non-material values and commitments. See SKLAR, *supra* note 76, at 390, 398–400. See also PAUL F. BOLLER, *AMERICAN THOUGHT IN TRANSITION: THE IMPACT OF EVOLUTIONARY NATURALISM, 1865–1900* (3rd prtg. 1971).

<sup>95</sup> Will Hays, President of the Motion Picture Producers and Distrib. of Am., Inc., *The Film as International Salesman* (May 22, 1930), microformed on The Will Hays Papers, CINEMA HISTORY MICROFILM SERIES (Univ. Publ'ns of Am.). The Motion Picture Producers and Distributors Association is now the Motion Picture Association of America.

movies and newsreels produced by a handful of studios and released to national audiences had eclipsed traditional local and heterogeneous sources of news and entertainment.<sup>96</sup> Motion pictures, like mass advertising, offered images of “an homogeneous population pursuing the same goals—‘living well’ and accumulating goods.”<sup>97</sup> Americans not only increasingly understood their economic and social identities in terms of their role as consumers, but increasingly consumed vicariously through representations of the things and lifestyles they could not actually afford. At the movies, one “needed only to pay a small admission price in order to share equally in the spectacle offered on the screen.”<sup>98</sup> These spectacles thus came to play an integral role in the acculturation of consumer citizens to a democracy of desire.

Like other forms of mass culture, film “substitutes a plurality of copies for a unique existence.”<sup>99</sup> The result—the potentially infinite replication of objects, or images of objects—fosters a “sense of the universal equality of things.”<sup>100</sup> And it is not just things that potentially lose their specific identity. Film affects the perception of the relationship between people, events, and objects.<sup>101</sup> In *The Culture Industry*, Max Horkheimer and Theodor Adorno explain:

Once a member of the audience could see his own wedding in the one shown on the film. Now the lucky actors on the screen are copies of the same category as every other member of the public, but such equality only demonstrates the insurmountable separation of the human elements. The perfect similarity is the absolute difference. The identity of the category forbids that of the individual cases. . . . Now any person signifies only those attributes by which he can replace everybody else: he is interchangeable, a copy. As an individual he is completely expendable and utterly insignificant . . . .<sup>102</sup>

The groups that emerged from the consumer culture of the 1930s were comprised of people participating in “mass behavior,” like following the exploits of Pretty Boy Floyd on the radio or smoking Lucky Strike cigarettes.<sup>103</sup> The groups defined and protected by New Dealers and Progressive judges—women who worked in factories, consumers of milk—

<sup>96</sup> In 1931, there were only 2268 daily newspapers and 12,636 weekly publications compared with the Department of Commerce’s estimated 22,731 movie theaters in the country, with weekly admissions of 100,000,000. See Malcolm M. Willey & Stuart A. Rice, *The Agencies of Communication*, in RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT’S RESEARCH COMMITTEE ON SOCIAL TRENDS, *supra* note 38, at 167, 204, 208.

<sup>97</sup> Judith Mayne, *Immigrants and Spectators*, 5 WIDE ANGLE 32, 34 (1982).

<sup>98</sup> *Id.*

<sup>99</sup> See Benjamin, *supra* note 39, at 794.

<sup>100</sup> *Id.* at 795.

<sup>101</sup> Benjamin describes this influence as “the adjustment of reality to the masses and of the masses to reality.” *Id.*

<sup>102</sup> MAX W. HORKHEIMER & THEODOR ADORNO, DIALECTIC OF ENLIGHTENMENT 145–46 (John Cumming trans., Continuum 1987) (1944).

<sup>103</sup> Blumer, *supra* note 77, at 43.

shared this basic quality as aggregates of “individuals who are separate, detached, anonymous, and thus, homogeneous as far as mass behavior is concerned.”<sup>104</sup> In *Fury*, both the formation of the lynch mob and the collective trial reduce individual identity to undifferentiated group membership. In this way, *Fury* suggests not merely the hazards for individuals posed by groups so conceived but the possible consequences for the rule of law.

#### IV. WHAT LYNCHING MEANS IN *FURY*

The distinction between lynching and official law depends on identity. Lynching elides identity: its victim is never positively identified as guilty; the details of the crime—motive, circumstances, agency—are unknown and irrelevant.<sup>105</sup> In contrast, the rule of law turns on identity. Legal procedure is designed to assure that the correct person is punished for the appropriate crime in proportion to its circumstances. The goal of one is vengeance; the goal of the other is justice. This distinction, however, collapses in *Fury*.

Joe’s lynching begins in the sheriff’s office after his arrest. In this scene, the sheriff mistakes membership in a mass group for individual identity. The sheriff seems fair-minded as he begins to question Joe but two arbitrary coincidences quickly change the situation: Joe and one of the real kidnapers both like salted peanuts, and Joe is in possession of a single five dollar bill from the kidnapers’ ransom. Once these suspicious but wholly circumstantial facts are literally on the table between them, Joe understands that he has become a prisoner. “What crime am I being accused of, anyway?” he asks as the sheriff’s eyes narrow. The sudden recognition of both his own jeopardy and the sheriff’s false conclusion leads Joe to forego the potential aid of Katherine and his brothers for fear of incriminating them as members of the kidnapping gang. And without their help, Joe has no hope of establishing his identity or obtaining a lawyer. He is no longer a citizen in the familiar sense.

The evidence against Joe is not merely circumstantial, it is generic. His possession of the peanuts and the five dollar bill proves only that he has bought the same kinds of things as the kidnapers. The film has earlier shown Joe buying peanuts at a train station—indicating that they are easily available and associating them with travel—and Joe offers the entirely plausible suggestion that he received the five dollar bill in change someplace the real kidnapers had used the ransom money. But the sheriff wrongly associates specific identity with these undifferentiated objects. As a result, he believes he has positively identified Joe as a suspect when he has merely identified him as a consumer. In this slip, the sheriff embodies

<sup>104</sup> *Id.* at 44. See also *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding New York State regulation of milk prices); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a Washington State minimum wage law for women).

<sup>105</sup> GRACE ELIZABETH HALE, *MAKING WHITENESS* 229 (1998). Like torture, lynching demonstrates “the end of the normative world of the victim—the end of what the victim values, the end of the bonds that constitute the community in which the values are grounded.” Robert M. Cover, *Violence and the Word*, 95 *YALE L. J.* 1601, 1603 (1986). On the historical association of lynching with torture, see ORLANDO PATTERSON, *RITUALS OF BLOOD* (1999).



the law's inattention to the impact of mass production on the relationship between people and things. The result is an indifference to specific individual identity that parallels the indifference of the lynch mob.

Not only does Joe's lynching begin under the rubric of legal authority, but the association between law and lynching continues as Joe orchestrates the lynch mob's "legal trial."<sup>106</sup> In *Fury*, the members of the mob are tried under an anti-lynching statute Joe has found in a law book. The audience is shown a close-up of the text when Joe shows it to his brothers: "Killing by lynch law is murder in the first degree. When the object is to inflict capital punishment by what is called lynch law, all who consent to the design are responsible for the overt act."<sup>107</sup> By this definition, the members of the mob are technically innocent because Joe did not die in the fire they set to kill him. But, as Joe says, "it's not their fault I'm alive."

Indeed, Joe is adamant that he has been lynched, even though he is still breathing. And after the attempt on his life the film bears out this conviction. Joe is transformed physically: he is kept in shadow, his voice is different, his expression is changed. But much more alarmingly, he doesn't care about the things he used to: his love for Katherine is eclipsed by his desire for revenge, his faith in working hard and living right has dissolved into a scheme to game the system. Eventually he pulls a gun on Tom, the kid brother he has spent a lifetime trying to protect. This isn't Joe, and Joe knows it. Joe is a dead man. In this sense, the lynching has been a success.

Joe and his brothers may want revenge, but the audience is encouraged to feel that justice requires the prosecution of Joe's would-be lynchers for murder because there is no other charge of which they are guilty commensurate with their acts or his suffering. Joe suggests that the members of an unsuccessful lynch mob would be tried for no more than disturbing the peace. But in light of the mob's casual indifference to his innocence and Joe's terrible transformation, even conviction for attempted murder would feel inadequate. As a result, punishing the mob seems to require something like the lawlessness in which Joe is engaged. "They'll hang for it," Joe insists, "according to the law that says if you kill somebody you have to be killed yourself."

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<sup>106</sup> This association has some historical foundation. In the nation's early history, lynching was regarded not as the antithesis of law but as the assumption of legal authority by the community, in the name of law itself or—more commonly—in the interest of preserving community norms. Most lynching victims were white. See STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930*, 88, 93–96 (1995). Over the course of the nineteenth century, and particularly after the federal government's retreat from Reconstruction, lynching became one of the mechanisms of enforcing racial hierarchy in the South. But the association between lynching and popular justice persisted. See, e.g., Luther Z. Rosser, *The Illegal Enforcement of Criminal Law*, Address at the American Bar Association at Cincinnati (Sept. 2, 1921), in 7 VA. L. REG. 569, 574.

<sup>107</sup> California passed anti-lynching legislation in 1933. But the language of the statute is very different from the language of the statute shown in *Fury*. The actual statute defines lynching as "the taking by means of a riot of any person from the lawful custody of any peace officer" and "every person who participates in any lynching is punishable by imprisonment in the state prison for two, three, or four years." CAL. PENAL CODE §§ 405(a)-(b) (Deering 1933). Historically, even successful lynch mobs were rarely prosecuted. By one 1933 estimate, "only about eight-tenths of one percent of the lynchings" reported since 1900 had "been followed by the conviction of the lynchers." JAMES HARMON CHADBOURN, *LYNCHING AND THE LAW* 13 (1933).

Joe's manipulation of the system feels even more justified once the audience learns that the "responsible businessmen of the community have decided it's a community and not an individual thing." This decision that "everybody's got to stick together" against the district attorney, leads to the perjury conspiracy that marks the beginning of the trial. Here the logic of group identity promises to insulate members of the mob from personal responsibility because the assault on the jail was an aggregate act.

