

Chapter 3

Criminal-Law Films: Crime-Control Versus Due-Process Cinema

IF HEGEL WAS right, an appreciation for dialectical oppositions can greatly enhance one's insight into the nature of existence, including the experience of historical development and change. Harvard law professor Duncan Kennedy, present at the creation of the critical legal studies movement, wrote a famous law-review article identifying a tension he saw running like a red thread through the history of American law: that between individualism and altruism. Historian Arthur M. Schlesinger, Jr., has described American history as a whole in terms of the "cycles of American politics," an oscillation in governmental commitment to public purpose as against private interest. In *Law and History*, I point to the complex Hegelian architectonic of American legal development, akin to Schumpeter's dialectic of "creative destruction."

Core genres within the culture of American legal cinema can similarly be portrayed in terms of a central and animating contradiction or dialectic specific to each. The rule of law itself can be seen in terms of a contradiction between adherence to the principle of a government of laws and not of men, on the one hand, and the obvious fact, on the other, that even in liberal legal systems, as Franz Neumann conceded,

it is men and women who rule. Whether we call this irony or contradiction, it provides the dramatic conflict, the antagonistic foundation, on which much popular legal narrative and film has been constructed.

Crime Control

The cinema of crime and criminal law, a vast and important genre of legal motion pictures, can readily be approached in terms of its central contradiction, which not surprisingly simply mirrors the central conflict structuring the Anglo-American criminal process: the dichotomy between crime control and due-process values within an adversary system of criminal justice.

It was the due process / individual rights orientation of lawyers like Josiah Quincy and John Adams (when they accepted British soldiers as clients) that so irritated radical defenders of "the people out of doors" in Boston. And it was the crime control / social order propensity of John Adams and the Federalists, once in power, which was behind the Adams administration's attempt to enforce the Sedition Act of 1798. Even if the alien and sedition acts merely reflected, as legal historian Stephen Presser contends, "fear that the sort of instability of life and liberty that prevailed in revolutionary France might be brought to the shores of America," the crime-control impulse reflected, even then, a desire to at least temporarily subordinate the rights of individuals to the presumed larger social stake in law and order, on which individual liberties themselves ultimately depend.

Two centuries later, during the 1960s, while Students for a Democratic Society were drafting, in Port Huron, Michigan, a statement of political faith that emphasized "the absence of individual freedom in modern American life," Richard Nixon, Spiro Agnew, George Wallace, and a phalanx of angry politicians were running for office on a "law and order" platform, promising to get tough on crime. "Nixon and the Republicans," according to historians George Brown Tindall and David E. Shi, "offered a vision of stability and order that a majority of Americans—soon to be called 'the silent majority'—wanted desperately." At just this time, as the country was rocked by violent

demonstrations and a "police riot" at the 1968 Democratic National Convention in Chicago, Stanford Law School dean Herbert Packer published his book *The Limits of the Criminal Sanction*, in which he outlined in the clearest possible terms the essential character of the conflict in values structuring the American criminal justice system.

Packer described what he called a "crime-control model," which was committed to keeping crime under tight control to insure public order, arrayed against a "due-process model," devoted to the primacy of individual liberty and concomitant limitations imposed upon official power. Advocates of the crime-control model sought to repress crime almost no matter the cost in terms of personal freedom. Their opponents, at the other end of the criminal procedure spectrum, were predictably fond of a familiar homily: it is better to let ten guilty men go free than to convict a single individual who is innocent.

The Boston Massacre took place in 1770. Exactly two hundred years after redcoats opened fire on either patriots or a "motley rabble of saucy boys," depending on your point of view, Ohio National Guardsmen shot and killed four students during an antiwar demonstration on the Kent State University campus. Crime-control advocates defended the use of force to secure public order both in 1770 (the British colonial regime) and in 1970 (the governor of Ohio). Due-process proponents were outraged. In filmmaker Sidney Lumet's original series *100 Centre Street* (2001), the central dramatic conflict

reproduces precisely Herbert Packer's crime-control / due-process dichotomy, embodied in the sharply juxtaposed perspectives on life and law held by two criminal court judges, Joe Rifkind (Alan Arkin), Jewish and liberal, and Attallah Sims (LaTanya Richardson), African American and conservative.

Judge Rifkind, exercising routine bureaucratic discretion, releases on his own recognizance a juvenile offender charged with subway turnstile jumping. A packer at Macy's, defendant William Floyd cannot pay a \$250 fine and, in the alternative, has served two days of a possible three-day sentence when Rifkind says "we're not going to wreck his life over 240.20," and releases Floyd on the basis of time served. Rifkind then meets Judge Sims for dinner at a fancy Italian restaurant. After telling the judge that she never met a sentence she didn't like, Rifkind asks her, "Attallah, has there ever been a case

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where you were moved by the circumstances surrounding the criminal?" She replies she has not, and when Rifkind asks, "Not once?" she shakes her head. "OK," Rifkind begins hypothetically, "how about this, a black man . . ." But she immediately cuts him off, interjecting: "Oh come on now Joe, don't start with that crap. . . . Listen, if I can make it anyone can; straighten up and fly right like the old song says." Rifkind laughs and says, "You're a tough broad, Attallah, but that's why I love you," and the sincerity of his affection, despite their different judicial philosophies, is evident. "Your bleeding Jewish heart is going to drop you in it one of these days. And I love you, too." The soup arrives.

Judge Sims's words prove prophetic. After scenes in which the recently reprieved William Floyd brutally beats the owner of a Chinese takeout over \$4.75 worth of greasy eggrolls and, in court, Judge Sims seems especially harsh toward an HIV-positive teenage prostitute strung out on drugs, Floyd, on a roll, shoots and kills a twenty-two-year-old female cop on her first patrol, while holding up a downtown delicatessen. Whatever the apparently bottomless depths into which Judge Rifkind is then dropped, all of New York City is judging him.

If the key issues, seen through the optic of the crime-control / due-process antinomy, remain central concerns of popular legal culture today, it was in the 1960s, perhaps, that this particular battle was most fiercely waged, both in the movies and in the streets, and it was from within the maelstrom of the first Nixon administration that the quintessential crime-control motion picture, Don Siegel's *Dirty Harry* (1971), emerged.

Far more in the style of a war film than a crime film, *Dirty Harry* opens with a close-up of a stone wall, on which are inscribed these words: "A tribute to the Police Officers of San Francisco who gave their lives in the line of duty." The camera then pans down through a long list of names and the years of death, even without any of the film's credits being superimposed over this somber introductory series of shots. Siegel then immediately cuts to the film's action.

Deploying a classic mask shot, in which a portion of the screen area is darkened, Siegel trains the audience's line of sight through the scope of a rifle. A maniac sniper shoots and kills a young lady taking a dip in the brilliantly blue water of her penthouse pool, high above the

streets of San Francisco, and threatens further mayhem if the city does not immediately fork over \$100,000. Enter police officer Harry Callahan (Clint Eastwood), his own wife mysteriously dead, quietly resolved to put the killer out of action in his own way, even though the liberal mayor (John Vernon) wants to play ball with the nut. Callahan takes time out from eating a hot dog to shoot a few urban gangsters holding up a downtown bank in broad daylight and, in the process, introduces into American cinema the famous line "Do I feel lucky? . . . Well, do you punk?" Meanwhile, the sniper (calling himself Scorpio in the scribbled notes he leaves at crime sites), true to his word, shoots a randomly selected African American boy in the street and narrowly misses killing a priest.

Harry Callahan and his new partner, Chico Gonzalez (Reni Santoni), a graduate in sociology from San Jose State, obviously need to get down to a little serious police work. Scorpio has kidnapped a fourteen-year-old girl, Ann Mary Deacon, and buried her somewhere beneath San Francisco with only a few hours of available oxygen supply. Good old Harry, always stuck with the dirty assignments, gets to make the connection and, ransom in hand, manages to get set up and beat up, puts a knife in the killer's leg, and is finally saved from execution only by the gunplay of his sidekick Chico, while sweet Ann Mary Deacon, the audience worries, breathes none too easily. Though wounded, the police officers' prey has escaped again.

With Chico himself fallen in battle and hospitalized, like Callahan's previous partner, Harry is now on his own. Still, he catches up with the long-haired predator in an abandoned Kezar Stadium, bloodies his leg a little with one carefully placed shot from his patented .44 magnum handgun, and then steps on the wounded limb. After crying out, "I want a lawyer" and "I have a right to a lawyer," Scorpio can no longer stand the pain Harry is inflicting and divulges an underground burial location where Miss Deacon, once she is dug up, is very pale and very dead.

But at least Harry got even, right? Wrong. Apparently the district attorney and the brass upstairs do not take kidnapping and murder seriously, because—one, two, three—Scorpio is free. Because Harry got the truth out of his prisoner by slightly illicit means (torture), the solid case evaporates. And guess who is out on the streets again? Nothing if not persistent, Scorpio soon kidnaps a bus full of school-

children and wants the city of San Francisco to pick up the cost of an airline ticket (with some serious spending money thrown in) to somewhere—maybe Morocco, where drugs are supposed to be cheap—but definitely out of Callahan country.