Over the course of the trial, however, our sympathy with Joe increasingly threatens to turn the audience into a lynch mob—indifferent to factual innocence and unchecked by legal procedure. Joe's brothers, too, become increasingly uncomfortable with their complicity with Joe's orchestration of the mob's "legal death." Finally, Tom insists to Joe, "You're lynching *me*." This formulation of Tom's discomfort is telling. Joe has done more than ask Tom to hide the fact that he is alive. Joe has asked Tom and Charlie to enact Joe's condemnation of his would-be lynchers vicariously.<sup>108</sup> So when Tom accuses Joe of lynching him, the charge is not merely metaphorical. If lynching is the destruction of identity, Joe is lynching Tom by destroying their family and compelling him to do things against their once-shared values—by forcing him to be someone he is not.

Having put together the clues that Joe is still alive, Katherine arrives on the scene just as Joe pulls a gun on Tom for wanting to come clean. "Why don't you kill me, too?" she asks Joe, "What's one more?" Joe doesn't understand it yet, but the trial reproduces the destruction of identity that the lynching caused. In its treatment of Joe, the mob repeats the imbalance of power of the kidnapping it formed to redress; during the trial Joe is as indifferent as the mob had been.<sup>109</sup> Katherine tries to explain this to him by arguing that the members of the mob have been effectively punished because they have suffered "for days and weeks" the torture that Joe felt only for a few hours in the form of helpless insecurity. But Joe feels that this is a betrayal, that Katherine and Tom are siding with his would-be lynchers. He storms out of the room insisting, "I don't need anyone."

At this moment of extremity, Joe claims something like the abstract identity of the classical liberal subject: autonomous and singular, independent of constitutive social relations. And Joe's choice is understandable. The law has failed to protect the robust personal identity he enjoyed at the beginning of the film; the mob has shown group identity to be equally perilous. But alone in public places—a beer garden, an empty bar, a street lined with closed shops—he is not quite alone: the faces and footsteps of his now imminent victims haunt him like the Furies.<sup>110</sup> In a world of public spaces, singular and autonomous identity turns out to be

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<sup>108</sup> As Cover observes, the violence of law is made "legal" through the dissociation of judgment and enforcement. Cover, *supra* note 105, at 1611.

<sup>109</sup> Much the same way, the "interventionist state acting to offset concentrations of private power" redistributed this power without "fundamentally altering underlying social and economic conditions, in which the individual remained fundamentally vulnerable." Bernstein, *supra* note 73, at 264.

<sup>110</sup> In the ORESTEIA, the Furies hound Orestes for killing his mother to avenge the murder of his father. Athena creates a court of law to end the cycle of vengeance, transforming the Furies into a jury. AESCHYLUS I, ORESTEIA (David Green & Richard Latimore eds., Univ. Chi. Press 1969). In *Fury*, however, the legal system fails to end the cycle of vengeance.

unlivable. Joe runs back to the apartment where he left Katherine and his brothers, but they are already gone.

At the end of the film, Joe appears before the judge as the guilty verdicts are read, not to save the defendants, but so he won't be alone. As Lang insisted in interviews after the film was released, Joe is not motivated by "social conscience," but by "personal emotions."<sup>111</sup> "Don't you see we could be happy?" Katherine has asked as she pleads with him to reveal his survival. And it is the promise of this happiness—married life in a third floor apartment with a kitchenette—that Joe finally chooses.<sup>112</sup> In this way, as Norman Rosenberg has observed, *Fury* imagines a private, rather than public, solution to legal breakdown.<sup>113</sup> But Rosenberg misses the important respects in which the "private" here has been transformed from the sphere of individual freedom and independence associated with the traditional legal subject to the domestic space of consumption shaped and required by mass markets.

## V. IMPULSIVE SUBJECTS

In *Fury* we first meet Katherine and Joe in Chicago, looking through a department store window at a bedroom furniture set. Department stores, which had virtually not existed before 1880, emerged to sell new mass produced commodities with impressive rapidity in the 1890s.<sup>114</sup> Enticing buyers through the equally new tools of plate glass and electricity, department store windows showed passers-by what they were missing, and what they could have.<sup>115</sup> Spectacular window displays, flooded with light and color and even moving electrical components, were designed to "arouse in the observer the cupidity and longing to possess the goods."<sup>116</sup> In most cases the objects showcased were entirely new to consumers and did not fill an existing need.<sup>117</sup> The logic of modern advertising transcended merely selling—its goal was the production of desire.<sup>118</sup>

<sup>111</sup> BOGDANOVICH, *supra* note 8, at 30.

<sup>112</sup> In this way, *Fury* anticipates the alignment of consumer culture and domesticity in the 1950s. See COHEN, *supra* note 88, at 112–65.

<sup>113</sup> See Rosenberg, *Law Noir*, *supra* note 25, at 283.

<sup>114</sup> See LEACH, *supra* note 78, at 20. See also MICHAEL B. MILLER, THE BON MARCHÉ: BOURGEOIS CULTURE AND THE DEPARTMENT STORE, 1869–1920, 31 (1981). "From 1900 to 1930 the population of the United States increased by 65 percent, while from 1899 to 1930 the quantity volume of manufactures increased by 151 percent, with a peak in 1929 representing an increase of 208 percent from 1899." Robert S. Lynd, *The People as Consumers*, in RECENT SOCIAL TRENDS IN THE UNITED STATES: REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS, *supra* note 38, at 857.

<sup>115</sup> See LEACH, *supra* note 78, at 39.

<sup>116</sup> *Id.* at 60 (quoting L. Frank Baum, who pioneered the practice of spectacular window displays in Chicago in the 1890s. Baum would go on to author the *Wizard of Oz* books).

<sup>117</sup> See KYVIG, *supra* note 26, at 187–88. They were not even necessarily affordable to passers-by. On the question of affordability, see Daniel Horowitz, *Consumption, Capitalism, and Culture*, 6 REV. AM. HIST. 388 (1978) (reviewing STUART EWEN, CAPTAINS OF CONSCIOUSNESS (1976)).

<sup>118</sup> Indeed, in 1925, Secretary of Commerce Herbert Hoover credited the advertising industry with having "taken over the job of creating desire." "In the past," he observed, "wish, want and desire were the motive forces in economic progress." Now economic progress was driving desire. See LEACH, *supra* note 78, at 375.

In addition to fueling economic recovery, the desire generated by advertising helped fill a vacuum of meaning precipitated by social and economic change.<sup>119</sup> In their representations of social and material possibilities, from how a family might look sitting around the kitchen table to what a successful man of business wears, display windows and magazine advertisements offered models “in the face of those modern complexities and impersonal judgments that made the individual feel incompetent and insecure.”<sup>120</sup> Mass culture taught immigrants and newly urban workers not merely what to want but how to live.

This is clearly the case with Katherine and Joe as they stand before the window display, a modern young couple without any other models of what domesticity and privacy might look and feel like in the city. (Katherine is an orphan and lives in a boarding house, Joe and his two brothers live in a spare two-room apartment.) The bedroom set is not merely furniture in their gaze; it holds the promise of a future together.<sup>121</sup> As they look through the glass at the staged room, they can almost see themselves in it, and so can the audience. “Them slippery little rugs is out” Joe tells Katherine, “—man’s liable to break his neck on them.” “You planning to do a lot of running around in there?” she asks, smiling. “Yeah,” Joe answers, “After you.” “And them twin beds, too,” Joe adds, implying only a shared bed will do. Katherine agrees: “Out like a light.” The erotic charge of the scene is unmistakable.<sup>122</sup> Joe and Katherine have stopped at the display window on their way to the train station, where Katherine boards a train to California where there is “a better job” because they don’t have enough money to get married. Their vicarious enjoyment of the bedroom set in the window represents but also substitutes for the deferred and longed for scene of sexual satisfaction.

But the display window also holds the more general promise of what Joe and Katherine are working for, even if they can never afford the bedroom set. “Sell them their dreams,” the announcer at a convention of advertising display professionals confidently exhorted in 1923, “[s]ell them what they longed for and hoped for and almost despaired of having. . . . After all, people don’t buy things to have things. They buy things to work for them. They buy hope—hope of what your merchandise will do for them.”<sup>123</sup> In an economy of desire, objects take on a life of their own. No longer associated with concrete needs or particular sources, the value of mass-produced objects becomes detached from both their utility and their production. Instead, the identities of consumers come to depend on the objects they desire. And the potential objects of desire are as

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<sup>119</sup> See T.J. JACKSON LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880–1920*, at 26–37 (1981).

<sup>120</sup> See MARCHAND, *supra* note 92, at xxi.

<sup>121</sup> The promise of the future was one of the central motifs of the advertising of the period. See MARCHAND, *supra* note 92, at 255–59.

<sup>122</sup> Sexual desire was very much part of the logic of desire encoded in display windows. See LEACH, *supra* note 78, at 66, 296.

<sup>123</sup> *Id.* at 298 (quoting Helen Landon Cass). As Colin Campbell has observed, in consumer culture, “the true focus of desire is less the object itself than the experience the consumer anticipates possessing it will bring.” See Campbell, *supra* note 94, at 26.

limitless as the imagination: a bedroom set one day, a luxury cruise the next.

In *Fury*, “the dream [is] teaching the dreamers how to live.”<sup>124</sup> Despite their long separation, when he has saved enough money Joe buys a car instead of sending for Katherine. The photograph of the new convertible he mails her looks just like an advertisement.<sup>125</sup> Joe and Katherine can finally get married because he and his brothers have bought a gas station, but it is not their hard work that results in financial success. Rather, the gas station turns out to be next to the site of a new racetrack.<sup>126</sup> The newspaper clipping of a photograph of the racetrack he mails her announces their future together under the auspices of leisure and entertainment.

The way of life in which advertising instructs individuals, however, bears little resemblance to the traditional conception of democratic citizenship.<sup>127</sup> In the nineteenth century, self-control was understood to guarantee not just personal morality but social stability.<sup>128</sup> As Robert Lynd observed in 1936, “[o]ur form of government, our economic system, theory of criminal responsibility, and many other institutional forms were laid down in an era when human nature was looked upon as calculating rationally and dispassionately before it acted.”<sup>129</sup> But the implicit standard of conduct in consumer culture is the personal gratification of desire. Mass culture generates a “vast array of institutional disjunctions that are disruptive to coherent behavior.”<sup>130</sup>

To men in their functional rôles [sic] as consumers these operate to confuse reflection because of the very number and incoherence of the choices presented, and to breed urgent personal insecurities which predispose towards blind, spasmodic reaction rather than the kind of deliberate reflective sorting of relevant issues that we are wont to call “rational choice.”<sup>131</sup>

In contrast with the relatively stable, morally unified, independent, liberal individualist conception of the self, the consuming self is dependent and discontinuous—“a bundle of appetites and impulses and propensities.”<sup>132</sup>

<sup>124</sup> JOAN DIDION, *Some Dreamers of the Golden Dream*, in *SLOUCHING TOWARDS BETHLEHEM* 3, 17 (1968).