Once again invited by city hall to play the uncaged killer's game, this time Harry refuses and instead goes after a little sweet, potentially suicidal, revenge. Jumping onto the hijacked vehicle from a highway overpass and forcing the bus to crash, Callahan finally corners his prey outside an isolated quarry and mine shaft. Callahan gets the drop on him and then repeats, for emphasis, the crowd-pleasing line, asking whether this particular punk feels lucky. Apparently without first checking with his broker, this punk *does* feel lucky and stupidly goes for his gun. Harry blows the little rat's guts into the river. Probably out of a job for his unorthodox police work (and who wants to fight a losing battle against crooks coddled by the courts anyway?), dirty Harry Callahan quietly takes his badge from his wallet and skips it across the surface of his last target's watery grave.

Dirty Harry is a product of a chaotic, even hysterical, moment in American social history, and perhaps only Sam Peckinpah's *Straw Dogs* (1971) and Arthur Penn's *Little Big Man* (1970) compete with *Dirty Harry* in terms of their ability to draw the audience into an unambiguous identification with extremely brutal and violent conduct. It is hard not to experience the conclusion of the Penn film, for example, as a delirious celebration (for better or worse) of the Custer massacre. In all three films, a visceral and larger-than-life moving image of righteous killing is substituted for classical tragedy as the means by which an audience becomes emotionally cleansed, if that is an adequate characterization of the kind of cathartic release this sort of cinema delivers.

Paul Taylor, writing in the 2001 edition of Britain's wonderfully hard-edged collection of film "blurbs"—the *TimeOut Film Guide*—says that *Dirty Harry's* critics "were immediately thinking of effects ('Every frame votes Nixon')," but adds that in his view "Siegel's ambiguity wins out." And Geoff Andrew, in the same film guide, asserts that in *Little Big Man* "[a]mbiguity, both toward fact and character, is the keynote." Most remarkable of all is Chris Petit's claim, again in *TimeOut*, that in Peckinpah's *Straw Dogs* "[c]ivilized' man's confrontation with irrational violence is handled with impeccable logic."

Indeed, "looking back," Petit concludes, "it's hard to see what the charges of gratuitous violence were all about."

Did they show the same prints of these films in Britain as in the United States? Or is this another case of "you had to be there"? In retrospect, what seems most striking about these films is the way in which they *unambiguously* revealed some of the legal, historical, and sexual fault lines along which the political landscape shook during the 1960s. Paul Taylor's throwaway line about *Dirty Harry*, "[s]eminal law and order cinema," gets right to the heart, not only of how *Dirty Harry* was received at the time it was made, but of what it represents structurally and generically: the right-wing pole or extreme of the criminal-law film's dialectic.

In *Dirty Harry's* defense, Taylor says it is "more than a little embarrassing when critics trust audiences less than filmmakers do." Embarrassing to whom? One need only try to imagine the same kind of comment being made about "the critics" failing to trust the essential intelligence and better instincts of audiences for Leni Riefenstahl's *Triumph of the Will* (1935) or Veit Harlan's *Jud Suss* (1940). Fortunately, Chris Petit, who liked *Straw Dogs*, nevertheless regards *Triumph of the Will* as "still one of the most disturbing pieces of propaganda around."

A routinely insightful, remarkably reliable, and progressive film writer, Patrick McGilligan points out in his 1999 biography of Clint Eastwood that even Eastwood acknowledged "he had realized right from the onset of the project that *Dirty Harry* contradicted the 1966 *Miranda vs. Arizona* decision of the U.S. Supreme Court, which protected criminal suspects by assuring them they would receive a 'Miranda warning' of their constitutional rights before any interrogation by police." And at the critical point in the film, where Ann Mary Deacon is found dead but at least Scorpio is finally in custody, Callahan is shocked to learn that Scorpio must be released. After Harry graciously acknowledges he had some luck cracking the case, the rug is pulled out from under him and he is told in no uncertain terms by District Attorney William T. Rothko that he's lucky he is not being indicted on a charge of assault with intent to commit murder.

"Where the hell does it say you've got a right to kick down doors, torture suspects, deny medical attention and legal counsel?" Rothko

demands to know. "Where," he continues, his tone becoming nastier, "have you been? Does Escobedo ring a bell, Miranda? I mean you must have heard of the Fourth Amendment?" he asks derisively. "What I am saying," Rothko bluntly adds, "is that man had rights." Behind his desk—tan suit, button-down shirt, regimental tie, black horn-rim glasses—he is all lawyer, all rules. Everything Harry hates, even about his side of the legal fence.