<sup>125</sup> Automobiles played an important role in the emerging culture of consumption. See KYVIG, *supra* note 26, at 27–52. But it is also this car—a symbol of anonymous mobility—that makes him a suspect in the kidnapping.

<sup>126</sup> In the early 1930s, states hungry for revenue started legalizing gambling. The number of racetracks nationally increased by seventy percent and horse racing “was rapidly becoming far and away America’s most heavily attended sport.” See LAURA HILLENBRAND, *SEABISCUIT* 17 (2001).

<sup>127</sup> Advertising, “with all its vast power to influence values and conduct, cannot ever lose sight of the fact that it ultimately regards man as a consumer and defines its own mission as one of stimulating him to consume or to desire to consume.” DAVID M. POTTER, *PEOPLE OF PLENTY* 177 (1954).

<sup>128</sup> In the early twentieth century, however, these values were being rapidly supplanted by new conceptions of “personality” and personal gratification. See Warren Susman, “Personality” and the *Making of Twentieth-Century Culture*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 214 (John Higham & Paul K. Conkin eds., 1979). See also DAVID RIESMAN ET AL., *THE LONELY CROWD* (1950).

<sup>129</sup> Robert S. Lynd, *Democracy’s Third Estate: The Consumer*, 51 *POL. SCI. Q.* 481, 487 (1936).

<sup>130</sup> *Id.* at 489.

<sup>131</sup> *Id.*

<sup>132</sup> LEARS, *supra* note 119, at 34, 39.

Motivated not by need but by desire, the consuming subject is at base an impulsive subject.<sup>133</sup>

The dependence of New Deal policies on consumption only intensified the imperative to generate desire.<sup>134</sup> American workers were paid forty percent less in 1932 than they had been in 1929 and many were forced into part-time work.<sup>135</sup> Nevertheless, the producers of consumer goods responded to falling sales with "more advertising and more innovative advertising copy."<sup>136</sup> These ads virtually ignored the realities of the Depression, while simultaneously suggesting that opportunity and relief were to be found in specific products, like Cream of Wheat and Listerine.<sup>137</sup>

Indeed, David Potter identifies the Depression as the moment at which it became clear that "the politics of our democracy" is "a politics of abundance rather than a politics of individualism," in which freedom and "abundance"—government-assured access to commodities—are conflated.<sup>138</sup> The "new order of liberty" Attorney General Cummings anticipated in 1934 was quickly converging with the democracy of desire, a society in which every individual had "equal rights to desire the same goods" and to long "to enter the same world of comfort and luxury."<sup>139</sup>

Contemporary social critics were worried by "the specter of a mass society composed of millions of passive, conforming consumers who struggled in vain against the pressures of a mature capitalism's advertising campaigns."<sup>140</sup> But in *Fury*, the hazards of consumer citizenship lie not in passivity but in the alchemy of desire. Desire, after all, is not merely objectless (its potential objects are unlimited), but insatiable (its potential objects can never be exhausted). The desiring subject is potentially as unstable as the objects of its desire are polymorphous.<sup>141</sup>

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<sup>133</sup> "Advertising helped to create a culture in which there were few symbols rooted in specific customs (as in traditional cultures), nor even many signs with specific referents (as in Victorian print culture). There were only floating, detached images that (like the flickering faces in the movies) promised therapeutic feelings of emotional or sensuous excitement. But fulfillment seemed always just out of reach." T.J. Jackson Lears, *From Salvation to Self-Realization*, in *THE CULTURE OF CONSUMPTION* 1, 22 (Richard Wighman Fox & T.J. Jackson Lears eds., 1983). See also EDWARD BERNAYS, *PROPAGANDA* 73–75 (Ig Publishing 2005) (1928).

<sup>134</sup> See LEACH, *supra* note 78, at 382. Roosevelt himself would become "the master advertiser of government" over the course of the 1930s. See T.J. JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* 243 (1994). See also RICHARD W. STEELE, *PROPAGANDA IN AN OPEN SOCIETY: THE ROOSEVELT ADMINISTRATION AND THE MEDIA, 1933–1941* (1985).

<sup>135</sup> EDSFORTH, *supra* note 10, at 46–47.

<sup>136</sup> *Id.* at 77.

<sup>137</sup> See LEARS, *supra* note 134, at 236–37; MARCHAND, *supra* note 92, at 285–333. This is not to say that the advertising industry did not receive criticism during this period—it did, and the Depression saw a growing consumer rights movement. See LEARS, *supra* note 134, at 236–37. See also COHEN, *supra* note 88, at 31–61.

<sup>138</sup> POTTER, *supra* note 127, at 126–27. Stuart Chase had coined the phrase in a 1934 book. See STUART CHASE, *THE ECONOMY OF ABUNDANCE* (1934). Marchand describes the sense in which advertising equated citizenship with buying power. See MARCHAND, *supra* note 92, at 64.

<sup>139</sup> See LEACH, *supra* note 78, at 6.

<sup>140</sup> HOROWITZ, *supra* note 86, at 134.

<sup>141</sup> See MARK C. TAYLOR, *ALTARITY* 20 (1987).

Before the mob forms in *Fury*, the immigrant barber remarks that “people get funny impulses.”<sup>142</sup> “Would you believe,” he asks his client, “that in the twenty years I’ve been stroking this razor across throats here that many a time I’ve had an impulse to cut their Adam’s apple wide open?” When the deputy asks whether he feels an impulse coming on, the barber observes, “An impulse is an impulse—it’s like an itch you’ve got to scratch.”<sup>143</sup> When it works, consumer culture succeeds “better than the state in imposing its restraints upon individuals, because its imperatives are disguised as choices.”<sup>144</sup> But when it doesn’t work, the volatile combination of personal insecurities and blind reaction unleashed by desire threatens the authority of the state.

## VI. LYNCHING AND THE SPECTACLE

In interviews after *Fury* was released, Fritz Lang lamented the fact that he had been prevented from depicting lynching as racialized violence.<sup>145</sup> But a film released in 1936 could not have explicitly treated the racial dimension of lynching.<sup>146</sup> Since 1922, the movie industry had worked very hard, under the guidance of Will Hays and the Motion Picture Producers and Distributors Association he founded, to prevent government regulation through self-censorship.<sup>147</sup> By 1934, this industry practice had taken the form of vigorous enforcement of a Production Code.<sup>148</sup> Though the Hays

<sup>142</sup> “If you resist them, you’re sane,” he explains, and “if you don’t, you’re on the way to the nuthouse, or the pen.” But as this Article argues below, acting on impulse is one of the traits of the consuming subject and the members of the mob are not ultimately punished for acting on theirs.

<sup>143</sup> This little speech provides a moment of humor in the film—the barber’s half-shaved client slips down from the chair and out the door while the barber is talking. But it comes within seconds of the other barber’s admonishment that the client, who has just complained there should be a law against free speech, should read the Constitution. In other words, the barber has been right about the law, and brings that authority to his discussion of impulse.

<sup>144</sup> Lynd, *supra* note 129, at 489 (quoting Walter Hamilton). Indeed, contrary to conservative fears about the decline of the protestant ethic, the “consumption of industrial abundance” did not necessarily “divert people away from their devotion to disciplined labor.” See MARCHAND, *supra* note 92, at 64. Rather, the “desire for cultural and material betterment” kept “people striving for more things as they struggled to maintain an ever-rising standard of living.” See LEARS, *supra* note 134, at 113–14. The classic study of the changes brought by consumer culture in the 1920s was made by Helen Lynd and Robert Lynd. See ROBERT S. LYND & HELEN M. LYND, MIDDLETOWN: A STUDY OF MODERN AMERICAN CULTURE (1929).

<sup>145</sup> See, for example, Peter Bogdanovich’s 1965 interview in which Lang says an anti-lynching film should have been about a black man accused of raping white woman but it could not be done. Lang also describes his attempts to include minor appearances of African Americans in the film, which were largely frustrated by the studio. BOGDANOVICH, *supra* note 8, at 32.

<sup>146</sup> The Production Code Administration set the following terms limiting the production of *Fury*: “the actual kidnappers” had to be “apprehended and punished,” there could be “no travesty of justice or the courts,” and “the forces of law and order” were not to be “treated unfairly.” See Barbara Mennel, *White Law and the Missing Black Body in Fritz Lang’s Fury (1936)*, 20 Q. REV. FILM & VIDEO 203, 210 (2003) (quoting a letter from the production code office) (internal quotation marks omitted). Mennel argues that the film’s critique of lynching is undermined by its reinscription of “the race/gender power structure that supported lynching in the United States” because it “addresses the inadequacies of law, but then reestablishes the belief in the law, which functions to keep racial hierarchies in place.” *Id.* at 203, 208. But white audiences in the 1930s were well aware of what Mennel rightly identifies as the “gruesome reality of [inter-racial] lynching.” *Id.* at 208. No film about lynching could fail to evoke that reality simply because it offered a white victim. Moreover, as this Article argues, the film refuses to reestablish a belief in the law, and while the film is silent on race, Katherine’s authority at the end of the film suggests a disruption of traditional gender hierarchies.

<sup>147</sup> See RAYMOND MOLEY, THE HAYS OFFICE 52–67 (1945).

<sup>148</sup> *Id.* at 68–88.

Code, as it came to be called, made no explicit mention of race (except to prohibit the filmic representation of “miscegenation”), the “willful offence to any nation, race or creed” had been prohibited by industry standards since 1927 and the depiction of inter-racial violence clearly, if tacitly, violated the Hays Code’s injunctions against inciting violence and “fomenting political and social unrest.”<sup>149</sup> There had been riots when D. W. Griffith’s *Birth of a Nation*, which depicted the lynching of an African American by hooded members of the Ku Klux Klan, was released in 1915.<sup>150</sup> And the nationally publicized intervention of the National Guard in Scottsboro in 1931 to prevent the lynching of nine young black men would have been fresh in the minds of the Production Code administration and audiences alike.