The *Miranda* ruling, adds McGilligan, "was generally regarded as a victory for liberals." In fact, liberal Supreme Court justice Abe Fortas had stated in defense of the *Miranda* decision, "we deal not with the criminal against society, but the state and the individual." Not exactly the way Harry Callahan would have put it. "Dirty Harry was a character who gladly bent the *Miranda* rules," concludes McGilligan, "and Clint's dialogue excoriated mushy academics, stupid prosecutors and judges, inept government officials."

In the summer of 2000, the United States Supreme Court decided a case, by a margin of seven votes to two, that reaffirmed their 1966 *Miranda* decision. "The big surprise" in the case, according to a *Nation* magazine editorial, "was [Justice William] Rehnquist himself, whose vote with the majority left dissenting Justices Antonin Scalia and Clarence Thomas to flail on the conservative margin." If one of the most right-wing Supreme Court justices since the Second World War could convince himself that *Miranda* warnings are truly mandated by the Constitution's Bill of Rights, then maybe it really is time for Harry Callahan to discard the badge. More importantly for our purposes, however, this may be a sign that the world movies reflect has been transformed to a point where crime-control cinema must now reinvent itself.

To be sure, police vigilantism, like that of Harry Callahan (or by Harry Callahan's police department *adversaries* in director Ted Post's counterpoint, *Magnum Force*), has occasionally been replaced by citizen vigilantism, both on film (e.g., Charles Bronson in Michael Winner's three *Death Wish* pictures) and in life (e.g., Bernhard Goetz on New York's subway trains). Law professor Susan Estrich, in her book *Getting Away with Murder*, ranks vigilantism as one of the nation's "top ten sympathy defenses" and provides a long list of cases in which individuals acting alone or as part of a mob effectively utilized the defense to escape punishment for homicide. Citizen vigilantism rep-

resents the sinister underside to movements for “popular justice”—grassroots alternatives to legal formalism whose reflection in film is surveyed in my contribution to a group of essays collected under the title *Legal Reelism*.

In the movies, even judges (Michael Douglas in Peter Hyams’s *The Star Chamber*) and criminal-defense attorneys (Glenn Close in Richard Marquand’s *Jagged Edge* and Gary Oldman in Martin Campbell’s *Criminal Law*) have been pressed to take law into their own hands. But didn’t Atticus Finch, too, bend the rules in the end when his children were endangered, in Robert Mulligan’s screen adaptation of Harper Lee’s *To Kill a Mockingbird* (1962)? Perhaps this stalwart cinematic entry in the “rule of law” pantheon deserves just the kind of subtle critical reconsideration at which the British *TimeOut* critics appear to excel.

Due Process

If *Dirty Harry*, more than any other film, seems to distill key elements of crime-control cinema, what are the crucial characteristics of due-process films within the criminal-law genre? Two crime films, taken together, are illustrative in this regard: a contemporary equivalent of the Hollywood “B movie,” *Shakedown* (1988), and a major star vehicle, *True Believer* (1988). These two films, made in the same year, evidence a stage of evolution, a turning point, in the developing due-process film formula.

Admittedly, James Glickenhaus’s *Shakedown* is hardly an original or pathbreaking film. “No celluloid cliché,” says James Christopher, “that could possibly fit into *Escape from New York* or *Dirty Harry* is left unstitched” in *Shakedown*. But its very conventionality, each stitched cliché, can help draw together important elements of the due-process film’s fabric. *Shakedown* includes a strong woman character in the role of an assistant district attorney. The inclusion of women attorneys, in fact, represents a significant trend in criminal-law films over the last twenty years (e.g., *Jagged Edge*, *Suspect*, *The Accused*, *Physical Evidence*, *The Client*, *Guilty as Sin*).

Susan Cantrell (Patricia Charbonneau) performs a function in *Shakedown* similar to that of Debra Winger’s character, Laura Kelly,

in Ivan Reitman's *Legal Eagles* (1986), or even that of Mrs. Christine Manson, wife of Dr. Andrew Manson, in King Vidor's 1938 film version of A. J. Cronin's novel *The Citadel*. She is keeper of the conscience and moral lightning rod for a professional husband/boyfriend torn by the conflict between public obligations and private desires.

Tempted to abandon a criminal client he believes is innocent, and ready to move into corporate legal practice via a well-chosen marriage to the daughter of the corporate firm's name partner, Roland Dalton (Peter Weller) briefly revives a former liaison with Cantrell.

Having breakfast on a porch overlooking Manhattan's Central Park, Cantrell challenges her old flame: "So you're going to take fourteen years of legal aid work and chuck it out the window?" Dalton is irritated. "You don't get it, do you?" he replies. "I mean you got me as some kind of retrograde Clarence Darrow or something. . . . You keep thinking I'm leaving legal aid because I want to be something else. I'm outta here, babe, because it's kicking the life out of me." He gives up trying to sound high-minded. "So what if I want things, Susan. People want shit, you know? I want things!"

Although, as it turns out, Susan Cantrell helps motivate Dalton's renewed commitment to fighting the good fight, she is not at the dramatic center of the film. What *Shakedown* has in common with *True Believer* is its focus on the importance of a zealous criminal defense, regardless of the odds, and its disdain for the precise, calculated, almost impersonal logic of official coercion, including criminal conspiracies perpetrated by police and prosecutors. Traditional due-process films like John Ford's *Young Mr. Lincoln*, discussed earlier, Henry Hathaway's *Call Northside 777* (1947), or Alfred Hitchcock's *The Wrong Man* (1956), dealt with efforts to vindicate the innocent. But later due-process films go further and brand government officials as frame-up artists. In this respect, *Shakedown* and *True Believer* mark a turning point.

In *Shakedown*, the finale is virtually a kind of auto smash-up cartoon, a "heady mix of sleaze and comic book heroes" that causes *TimeOut's* James Christopher to predict for the film "a long life on the video shelf." Having stuck with his client after all, and having nearly been executed by rogue cops as a reward, Dalton crashes a taxicab into an official police cordon blocking his entry to the criminal-courts

building where, exculpating evidence in hand, he plans to save his client from conviction. Officers attempt to arrest him on the spot (and no doubt have a jailhouse accident planned for him) as the cover-up continues.

But Judge Maynard (Augusta Dabney) marches into position between Dalton and the secretly drug-dealing cops, telling the police in no uncertain terms: "On the streets you are the law but on the steps of this courthouse, I am the law. If this police officer does not lower his gun," the robed judge now instructs her bailiff, "arrest him for obstructing justice." Admittedly, "Mr. Big," the conventional hoodlum who wears fancy clothes and rules from on high over a criminal empire where cops are mere errand boys, is not brought down to earth or to justice without the standard pyrotechnics. Nor is he subjected to the rule of law without some extralegal crime fighting by a lawyer / unorthodox cop duo, a buddy team that turns up in modified form in films as different from each other as Brian DePalma's *The Untouchables* (1987), Alan Parker's *Mississippi Burning* (1988), and Alan Pakula's *Presumed Innocent* (1990).

Joseph Ruben's *True Believer* revolves around an intense characterization by James Woods of politically hip criminal-defense attorney Eddie Dodd. The element of altruism or conscience helping to regulate decision making in *Shakedown*, injected by Susan Cantrell, or by Laura Kelly in *Legal Eagles*, becomes a kind of moral Marshall Plan in *True Believer*. The film includes an idealistic young lawyer fresh off the staff of the University of Michigan Law Review (Robert Downey, Jr.), a private investigator who still clings to her faith in Dodd, as well as the immigrant mother of a purportedly unjustly convicted, Korean-American gang member, all of whom totally commit themselves to waking up Eddie from his marijuana-induced indifference. They want desperately to remind him that the words of the U.S. Constitution actually mean something—or, at least, *should*.

True Believer, according to *New Yorker* film critic Pauline Kael, "can be said to be about Dodd's finding his lost ideals, but it's basically about pace and drive. The director doesn't use the movie to congratulate himself on sharing Eddie's ideals; he uses it to make us share the excitement of Eddie's recovering those ideals." Of course, it can be argued that director Joseph Ruben's emphasis upon the medium

rather than the message makes the message about keeping in touch with the progressive, if idealistic, values of youth more self-effacing and thus provisionally attractive than would be the case were the message broadcast over a loudspeaker. This may be Ruben's way of responding to the old Hollywood adage "If you have a message, send it by Western Union."