But the elision of race, for Lang, did not disable the film’s social critique.<sup>151</sup> This critique was not merely of the practice of lynching—which had reinforced the status quo of both racial and economic hierarchies through intimidation since the postbellum period—but of the broader culture of consumption. “Modern man,” Lang lamented, “has forgotten the true meaning of life, he works only for things, for money, not to enrich his soul, but to gain material advantages. And because he has forgotten the meaning of life, he is already dead. He is afraid of love, he simply wants to go to bed, make love, but he doesn’t want any responsibilities. He only wants to satisfy his desire.”<sup>152</sup> In *Fury*, frustrated and irresponsible desire erupts into violence. In this way, *Fury* discloses the instability inherent in consumer citizenship. Lang insists that the nightmare is teaching the dreamers how to live, too.

In November of 1933, two white men accused of kidnapping and murdering a young man in San Jose, California, were taken from the jail and hanged from trees by a mob.<sup>153</sup> The incident garnered widespread publicity; one New York newspaper published a photograph of “parents holding up their children so they could get a good view.”<sup>154</sup> And California’s governor, James Rolph, not only publicly praised the mob’s

<sup>149</sup> *Id.* at 240, 117.

<sup>150</sup> See BENJAMIN B. HAMPTON, HISTORY OF THE AMERICAN FILM INDUSTRY FROM ITS BEGINNINGS TO 1931, at 129 (1970). BIRTH OF A NATION (Epoch Producing Corp. 1915) was based on Thomas Dixon’s racist historical romance, THE CLANSMAN: AN HISTORICAL ROMANCE OF THE KU KLUX KLAN (1905).

<sup>151</sup> “When I made *Fury*, on the subject of lynching, I couldn’t hope for the abolishment of hanging. . . . I can simply show certain things and say, ‘I think this is right,’ or ‘I think this is wrong,’ ‘look at these things, one after the other.’ . . . [T]here is a critique of certain aspects of reality.” Fritz Lang, *Fritz Lang Speaks* (1962), reprinted in FRITZ LANG: INTERVIEWS 28, 31 (Barry Keith Grant ed., 2003).

<sup>152</sup> Jean Domarch & Jacques Rivette, *Interview with Fritz Lang* (1959), reprinted in FRITZ LANG: INTERVIEWS, *supra* note 151, at 16, 17 (quoting Fritz Lang).

<sup>153</sup> The lynched men’s victim, Brooke Hart, was the son of a local department store owner. His father was Jewish, his mother was Catholic. Hart had been pistol-whipped and his body dumped in the San Francisco bay. One alleged kidnapper worked as a gas station attendant and the other, as a salesman. See generally HARRY FARRELL, SWIFT JUSTICE: MURDER AND VENGEANCE IN A CALIFORNIA TOWN (1992) (describing the incident).

<sup>154</sup> Michael J. Nolan, *Defendant, Lynch Thyself: A California Appellate Court Goes from the Sublime to the Ridiculous* in *People v. Anthony J.*, 4 HOW. SCROLL: SOC. JUST. L. REV. 53, 75 n.104 (2001). See also FARRELL, *supra* note 153, at 233.



actions but promised to pardon anyone “arrested for the good job.”<sup>155</sup> This lynching provided the kernel of the script that would become *Fury*.<sup>156</sup>

In 1933, there were twenty-eight reported lynchings nationally and the victims of all but four were black.<sup>157</sup> Nevertheless, the San Jose lynching was in other respects characteristic of the phenomenon of “spectacle lynching” that developed in the early twentieth century.<sup>158</sup> Starting in the 1890s, lynchings were increasingly public and urban (as opposed to rural and clandestine) affairs.<sup>159</sup> As the emergence of a national consumer culture largely indifferent to racial identity exacerbated volatile race and class tensions, these spectacle lynchings helped to “ease white fears of a raceless consumer society” and “minimize social and class distinctions” through the vicarious consumption of black bodies.<sup>160</sup> But gender and class tensions also occasionally culminated in white-on-white violence.<sup>161</sup> One widely publicized example was the 1915 spectacle lynching of Leo Frank in Georgia.<sup>162</sup> There, working-class whites lynched a northern born Jewish factory manager for allegedly killing a young woman who worked in the factory.<sup>163</sup> The Frank lynching occurred in a climate where “economic development” had “acted as a solvent on older relations of power and authority”—particularly between men and women.<sup>164</sup> This was characteristic of spectacle lynchings as well: anxiety about changing gender dynamics in new urban and industrial contexts acted as a “trigger” for mob violence, and the interaction of the mob and its victim often took on the erotic charge of a sexual encounter.<sup>165</sup>

Not only were spectacle lynchings fueled by the anxieties of mass culture but their development was inextricably connected with modern technologies: “Lynchers drove cars, spectators used cameras, out-of-town visitors arrived on specially chartered excursion trains, and the towns and

<sup>155</sup> FARRELL, *supra* note 153, at 241.

<sup>156</sup> See BOGDANOVICH, *supra* note 8, at 16.

<sup>157</sup> FARRELL, *supra* note 153, at 300. During the worst years of the Depression, a handful of gruesome, well publicized spectacle lynchings bolstered widespread non-lethal white on black violence and intimidation aimed at assuring that whites had access to what jobs and aid were available at the expense of blacks. See EDSFORTH, *supra* note 10, at 112–13.

<sup>158</sup> HALE, *supra* note 105, at 203–05.

<sup>159</sup> *Id.* at 201. Thus, even as the absolute number of lynchings declined in the early twentieth century, spectacle lynchings did this cultural work on a broader scale. See PATTERSON, *supra* note 105, at 192; STEWART E. TOLNAY & E.M. BECK, *A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS 65–82* (1995). Of course, small-scale, unpublicized lynchings continued to occur in the South. See HALE, *supra* note 105, at 201.

<sup>160</sup> HALE, *supra* note 105, at 202–03. The leveling effect of consumer culture was dramatized in a 1934 film about racial passing, *IMITATION OF LIFE* (Universal Pictures 1934). See HALE, *supra* note 105, at 229–30.

<sup>161</sup> Indeed, Hale identifies the 1891 lynching of eleven Italian immigrants as one of the events that “initiated the early development of spectacle lynchings as practice and narrative.” HALE, *supra* note 105, at 206–07.

<sup>162</sup> After *Fury*’s success, Lang was offered and turned down the job of directing a film about the Frank murder. See *THEY WON’T FORGET* (First National Pictures 1937).

<sup>163</sup> Like many spectacle lynchings with black victims, the Leo Frank lynching was partially driven by unproven allegations of rape and the corresponding rhetoric of protecting innocent white womanhood.

<sup>164</sup> Nancy MacLean, *The Leo Frank Case Reconsidered: Gender and Sexual Politics in the Making of Reactionary Populism*, 78 J. AM. HIST. 917, 921 (1991). Nancy MacLean links the Frank lynching to social anxieties about a burgeoning population of young, independent, sexually active, working women. See *id.* at 935–36.

<sup>165</sup> See HALE, *supra* note 105, at 231, 230.

counties in which these horrifying events happened had newspapers, telegraph offices, and even radio stations that announced times and locations of these upcoming violent spectacles.”<sup>166</sup> This mixture of technologies of representation with the barbarity of spectacle lynchings (victims were tortured and often burned alive) produced unprecedented commodities. The accounts of journalists and spectators were widely disseminated in newspapers and as pamphlets.<sup>167</sup> Pieces of the victims’ bodies, including fingers and genitalia, were kept as souvenirs, and photographs of mutilated bodies were made into postcards.<sup>168</sup> The paraphernalia of spectacle lynchings entered into consumer culture’s inventory of objects of desire.

In San Jose, where there was relatively little non-white competition for jobs, class tensions within the white community were high.<sup>169</sup> More than 1500 demonstrators had “stormed the city jail in a failed attempt to free 11 striking workers who had been arrested during a police assault on picket lines outside a local cannery” in 1931.<sup>170</sup> And in the winter of 1932–33, California’s crops had been destroyed by frost, leading to widespread unemployment.<sup>171</sup> The lynching of Brooke Hart’s alleged kidnapers temporarily allayed those tensions, unifying members of the community across class lines. Newsreels and radio played a significant role in the formation of the mob; the victims were stripped naked before they were hanged and the mob lowered one of them to break his arms before hanging him again; souvenirs were taken by the crowd.<sup>172</sup> The fact that the mob took its victims from the same jail that had recently been stormed in a labor dispute to avenge the murder of a rich young man at the height of the Depression is striking.<sup>173</sup> But the fact that Brooke Hart’s family owned the local department store helps explain the anomaly.<sup>174</sup> In a democracy of desire, the department store is not merely a place of business but the site of

<sup>166</sup> *Id.* at 201.

<sup>167</sup> *Id.* at 206–08 (detailing the role of newspapers and pamphlets—as well as other technologies—in early spectacle lynchings).

<sup>168</sup> See PATTERSON, *supra* note 105, at 193–202; HALE, *supra* note 105, at 204.

<sup>169</sup> The 1940 U.S. Census Statistical Abstract reports that out of a total population of just under 5,800,000 in California in 1930, African Americans numbered 81,000. See U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 12–13 (1940). The largest minority population was Mexican at 368,000, followed by Japanese at 97,000 and Chinese at 37,000. *Id.* In Georgia in 1930, by comparison, the total white population numbered 1,837,000 and the black population was 1,076,000. *Id.*

<sup>170</sup> EDSFORTH, *supra* note 10, at 106.

<sup>171</sup> *Id.* at 76.

<sup>172</sup> FARRELL, *supra* note 153, at 203, 214, 233, 235.

<sup>173</sup> In 1933 “[b]lue-collar workers were three times as likely to be without jobs as white-collar workers” and “[m]ost wealthy Americans continued to live in conspicuous luxury . . . .” EDSFORTH, *supra* note 10, at 79–80. This was true of the Hart family.