But there is another way to look at *True Believer*, beyond noting Eddie Dodd's revitalized radicalism or the "marriage of purpose and adrenaline" that keeps the film hurtling forward to its conclusion, the release of falsely convicted Shu Kai Kim from Sing Sing. Consider actor Kurtwood Smith's performance in the role of district attorney. Eddie Dodd first begins to wonder if Shu Kai Kim just might be innocent when the DA, out of the blue, offers to let the Korean convict out of jail in only a few years if Dodd refrains from his effort to reopen the case. This deal or bargain represents a proffered exchange. It is designed by the DA to keep under wraps the *real* trade-off, the original Machiavellian justification for the state's decision to frame Shu Kai Kim for a murder actually committed by a valued police informant. The notion that "the end justifies the means," a classic prescription for authoritarian tyranny, may constitute the real target of *True Believer*.

At a certain point, the transformation of the due-process genre of criminal-law film into a kind of jurisprudential critique of the entire political system necessitates a generic category of its own. We will explore that possibility shortly, under the heading "Underground Film." But first it is worthwhile to consider ways in which the crime film, narrowly conceived, might still reinvent itself.

Breaking Out of the Double Bind

The crime-control/due-process tension remains so sufficiently sharp and ideologically contemporary that entire television series can and will be spun from this central conflict, rotating the moral and dramatic tensions again and again around the same dynamic confrontation. And crime films with contemporary urban settings, "the naked city" or "asphalt jungle" of modern society (e.g., *City Hall*), historical settings (*L.A. Confidential*), organized-crime milieu (*Goodfellas*), police mis-

conduct (*Training Day*), or that focus on especially disturbing forms of criminal behavior (*Silence of the Lambs*), will continue to draw enthusiastic audiences.

But in his updated conclusion to Carlos Clarens's classic *Crime Movies* (1997), Foster Hirsch describes what he believes to be a certain exhaustion in the crime genre. In the case of Quentin Tarantino's *Pulp Fiction* (1994), for example, which is "[c]oated with references to other movies and pop-culture artifacts," and which Hirsch calls "terminally hip postmodern collage," he worries that criminal law and procedure, "the criminal way of life" itself, has become "removed altogether from any ethnic or sociological reality and suspended in a world that could exist only in the movies or, as the title informs us, in the pages of a pulpy paperback."

Taylor Hackford's *The Devil's Advocate* (1997), a film in which John Grisham appears to meet Anne Rice, may be another example of what Foster Hirsch is getting at. *Chicago Sun-Times* critic Roger Ebert says that the movie "is neither fish nor fowl: It is not a serious film about its subject, nor is it quite a dark comedy, despite some of [Al] Pacino's good lines." Sam Mendes's *American Beauty* (1999) seemed to suffer from the same defect: it was too broadly drawn to be serious but neither sufficiently subversive nor sharp enough for black comedy. Nevertheless, *Devil's Advocate*, by literally identifying legal practice with satanism and thus pandering to anti-lawyer sentiment to an unprecedented degree, may have achieved greater popularity with movie audiences and been given more credence by some critics than Ebert allows.

Beyond the gothic horror of *Devil's Advocate*, where might the criminal-law film be headed—gaining its second wind and exploring new territory beyond the now familiar crime-control/due-process impasse? In 1970, Yale law professor John Griffiths published a law-review article in which he proposed a "third model" of the criminal process. Specifically referring to Herbert Packer's crime-control and due-process models as, in reality, just one model, a "battle model" with two contradictory poles, Griffiths complained that "Packer consistently portrays the criminal process as a struggle between two contending forces whose interests are implacably hostile: the Individual (particularly, the *accused* individual) and the State." Griffiths characterized this dichotomy as essentially a double-bind situation. No one

in their right mind would willingly sacrifice either of the central interests (ordered liberty or individual rights) ideologically portrayed as necessarily contradictory in Packer's opposition.

But Griffiths sought a way out of this conflict by proposing an alternative family model of criminal process—a model that started by abandoning the notion of absolute irreconcilability between the individual and society, between personal liberty and state power. Based on an idealized version of family solidarity rather than a psychodynamic portrait of the way many nuclear families actually work, Griffiths's family model looked a lot like the informal, nonadversarial, communitarian approach to criminal justice that anthropologists had frequently identified among Native American tribes and other traditional cultures. Without further exploring Griffiths's approach to criminal procedure but still following his cue, we might look for an alternative criminal-justice cinema, a new synthesis or attitude, structuring a different way of making films about crime and criminal law.