<sup>174</sup> The Harts’ department store provided the goods consumed by much of the Santa Clara valley. See FARRELL, *supra* note 153, at 7. And though Brooke Hart was an adult, his kidnapping would also have tapped in to public outrage over the 1932 kidnapping and murder of aviator Charles Lindbergh’s toddler son. The Lindbergh kidnapping became a national sensation and Congress responded with the 1932 Federal Kidnapping Act making kidnapping a federal crime and a capital offense. Federal Kidnapping Act, ch. 271, 47 Stat. 326 (1932) (codified as amended at 18 U.S.C. § 1201 (2009)). Many states subsequently passed Little Lindbergh laws, including California, which passed such a law in 1934. CAL. PENAL CODE § 209 (West 1934).

consumer citizenship; during the Depression it represented the promise of recovery.<sup>175</sup>

The San Jose lynching turned out to be one of a handful of nationally publicized incidents that marked the end of the tradition of spectacle lynchings. By the mid 1930s, the shocking barbarity of these spectacles had undermined conventional tolerance for the practice, even in the South.<sup>176</sup> Nevertheless, by the mid 1930s, representations of lynchings worked almost as well as lynchings themselves.<sup>177</sup> Beginning with their widespread publicity in the 1890s, “representations of spectacle lynchings increasingly fell into a ritualistic pattern as the narratives constructed by witnesses, participants, and journalists assumed a standardized form.”<sup>178</sup> As a result, spectacle lynchings “became more powerful even as they occurred less frequently because the rapidly multiplying stories of these public tortures became virtually interchangeable.”<sup>179</sup> By the 1930s, everyone knew what a lynching was supposed to look like, though very few people had seen one firsthand. Hollywood followed and reinforced these expectations, offering vicarious consumption of spectacular victims on a whole new scale.<sup>180</sup>

The failed lynching in *Fury* observes the conventions of spectacle lynching even more faithfully than the San Jose lynching had. Not only do clear class differences within the white community evident before the mob forms dissolve into a singleness of purpose and status, but there is the suggestion of rape in the fact that Joe is accused of kidnapping a young girl. A member of the forming mob goads the others for not defending her honor: “What are you eggs, soft-boiled that you don’t stick up for a kidnapped girl?” But unlike other filmic spectacle lynchings, *Fury* presents the anxieties that fuel the formation of the lynch mob in their cultural context. *Birth of a Nation* disclosed general anxiety about changing early twentieth century social and economic conditions but sought to contain it in a facile racist narrative that suppressed the other alarming possibilities.<sup>181</sup> It is these other alarming possibilities that Lang exposes in *Fury*.

<sup>175</sup> Brooke Hart’s father, Alex Hart, was also one of the few businessmen in San Jose to support the National Recovery Administration and his department store had instituted sale days with deep discounts during the Depression. See FARRELL, *supra* note 153, at 8, 24.

<sup>176</sup> HALE, *supra* note 105, at 222, 237, 285. In 1933 the new President Roosevelt condemned the practice as “a vile form of collective murder.” See EDSFORTH, *supra* note 10, at 274. In 1934, the NAACP published a report on the gruesome lynching of a black man named Claude Neal in Marianna, Florida, which included photographs of his mutilated body and details about the torture he suffered at the hands of the lynch mob for ten hours before his murder. The report highlighted the complicity of the local media in advertising the “lynching party.” See HALE, *supra* note 105, at 223–24. Against the background of the Scottsboro trials, this account effectively garnered the widespread public outrage the NAACP had long sought. Nevertheless, Roosevelt refused to support the 1934 anti-lynching bill for fear of upsetting Southern legislators opposed to it. See Bernstein, *supra* note 73, at 279. Proposed federal anti-lynching legislation failed in 1934 and 1938. See generally ROBERT ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950* (1980).

<sup>177</sup> HALE, *supra* note 105, at 238.

<sup>178</sup> *Id.* at 206.

<sup>179</sup> *Id.*

<sup>180</sup> Indeed, D. W. Griffith’s 1915 *Birth of a Nation* simultaneously “created the modern film industry” and provided the first cinematic spectacle lynching for a national audience. *Id.* at 216.

<sup>181</sup> See Michael Rogin, *The Sword Became a Flashing Vision*, in RONALD REAGAN, *THE MOVIE AND OTHER EPISODES IN POLITICAL DEMONOLOGY 197–98* (1987).

## VII. THE INTERSECTION OF LAW, SPECTACLE AND DESIRE

Lang makes the connection between consumer culture and spectacle lynching explicit by portraying the formation and actions of the lynch mob in terms of the democratization of desire. In *Fury*, the formation of the lynch mob looks like a consumer revolt, fueled by frustrated desire. There is no work and nothing but food to buy in Strand—conditions that precipitate the need for vicarious consumption. At first, gossip in the form of plausible but unsubstantiated information about Joe's arrest is the coveted object. It endows its possessor with enviable status, in both the kitchens of Strand's feminized domestic spaces and in the masculine realm of the bar. This desire for information escalates into a more general desire for entertainment—the men in the bar take to the street after a boy among them yells, "let's have some fun." They do not degenerate into a mob until the sheriff denies them access to Joe, depriving them of their (terrible) enjoyment. Until that moment, the advance of the people of Strand on the jail is depicted as a parade.

As the advertising industry developed, it increasingly downplayed the aspects of "gorgeous Carnival" that characterized the show windows of the late nineteenth century in favor of representations of everyday life.<sup>182</sup> But the carnivalesque persisted, and took on new cultural meanings in new urban spaces.<sup>183</sup> For example, the dazzling spectacle of department store windows spilled out into the street in the commercial parades of the teens and twenties.<sup>184</sup> In contrast with civic parades, which celebrated national holidays like the Fourth of July and Memorial Day and had played an important role in reunification after the Civil War, commercial parades celebrated buying. Parading citizens were transformed into parading consumers, attracted by representations of abundance and the promise of the satisfaction of desire. But in *Fury*, the anticipation of enjoyment built into the spectacle parade is transmuted into the anticipation of the consumption of the victim of spectacle lynching.<sup>185</sup>

In a 1965 interview, Peter Bogdanovich asked Lang how he knew about mobs when making *Fury*. Lang's answer took the form of an anecdote about an incident on a Paris street he had witnessed in 1934. A crowd "walking down the street, very quietly" was transformed into a "big riot that had to be stopped by the police" by one man knocking his walking stick along an iron fence.<sup>186</sup> "It was funny and the people laughed; the more the people laughed, the more he did it. Then the fence ended, and he came

<sup>182</sup> See LEACH, *supra* note 78, at 58.

<sup>183</sup> Fritz Lang cited his 1923 visit to Times Square—a kind of "permanent spectacle site"—as the kernel of the idea for his watershed film *THE METROPOLIS* (Universum Film 1927). *Id.* at 345.

<sup>184</sup> The Macy's Thanksgiving Day parade in New York—which in 1927 involved four hundred employees wearing oversized masks, enormous papier-mâché forms of exotic animals, including a sixty-foot "smoke-breathing dinosaur" and a twenty-five-foot dachshund, a "giant float depicting Robinson Crusoe's desert island" and, naturally, Santa Claus—offered the most spectacular example. *Id.* at 336. But commercial parades were held throughout the country. *Id.* at 89, 326.

<sup>185</sup> Newly installed streetlights provided the occasion for many early commercial parades, which introduced consumers to the imaginative possibilities of shopping at night. See *id.* at 326–27. In *Fury*, the mob's faces are lit by the flickering of the enormous fire they have ignited to kill Joe.

<sup>186</sup> BOGDANOVICH, *supra* note 8, at 30–31.

to a display window. He started to knock on it, and after he had knocked on it two or three times with his cane, he broke the window. . . . The crowd became a mob."<sup>187</sup> But it had all started "with a casual, 'Oh, let's have some fun.'"<sup>188</sup>

William Leach helps to explain the power that the breaking of the glass of the display window would have had:

Glass was a symbol of the merchant's unilateral power in a capitalist society to refuse goods to anyone in need, to close off access without being condemned as cruel or immoral . . . . At the same time, the pictures behind the glass enticed the viewer. The result was a mingling of refusal and desire that must have greatly intensified desire, adding another level of cruelty.<sup>189</sup>

The frustration of desire caused by the Depression—the ongoing display of goods increasingly difficult to obtain—surely heightened that desire but also forced its displacement. The movies helped ease this frustration through vicarious consumption. But the disruption of the social discipline "characterized by equilibrium between labor and leisure, supply and demand"<sup>190</sup> in the early 1930s exposed the liabilities of consumer citizenship. In an economy of desire, the parading consumer, if she is denied satisfaction, is always potentially the member of a mob.

The department store is conspicuously missing in *Strand*—the object of the parading consumers' desire in *Fury* is located not behind glass, but behind law. Indeed, the sheriff has made Joe the object of that desire by arresting him. But law proves as fragile as glass. Rather than deterring what are still at this point parading consumers, the seriousness with which the sheriff meets them at the jail house steps makes him ridiculous. A boy in the crowd mocks his speech about law and order with an imitation of Popeye. The sheriff's mistake is clear: he confuses their desire for entertainment with lawlessness.<sup>191</sup> The result is an eruption of the carnivalesque normally contained by advertising and consumption.<sup>192</sup> When a thrown tomato hits the sheriff on the face, his power to protect Joe is discredited and the crowd becomes a mob.

The wanton violence of the attempted lynching is later highlighted by the newsreel frames that show members of the mob throwing dynamite, swinging torches and cutting fire hoses with axes. But in its initial depiction in the film, the erotic charge is most striking. In contrast with the gender segregation of the earlier scenes, the men and women of *Strand*, sweaty and mingled together, watch the burning jail in silent exhaustion. Billy Kirby, one of the instigators, smokes a cigarette with a familiar expression of sexual satisfaction. Still, when Katherine arrives on the scene it becomes clear that they have not quite gotten what they wanted. The

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> LEACH, *supra* note 78, at 63 (citations omitted).

<sup>190</sup> LEARS, *supra* note 134, at 198.

<sup>191</sup> In *YOUNG MR. LINCOLN* (Cosmopolitan Productions 1939), Lincoln deters a lynch mob by appealing to their desire for entertainment by becoming the entertainment.

<sup>192</sup> See LEARS, *supra* note 134, at 198.

pleasure of consumption is fleeting. The lynching not only fails to satisfy the frustrated community through the pleasure of consumption but exposes the irrationality of its desire.

The trial stands for the restoration of law and order to the community—the replacement of the glass between the polymorphous objects of insatiable desire and consuming subjects. But the trial turns out to be entertainment, too. This is perhaps most clear when the newsreel is introduced as evidence and the courtroom itself becomes a movie theater. It is also clear in the film's depiction of the radio coverage of the trial. The radio transforms the “legal lynching” of the defendants into a media spectacle—complete with advertisements. Alone in an apartment listening to the trial on the radio, Joe smokes a cigarette with much the same attitude of sexual satisfaction as Bill Kirby in front of the burning jail. The law, like the radio and the newsreel, produces and showcases objects of desire.