That might be what director Robert Altman is looking for in *The Gingerbread Man* (1998); the family-model option proposed by Griffiths stands in the background of Altman's latest entry within the crime movie / film noir category. Based on a story by John Grisham, *The Gingerbread Man*, according to *Memphis Flyer* critic Hadley Hury, writing from deep inside Grisham country, is "a dark jewel of a film in which the use of noir elements is not the usual matter of a few stylistic" flourishes but provides instead a "window on a seductive, unsettling, psychological state—the classic noir state of the center not holding." The center that does not hold in *The Gingerbread Man* is, as Hury argues, a psychological center, but it is also, metaphorically speaking, a legal center. A reliable and predictable opposition of criminal-justice forces delicately balanced between crime-control and due-process commitments gets knocked out of alignment, just as "weakness, corruption, and the mess they make of things" throws the lives of the film's characters into absolute chaos and confusion.

Rick Magruder (Kenneth Branagh), a brilliant southern criminal-defense attorney, has just won a big trial in Jacksonville, Florida, and is driving back up to his home in Savannah, Georgia. An overhead tracking shot follows Magruder in his red Mercedes sports car as he explains over a cell phone why he does not mind having destroyed a police officer's career on cross-examination: "He blew procedure, lied

on the stand, suppressed evidence—come on Terry, I’m a big supporter of cops but there is only one set of rules whether you read them or not.” Terry, evidently a reporter, asks Magruder about the morality of his trial strategy. “Morality in law?” laughs Magruder. “Who told you that, the great lawyer fairy? I’ve got to protect my client.” The due-process slant on criminal law (including its presumed indifference to crime control and social order) from Herbert Packer’s “battle model” has been firmly established as Magruder’s worldview a couple of minutes into the film, before Branagh’s face has been shown on camera and while the opening credits are still running. This kind of swift generic shorthand is only made possible by a deep and pervasive, if unconscious, familiarity with both legal and cinematic conventions, shared by audience and filmmaker alike.

Magruder then calls home and the baby-sitter answers, telling Magruder she is watching him on television at that very moment, being interviewed on Court TV. He wants of course to talk to his kids, and his daughter immediately says, “One of the guys on TV said you are a snake oil salesman and I told Jeff you couldn’t be because you’re still a lawyer, right?” She scolds her little brother, Jeff, saying she *was* right; Dad tells the kids not to fight and that he is on his way home; and that’s the central dynamic of the film: will Rick’s legal commitment to due process / client loyalty interfere with his personal commitment to being a good father and caring for his children? In short, the “battle model” versus the “family model.”

Later, when Magruder’s girlfriend (Embeth Davidtz) has her car firebombed and he goes to the police for help, he gets the cold shoulder. “This place is full of guys,” a police-detective acquaintance (not a friend) tells the angry lawyer, “who are fed up with bustin’ their chops bringing in scumbags, particularly ones that shoot at the cops, so that you can waltz in as some champion of civil rights and get ’em off.” The detective tells Magruder that if he has a complaint to make, he can file it at the front desk, and on his way out the door a receptionist suggests, tongue in cheek, “You got a car fire, maybe you ought to call the fire department.”

While Magruder has become quickly (and recklessly) obsessed with his new girlfriend, it is his children who remain the most important thing in his life. When the kids become the target of a creepy kidnap-

ping threat, he understandably panics and starts loading a revolver from his desk drawer to go after the culprit he thinks is responsible. Magruder's law partner is alarmed and asks him what he is doing. "These are my kids, Lois." But she still hesitates: "Maybe he's just trying to scare you." Acknowledging his vulnerability, Magruder responds as he races out the door, "Yeah, well, he's doing a pretty good job."

There is a remarkably similar scene to this one in Orson Welles's *Touch of Evil* (1958), a film with its own version of the crime-control/due-process tension within the battle model of criminal procedure. Charlton Heston plays a rather lawyer-like, cabinet-level, three-piece-suit, Mexican, drug-enforcement official named Vargas; Welles himself plays Hank Quinlan, a corrupt local cop on the Mexican-American border (the film was actually shot, mostly at night, in Venice, California). Quinlan has been fabricating evidence, putting people behind bars, and developing a tough reputation for years—until Vargas shows up. In a run-down apartment building on an oppressively hot summer afternoon, Vargas lectures the arrogant Quinlan on the principle of legality, the values structuring a due-process orientation toward criminal justice administration: "A policeman's job is only easy in a police state."

Welles as director subjects Vargas, however, to a severe test, forcing the liberal police official to make a choice—and in the process Vargas discovers an unexpected limitation upon his own commitment to the due-process model. His pretty American wife (Janet Leigh) is kidnapped by motorcycle gang members, headed by that appropriate queen black widow, Mercedes McCambridge (fresh from starring in Nicholas Ray's fabled Western *Johnny Guitar*). In the end, the elite drug-enforcement administrator (Heston/Vargas) manages to trap the hapless, overweight ("It's either the candy or the hooch") Welles/Quinlan, a symbolic figure for the perverse intercourse of law with pure political expediency who is also, practically and cinematically speaking, human slime floating like an oil slick beneath an abandoned concrete bridge in the film's concluding sequence.