#### VIII. THE EXPERTISE OF THE CAMERA IN AN ECONOMY OF DESIRE

When *Fury* was released in 1936, filmic evidence was inadmissible in California and Lang was criticized for the scene in which the newsreel footage is introduced in the trial.<sup>193</sup> But Lang was prescient. In a 1934 personal injury case, a New York appellate court reversed the lower court for refusing to allow the exhibition of a film made surreptitiously showing that the plaintiff was not, as he claimed to be, “totally disabled and unable to work.”<sup>194</sup> The court asserted that the case presented a “striking illustration of an instance where moving pictures are not only admissible but very important,” notwithstanding the line of precedent against admitting film as evidence.<sup>195</sup> “The mechanical means of perfecting such pictures has become so general,” the court continued, “that it may be necessary in the near future to frequently permit their introduction in evidence.”<sup>196</sup> This prediction was fulfilled less than a year after *Fury*'s release when a California appellate court found that a trial court had properly allowed the introduction of filmic evidence that the plaintiff was not the invalid she claimed to be.<sup>197</sup>

But Lang was not merely prescient about the introduction of filmic evidence in courtrooms, he was also less confident that fact and fiction could be easily distinguished on film than contemporary judges.<sup>198</sup> Although the “moving picture” in the New York case was not a newsreel but footage taken surreptitiously by an investigator, a sense of equivalence

<sup>193</sup> BOGDANOVICH, *supra* note 8, at 19.

<sup>194</sup> *Boyarsky v. G. A. Zimmerman Corp.*, 270 N.Y.S. 134, 137 (N.Y. App. Div. 1934).

<sup>195</sup> *Id.* at 138. Jessica Silbey has recently argued that filmic evidence works much the way the *Boyarsky* court imagines it will when managed properly. See Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J. L. REFORM 493 (2004).

<sup>196</sup> *Boyarsky*, 270 N.Y.S. at 138.

<sup>197</sup> *Heiman v. Market St. Ry. Co.*, 69 P.2d 178, 180 (Cal. Ct. App. 1937). Over the plaintiff's objections, that film is susceptible to manipulation, the court in *Heiman* argued by analogy to the admissibility of photographic evidence.

<sup>198</sup> See, e.g., *Boyarsky*, 270 N.Y.S. at 137–38; *Maryland v. U.S. Rys. & Elec. Co.*, 159 A. 916, 921–22 (Md. 1932).

between newsreels and reality informed the court's assessment of film's ability to depict "the true conditions sought to be shown."<sup>199</sup> This "remarkable accuracy," the court reasoned, "is now generally acknowledged through their constant use as a means of recording and publishing news items of interest to the public, and for that purpose they are featured daily in many of the moving picture theatres of the world."<sup>200</sup> The conviction that newsreels demonstrated the objective nature of filmic representation was widely shared by early twentieth century judges.<sup>201</sup>

The newsreel as a genre, however, developed around the turn of the century not as journalism but as a way of attracting viewers to theaters. Early newsreels were screened together with staged chase scenes, short situation comedies, and images of foreign places.<sup>202</sup> Footage from the Spanish-American War in 1898-99 provided the first projected filmic images that many Americans saw, but it was advertised as entertainment: "Wonderfully realistic, thrilling and appalling."<sup>203</sup> As the movie industry grew, so did the production of newsreels, which were popular and relatively cheap to produce. Newsreels became more journalistic as film eclipsed traditional sources of news, but they remained a "spectacularized, popular, highly visual form of journalism," produced by movie studios and shown in blocks with fictional films as entertainment.<sup>204</sup> The apparently documentary quality of newsreels, however, belies their artificiality—an effect that was surely part of their appeal.

During the trial in *Fury*, as the film critic Reynold Humphries has observed, no one will tell the truth, not even the sheriff.<sup>205</sup> In order to show the jury what really happened, the district attorney must turn the courtroom "into a cinema."<sup>206</sup> The projector's capacity to freeze individual frames allows him to show each defendant in some conspicuously reckless act of violence: a woman swings a lit torch over her head before throwing it towards the jail, which is also towards the camera; a man aims an axe at a fire hose. This evidence appears to speak for itself. The camera's ability to isolate aspects of what it represents instead of treating it as an organic whole combines with the viewer's association with the camera to produce the effect of expertise.<sup>207</sup> But the newsreel footage offered as evidence in the trial, while visually accurate, results in the jury's conviction of Joe's would-be lynchers for a crime they did not commit. What the audience

<sup>199</sup> *Boyarsky*, 270 N.Y.S. at 138.

<sup>200</sup> *Id.*

<sup>201</sup> In these cases, newsreels are not merely analogized to newspapers, but the idea that the filmic images capture an unmediated reality is repeatedly expressed.

<sup>202</sup> HAMPTON, *supra* note 150, at 36-37.

<sup>203</sup> *Id.* at 37 (quoting an Edison Wargraph Company advertisement).

<sup>204</sup> GIULIANA MUSCIO, *HOLLYWOOD'S NEW DEAL 77-78* (1996). See also RAYMOND FIELDING, *THE AMERICAN NEWSREEL, 1911-1967* (1972). During the Depression, the studios cooperated closely with the Roosevelt Administration in determining their content; Roosevelt's press secretary, Stephen Early, had formerly worked for the film industry. See MUSCIO, *supra*, at 77-81.

<sup>205</sup> REYNOLD HUMPHRIES, *FRITZ LANG: GENRE AND REPRESENTATION IN HIS AMERICAN FILMS 58* (John Hopkins Univ. Press 1989) (1982).

<sup>206</sup> Reynold Humphries argues that "[b]ecause we know the newsreel does not tell the truth and the reasons for this, *Fury* succeeds in undermining the very nature of the images it itself presents as making up its own textual system." *Id.*

<sup>207</sup> See Benjamin, *supra* note 39, at 800.

knows but the jury does not—that Joe is alive—is crucial context for correctly interpreting the images. Lang even includes a sequence during the mob's assault on the jail where the newsreel cameramen miss some of the action when they have to reload film: the filmic evidence is not only context sensitive, but incomplete.

Here Lang reminds us of the artificiality of all moving pictures, which are not just produced by the apparatus of the camera but spliced together out of individual frames in a way that creates the impression of continuity.<sup>208</sup> As Benjamin observed, the mental processes of the viewer are "interrupted" by the "constant, sudden change" of filmic images.<sup>209</sup> Thus "the public is an examiner, but an absent-minded one."<sup>210</sup> At the movies, as in the department store, the consuming public is a distracted audience. And, in *Fury*, so is the jury. The consumer citizen is unable to discern the truth behind the representation. The jury believes what it sees. And rather than correcting for this phenomenon, the law itself is revealed to be a technology of representation—a different kind of camera.

#### IX. THE CONSUMING SELF AS LEGAL SUBJECT

In his analysis of the effects of mass reproduction, Benjamin observed that the "presence of the original is the prerequisite to the concept of authenticity" in art.<sup>211</sup> So too in criminal law the body of the victim is required to establish the murder, a point on which the defense attorney in *Fury* insists. This is why Joe sends the judge the ring Katherine gave him as proof that he was in the jail when it burned, proof of his authenticity as a victim. But once the ring is used in this way, it is transformed from an expression of private, personal identity (a gift first from Katherine's father to her mother, and then from Katherine to Joe) to a public souvenir of the lynching.<sup>212</sup> This transformation is highlighted by the anonymous explanation Joe sends to the judge with the ring, which is written in letters cut out of a newspaper. The letter doubles as a ransom note. Joe thinks that the conviction of the members of the mob will redeem his loss (hence the ransom note—the ransom is their conviction). And as Katherine observes, the letter "cinches" it for the jury.

At the end of *Fury*, Joe has become the successful director of the spectacle that is the trial. But Joe's attempt to regain control of his own identity in this way requires doing to twenty-two people what has been done to him. The display window showcasing the bedroom set at the beginning of *Fury* is echoed at the end of the film when Joe is walking alone in Capitol City after telling Katherine and his brothers that he

<sup>208</sup> See NOËL BURCH, *THEORY OF FILM PRACTICE* 32 (1981).

<sup>209</sup> Benjamin, *supra* note 39, at 808 ("I can no longer think what I want to think. My thoughts have been replaced by moving images.").

<sup>210</sup> *Id.* at 809. See DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 108 (1976).

<sup>211</sup> Benjamin, *supra* note 39, at 793. Film, in contrast, "seems to have no origin; it is there, whole and complete, ready for our enjoyment or the enjoyment of anyone else with the price of admission . . . ." Robert P. Kolker, *The Film Text and Film Form*, in *THE OXFORD GUIDE TO FILM STUDIES* 12 (John Hill & Pamela Church Gibson eds., 1998).

<sup>212</sup> Katherine's engraved name inside the ring is even erased by the fire.



“doesn’t need anybody.” He turns to look at a window to avoid recognition by the policemen walking by and finds himself facing a display of white flowers. The flowers evoke the wedding that will now never happen, the domestic life with Katherine Joe can never have. But as he looks, the faces of his would-be lynchers and soon-to-be victims appear around his own reflection in the glass. In the scene, they share with Joe the “ghostly objectivity” of commodities.<sup>213</sup> In the deserted street, there are no more people—just things.

Joe’s conversion into a commodity at the hands of the mob turns out to be irreversible. His prior identity has been replaced with a reproduction. The newsreel documents and completes the transformation: Joe’s alienation from his former self is repeated over and over as he watches his own lynching on the newsreel.<sup>214</sup> “They like it,” Joe says of the audiences watching his “death,” “they get a real kick out of it.” As Benjamin explains, the once private “feeling of strangeness” one experiences looking in a mirror is made, through film, not merely public but “separable, transportable”—not merely reflected but represented to the market.<sup>215</sup> In this way, film captures not the authentic person but “the phony spell of a commodity.”<sup>216</sup> What’s more, this kind of representation strips the person of control of the representation of herself. The technology that made it possible for a person’s image to be caught on film at any time and reproduced without her permission or knowledge rendered individuals constantly vulnerable to unwitting and unwilling conversion into commodities.<sup>217</sup>

By the early twentieth century, the central role of mass-produced representations in consumer culture had precipitated a variety of legal contests concerning the ownership and protection of these new commodities. In the 1903 copyright case *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes noted that it is the copy of life that is protected, not the original: “Others are free to copy the original. They are not free to copy the copy.”<sup>218</sup> In *Bleistein*, this observation supported the conclusion that advertisements should enjoy copyright protection.<sup>219</sup> In *Roberson v. Rochester Folding Box Co.* (1902), the original was a young woman whose likeness had been reproduced in advertisements for Franklin Mills Flour.<sup>220</sup> She successfully sued in state court to enjoin the distribution

<sup>213</sup> *Id.* Georg Lukács explains that under modern industrial capitalism, the “individual object which man confronts directly” is “distorted in its objectivity by its commodity character.” GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 93 (Rodney Livingstone trans., The Merlin Press 1971) (1968). This process not only reduces “all objects for the gratification of human needs to commodities” but “stamps its imprint upon the whole consciousness of man . . .” *Id.* at 100.

<sup>214</sup> As Benjamin observes, “technical reproduction can put the copy of the original into situations which would be out of reach for the original itself.” Benjamin, *supra* note 39, at 793.

<sup>215</sup> Benjamin, *supra* note 39, at 801.

<sup>216</sup> *Id.* at 802.

<sup>217</sup> *See id.*

<sup>218</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

<sup>219</sup> Benjamin Wallace, the owner of the circus for which the lithographs were advertisements, had commissioned both the original lithographs, which bore his image along with other images from the circus, and the copies. *Bleistein*, 188 U.S. at 248.

<sup>220</sup> *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

of these advertisements because her photograph had been used without her permission.<sup>221</sup> But the New York State Court of Appeals overturned, finding that the reproduction and use of Roberson's image without her consent was "one of the ills that under the law cannot be redressed."<sup>222</sup> Short of libel or slander, "a party whose likeness is circulated against his will is without remedy."<sup>223</sup>

Roberson's and similar legal challenges to the unauthorized conversion of images of persons into commodities were articulated and decided in terms of a (not yet legally recognized) right to privacy rather than the more basic question whether a person owned her own image. This is at least partly explained by the influence of Samuel D. Warren and Louis D. Brandeis's 1890 article arguing that mass culture rendered a "right to privacy" necessary.<sup>224</sup> But it also reflects the uncertainty of contemporary judges as to what kind of property one's image might be.<sup>225</sup> In defense of his vote with the majority in the *Roberson* ruling, Judge Denis O'Brien asserted:

We may discard entirely the suggestion that a lady has any thing in the nature of a property right in her form or features that is invaded by the circulation of her picture against her will or without her consent. That would be altogether too coarse and too material a suggestion to apply to one of the noblest and most attractive gifts that Providence has bestowed upon the human race. A woman's beauty, next to her virtues, is her earthly crown, but it would be a degradation to hedge it about by rules and principles applicable to property in lands or chattels.<sup>226</sup>

But most contemporary judges shared the intuition of the *Roberson* trial court judge.<sup>227</sup> "It seems to me," Judge Davy had written, "that a photograph likeness of the plaintiff is her peculiar property, and no man can

<sup>221</sup> *Roberson v. Rochester Folding-Box Co.*, 65 N.Y.S. 1109 (Sup. Ct. 1900).

<sup>222</sup> *Roberson*, 64 N.E. at 447 (quoting *Atkinson v. John E. Doherty & Co.*, 121 Mich 372, 384 (1899)).

<sup>223</sup> *Id.* at 447-48.

<sup>224</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890).

<sup>225</sup> As the *Roberson* court asserted, "the theory upon which this action is predicated"—the idea that a person has a right to control the use of her image—"is new, at least in instance if not in principle, and . . . few precedents can be found to sustain the claim made by the plaintiff . . ." *Roberson*, 64 N.E. at 443 (quoting *Roberson v. Rochester Folding Box Co.*, 71 N.Y.S. 876 (N.Y. App. Div. 1901)).

<sup>226</sup> Denis O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437, 439 (1902). For a discussion of the public reaction to *Roberson*, see Benjamin Bratman, *Brandeis and Warren's 'The Right to Privacy' and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 648-49 (2002).

<sup>227</sup> See, e.g., *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Corliss v. E.W. Walker Co.*, 64 F. 280 (C.C.D. Mass. 1893); *Marks v. Jaffa*, 26 N.Y.S. 908 (Sup. Ct. 1893). In *Corliss*, the judge conceived of the right more or less in terms of personal expression:

I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk.

*Corliss*, 64 F. at 282. In *Pavesich*, the court based its assertion that "[t]he form and features of the plaintiff are his own" in a natural right of "personal security" including a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation . . ." *Pavesich*, 50 S.E. at 79, 70.

take it from her or make use of it without her consent.”<sup>228</sup> By 1911, the right to privacy—and tort actions for its violation—had been widely endorsed by judges and legislatures alike, relieving the embarrassing confusion judges had experienced trying to name the relationship between the individual and the representation.<sup>229</sup> Moreover, the commercial use to which the images in question were put in these early cases was treated as unremarkable. The commodification of representations of persons attendant on the development of mass consumer culture was thus tacitly accepted and sanctioned by the courts.

By the 1910s, state and local censorship arising in response to the rapid development and cultural dominance of moving pictures put the commercial aspect of filmic reproductions squarely before the courts.<sup>230</sup> The perception that the filmic apparatus affects not just the individual who is filmed but also the audience provoked a great deal of anxiety in the early twentieth century.<sup>231</sup> Sociologists found that film’s influence on psychology and behavior ranged from taste in clothes to attitudes about romance and social stereotypes.<sup>232</sup> Observing that “mass impression on so vast a scale has never before been possible,” one 1933 study concluded that the “major problem is to protect the interests and welfare of the individual citizen.”<sup>233</sup> But from what, exactly? At the time, the effects of film were generally considered to be “unpremeditated” or “unconscious” on the part of filmmakers, who intended simply to entertain.<sup>234</sup>

The account that emerged from the courts was that what the public liked was detrimental to the public order.<sup>235</sup> In *Higgins v. Lacroix*, for example, it was clear to the Minnesota Supreme Court that while to “furnish people with innocent and cheap amusement is laudable, . . . where amusements are furnished for pecuniary profit, the tendency is to furnish that which will attract the greatest number rather than that which instructs or elevates.”<sup>236</sup> Moving picture shows “must therefore be classed among those pursuits which are liable to degenerate and menace the good order

<sup>228</sup> *Roberson v. Rochester Folding-Box Co.*, 65 N.Y.S. 1109, 1112 (N.Y. Sup. Ct. 1900).

<sup>229</sup> See Bratman, *supra* note 226, at 643.

<sup>230</sup> See Comment, *Censorship of Motion Pictures*, 49 YALE L. J. 87 (1939). See also John Wertheimer, *Mutual Film Reviewed: The Movies, Censorship, and Free Speech in Progressive America*, 37 AM. J. LEGAL HIST. 158 (1993).

<sup>231</sup> See, e.g., HENRY FORMAN, *OUR MOVIE MADE CHILDREN* (1933); LEWIS MUMFORD, *TECHNICS AND CIVILIZATION* (1934); JOHN NASH, *SPECTATORITIS* (1932); HAROLD RUGG, *THE GREAT TECHNOLOGY* (1933).

<sup>232</sup> See Willey & Rice, *supra* note 96, at 209. See also HERBERT BLUMER, *MOVIES AND CONDUCT* (1933); HERBERT BLUMER, *MOVIES, DELINQUENCY AND CRIME* (1933); W.W. CHARTERS, *MOTION PICTURES AND YOUTH, A SUMMARY* (1933); *The Motion Picture in its Economic and Social Aspects*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1926, at 1.

<sup>233</sup> See Willey & Rice, *supra* note 96, at 215. Edward Bernays asserted in 1928 that “[t]he American motion picture is the greatest unconscious carrier of propaganda in the world today.” BERNAYS, *supra* note 133, at 166.

<sup>234</sup> Willey & Rice, *supra* note 96, at 215. See also BERNAYS, *supra* note 133, at 166; SKLAR, *supra* note 37, at 195.

<sup>235</sup> As state and local censorship boards sprang up across the country in the early twentieth century, courts inclined to uphold censors’ decisions found it necessary to formulate a coherent account of the threat to the public good. See, e.g., *Block v. City of Chicago*, 87 N.E. 1011, 1013 (Ill. 1909); *Higgins v. Lacroix*, 137 N.W. 417, 419 (Minn. 1912); *Epoch Producing Corp. v. Davis*, 1917 Ohio Misc. LEXIS 90, 19 (1917).

<sup>236</sup> *Higgins*, 137 N.W. at 419.

and morals of the people . . . .”<sup>237</sup> The Supreme Court echoed this view in *Mutual Film Corp. v. Industrial Commission of Ohio*, finding motion pictures all the more “insidious” due to their “attractiveness and manner of exhibition.”<sup>238</sup> This insidious tendency meant that films could not enjoy the first amendment protection of freedom of expression.<sup>239</sup> The “exhibition of moving pictures,” the Court insisted, “is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, . . . we think, as part of the press of the country or as organs of public opinion.”<sup>240</sup>

The moralizing in these censorship decisions masked the extent to which the courts were imagining audiences the same way that commercial films were.<sup>241</sup> The courts saw masses of undifferentiated consumer citizens, motivated in their choices by desire. The response of the law was the protection of the interventionist state. In the rhetoric of the opinions, popular culture and the social good were opposed, but in effect, they had converged.

Films categorized as fiction were subject to censorship until *Mutual Film* was overruled in 1952.<sup>242</sup> But judges continued to subscribe to the idea that newsreels offered objective facts.<sup>243</sup> In *Humiston v. Universal Film*, for example, New York lawyer Grace Humiston sued to enjoin the advertising and screening of a newsreel that included pictures of her in its reporting of her role in the discovery of the body of a missing girl.<sup>244</sup> The court found against Humiston, reasoning that there “is a clear distinction between a news reel and a motion picture photoplay. A photoplay is inherently a work of fiction. A news reel contains no fiction but shows only actual photographs of current events of public interest . . . taken on the spot, at the very moment of the occurrence depicted . . . .”<sup>245</sup> And newsreels continued to enjoy the legal imprimatur of fact long after the technological advances of sound and the Roosevelt administration’s overt influence on their content had discredited their objectivity. In one 1937 appeal of a censorship board decision, a court found that even the anti-fascist voiceover narration on a newsreel did not change its fundamental character as news.<sup>246</sup> “Every scene in ‘Spain in Flames’” the court asserted, “is life

<sup>237</sup> *Id.* (finding that as “amusements furnished for pecuniary profit” motion picture exhibition may be licensed and regulated or wholly prevented).

<sup>238</sup> *Mutual Film Corp. v. Indus. Comm’n*, 236 U.S. 230, 242 (1915).

<sup>239</sup> *See id.* at 242, 244.

<sup>240</sup> *Id.* at 244.

<sup>241</sup> On Benjamin’s account, when authenticity is replaced by the infinitely reproducible filmic image the result is the creation of audiences whose desire is “bent toward overcoming the uniqueness of every reality by accepting its reproduction.” Benjamin, *supra* note 39, at 795. Film’s “social significance” is “inconceivable without its destructive, cathartic aspect, that is, the liquidation of the traditional value of the cultural heritage.” *Id.* at 794.

<sup>242</sup> *See Burstyn v. Wilson*, 343 U.S. 495, 501–02 (1952).

<sup>243</sup> In one striking 1922 exception, a judge insisted that film “is clearly something more than a newspaper, periodical, or book, and clearly distinguishable in character. It is a spectacle or show . . . . It creates and purveys a mental atmosphere which is absorbed by the viewer without conscious mental effort.” *Pathe Exchange v. Cobb*, 195 N.Y.S. 661, 665 (N.Y. App. Div. 1922).

<sup>244</sup> *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752 (N.Y. App. Div. 1919).

<sup>245</sup> *Id.* at 755.

<sup>246</sup> *In re “Spain in Flames,”* 36 Pa. D. & C. 285, 294 (Ct. Com. Pl, Phil. Cty. 1937).

itself,” despite “incidental comment essential to the intelligent understanding of the picture.”<sup>247</sup>

The treatment of newsreels as unmediated representations of reality by the courts effectively privileged the interests of newsreel producers and distributors over individuals. This was, in part, an effect of mass consumer culture itself: as the *Humiston* court observed, it would be impossible to obtain the permission of every person portrayed in the newsreel representation of a public parade or a baseball game.<sup>248</sup> But individuals could and did sue to regain control of filmic representations of themselves.<sup>249</sup> The only remedies available, though—enjoining screenings and money damages—did not unmake the representation. Rather, they established the conditions under which individuals had to be compensated for their unauthorized conversion into commodities. In this way suing was not substantially different from becoming an actor, the only other method of asserting some control over one’s image, which was also only possible on the market’s terms. The consuming subject of the early twentieth century was thus always in a sense “on the market” as a potential commodity. This is precisely what has happened to Joe. And the law cannot protect him because the law reproduces the values of consumer culture.

## X. CONCLUSION

As *Fury* makes clear, Fritz Lang recognized the ways in which the growth of the administrative state and the ascendancy of consumer culture in the 1930s were not merely simultaneous, but interconnected and mutually reinforcing. This connection, however, was obscured by a legal apparatus intent on a particular account of social facts and the law’s relationship to those facts.<sup>250</sup> In a 1934 letter to Roosevelt, Felix Frankfurter described the world of marketing and mass consumption as idiosyncrasies of “these restless days,” and contrasted the “foolishness and fanaticism and self-interest” “exploited by professional poisoners of the public mind”—his epithet for ad men and public relations specialists like Edward Bernays—with “the general national interest.”<sup>251</sup> But Lang, with Bernays, understood that “political processes” take place in the same

<sup>247</sup> *Id.* at 292–93.

<sup>248</sup> *Humiston*, 178 N.Y.S. at 756–57.

<sup>249</sup> See, e.g., *Binns v. Vitagraph Co. of America*, 103 N.E. 1108, 1110–11 (N.Y. 1913) (holding that a filmed reenactment of an event violated the plaintiff’s protected right to control of his image used “for advertising purposes or for the purposes of trade.”).

<sup>250</sup> On this account, “the scientific observer, the judge or the administrator, was separate from social inscription and in touch with the real facts of social life.” See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1258 (1985). The ways in which the denial of the representational nature of law quickly caught up with the judges Roosevelt appointed after 1937 are well documented. My point herein is not to repeat familiar critiques of realism. The suggestion that law is a kind of representational apparatus is, of course, consistent with those critiques. But for Peller and other critics of realism, understanding law as a system of representation serves the conclusion that “legal representational activity is ideological . . . .” *Id.* at 1160. What interests me is the ways in which legal representational activity informs and is informed by popular culture—not at the margins but all the way down.

<sup>251</sup> Letter from Felix Frankfurter to Franklin Delano Roosevelt (May 7, 1934) (on file with author). Frankfurter, one of Roosevelt’s close advisors, became a Supreme Court Justice in 1939.

cultural field as “commercial and social processes.”<sup>252</sup> As popular culture informed the longings and expectations of consumer citizens, it inevitably helped give shape to the general national interest. And as traditional boundaries between the public and the private eroded and the range of what was properly clothed in the public interest expanded, the public’s interests were increasingly determined by consumer values.

Justice Holmes had anticipated this convergence of legal and cultural values in his dissenting opinion in *Bleistein v. Donaldson Lithographing Co.*<sup>253</sup> In *Bleistein*, the defendants argued, and the lower court held, that a picture “must have some connection with the fine arts to give it intrinsic value” and must have intrinsic value to enjoy the protection of copyright.<sup>254</sup> But Justice Holmes insisted that a “picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement.”<sup>255</sup>

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. . . . It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.<sup>256</sup>

Ultimately, Justice Holmes reasoned, if representations “command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt.”<sup>257</sup> The public law serves here is the mass audience of consumer culture.

In 1927, the Supreme Court was presented with the question whether “every public exhibition, game, contest or performance, to which an admission charge is made, is clothed with a public interest . . . .”<sup>258</sup> The majority in *Tyson and Brother—United Theatre Ticket Offices, Inc. v. Banton* held that theaters, in contrast with railroads, grain elevators and water companies, did not count as businesses clothed in the public interest and that consumers did not have a constitutional right to be protected from fraud and collusion on the part of theater managers and ticket sellers.<sup>259</sup> But writing in dissent, Holmes argued that “to many people the superfluous is the necessary” and, according to “fashionable conventions,” “theatres are

<sup>252</sup> BERNAYS, *supra* note 133, at 40.

<sup>253</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

<sup>254</sup> *Id.* at 253 (Harlan, J., dissenting) (quoting *Courier Lithographing Co. v. Donaldson Lithographing Co.*, 104 F. 993, 996 (6th Cir. 1900)). This was also Justice Harlan’s position in dissent. *Id.*

<sup>255</sup> *Id.* at 251.

<sup>256</sup> *Id.* at 251–52.

<sup>257</sup> *Id.* at 252. Holmes goes on: “It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs’ rights.” *Id.*

<sup>258</sup> *Tyson & Bro.—United Theatre Ticket Offices, Inc. v. Banton*, 273 U.S. 418, 428 (1927). The theaters in the case housed live performances, not movies. But 1927 was the year the first feature-length talkie, *THE JAZZ SINGER* (Warner Brothers), was released—ushering in the era of modern movie theaters.

<sup>259</sup> *Id.* at 431–32, 442.

as much devoted to public use as anything well can be.”<sup>260</sup> Justice Stone took this reasoning one step further, arguing in a separate dissent that the New York legislation fixing the resale price of tickets, like the grain elevator rate regulations in *Munn v. Illinois*, “was designed in part to protect a large class of consumers from exorbitant prices made possible by the strategic position of a group of intermediaries in the distribution of a product from producer to consumer.”<sup>261</sup> Anticipating the language of the New Deal Court, Justice Stone cast the issue as “one involving serious injustice to great numbers of individuals who are powerless to protect themselves . . . .”<sup>262</sup> The legal endorsement of consumer values in cases involving control of and access to cultural representations had thus already helped set the stage for the transformation of the legal subject in the 1930s.

The mistake of contrasting something defined as the social good against the representations of advertising and film in early twentieth century legal discourse is repeated today in the distinction between the representations of popular culture and an everyday social reality in which law operates. Richard Sherwin’s concern that the convergence of law and media “on the same set of images” undermines legal legitimacy by introducing “the disguised, and at times unconsciously displaced, compulsions and needs of irrational fury, retribution, fantasy, and illicit desire” into legal processes offers a good example.<sup>263</sup> Everyday social reality cannot be distinguished from the representations through which we understand it. As *Fury* reminds us, law and popular culture are mutually constitutive parts of a broader culture outside of which neither has meaning.<sup>264</sup> Moreover, there is no insulating law from technologies of representation; law itself is a technology of representation.

Far from posing a threat to the established legal order, in a culture saturated and dominated by now mostly digital representations, popular culture may in fact exaggerate the “naturalness” of existing social structures, including the legal system.<sup>265</sup> After all, the apparent objectivity of the camera obscures the artificiality of the image much the way the apparent autonomy of law obscures the historically contingent development of social and legal institutions. What we want from law is, to a great extent, to get what we want. And because what we want—at least since the 1930s—has been continuously fashioned in a market of and for objects of

<sup>260</sup> *Id.* at 447. Benjamin Cardozo advanced a similarly flexible definition of the public interest. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 87 (1921).

<sup>261</sup> *Tyson & Bro.—United Theatre Ticket Offices, Inc.*, 273 U.S. at 450–51 (Stone, J., dissenting).

<sup>262</sup> *Id.* at 454. Economic theory persistently conceived consumers as disabled with regard to protecting their own interests. See, e.g., WAITE & CASSADY, *supra* note 87; Lynd, *supra* note 129; Means, *supra* note 87.

<sup>263</sup> RICHARD SHERWIN, *WHEN LAW GOES POP* 226, 242 (2000). Jessica Silbey offers a thoughtful critique of Sherwin’s position. See Jessica Silbey, *What We Do When We Do Law and Popular Culture*, 27 *LAW & SOC. INQUIRY* 139, 166 (2002).

<sup>264</sup> This point has found many compelling expressions. See, e.g., Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35 (2001).

<sup>265</sup> As Edward Bernays and many others have observed, because motion pictures are “made to meet market demands, they reflect, emphasize and even exaggerate broad popular tendencies”—like movies, visual pop culture, “avails itself only of ideas and facts which are in vogue.” BERNAYS, *supra* note 133, at 166. See also LIPPMANN, *supra* note 40, at 166.

desire, popular tastes and legal values are never so different as we have grown accustomed to saying they are.