But Vargas has to transgress a few rules himself to catch the crooked cop. The scene where Vargas busts up the smoke-filled, punk mariachi bar, with the warning, "I'm not a cop now, I'm a husband!" is one of the most visually riveting examples of black-and-white film-

noir cinema one can imagine. Welles, like Altman later in *The Gingerbread Man*, seems to be taking aim at the durability of due-process, rule-of-law values when subject to the pressure cooker of extreme psychological stress. Both directors tend to leave viewers' solid convictions on such matters in a shambles, along some dark little alleyway, as night falls on a windswept Venice or rain-drenched Savannah.

Cultural historian Michael Denning regards the antifascist popular art of Orson Welles as the crowning achievement of that 1930s "popular front" art which managed to survive postwar reaction and McCarthyism. Denning tries to extract Welles's politics from the critique of (and fascination with) power evident in so many of his films. John Berry, on the other hand, an assistant to Welles in the Mercury Theater, interviewed by Pat McGilligan and Paul Buhle in their book *Tender Comrades*, describes Welles's politics as no more complex than "a wonderful, warm, human conception of what life should be." Admittedly, Denning says that "Welles's ambitions, accomplishments, and failures remain the most fitting emblem of the *unfinished* labors" of the popular front's cultural cadre. He also argues, however, that *Touch of Evil*, which Welles himself described as an attack on the abuse of police power, is an antifascist, pro-due-process film.

Denning describes the "framing of young Manolo Sanchez by the corrupt policeman Quinlan" in *Touch of Evil* as the "metamorphosis" of a California criminal case, tried in 1942-43, which had drawn Welles's attention. In "the Sleepy Lagoon case," Chicano teenagers landed murder convictions that Welles and other liberals regarded not as an example of blind justice but, rather, an expression of the "Nazi logic" of the Los Angeles police department. And Welles was on to something: the Sleepy Lagoon murder convictions were reversed on appeal. Manolo Sanchez in *Touch of Evil*, however, was *guilty*—he actually committed the murder Quinlan tries to pin on him through outrageously illegal means. In a sense, Welles's corrupt cop has more in common with dirty Harry Callahan (Clint Eastwood), who, as we have seen, utilizes unconstitutional methods in his effort to enforce a rough justice. *Touch of Evil*, like *The Gingerbread Man*, allows plenty of room for interpretation.

In the latter picture, Robert Altman's Rick Magruder ends up killing the wrong guy and having to face the consequences. He begs the Savannah police to try to understand that he was only protecting his

family and himself under the circumstances as he understood them to be. But the chief of police questioning Magruder responds: "You all never gave that same courtesy to Officer Watson down in Jacksonville, did you? You put that guy up on the stand. . . . He was just trying to protect himself. You punched holes the size of cow chips in a twenty-year career."

To the battle model of criminal procedure John Griffiths juxtaposed a family model—one where human or personal values would predominate, rather than the formal rules and official roles conventionally assigned within the administration of criminal justice in an adversary process. *Touch of Evil* and *The Gingerbread Man* suggest that when those same values, love and concern for family members, are interjected into the drama of criminal-law films, they can radically upset our normal or routine response to the battle model of criminal justice, and can throw into disarray the standard rules of a cinematic genre. Neither cops (contrast *Dirty Harry*) nor defense lawyers (contrast *True Believer*) emerge unscathed from *The Gingerbread Man*.

From this angle, we can appreciate the way in which a film like Steven Soderbergh's *Traffic* (2000) can also be seen as a movie that breaks the mold of conventional, crime-control/due-process cinema. Griffiths wants his readers to see the crime-control and due-process models of criminal procedure as opposites and yet, at the same time, as two sides of the same coin. A similar perspective is reflected in the original, six-hour British *Masterpiece Theatre* production of Alastair Reid's *Traffik* (1989), which deals with the international structure of the heroin business. And the same point of view governs *Traffik*'s feature-length, American, theatrical-release version, starring Michael Douglas and Benicio Del Toro, which substitutes cocaine for heroin and the US/Mexico center/periphery relation for that of Britain/Pakistan.

This approach to the international marketing of heroin or cocaine, conceived as a business enterprise with both legal and illegal components, represents an ideal way of portraying the presumed antinomies of criminal justice as part of a single unified and coherent process. Packer's crime-control and due-process models, on this view, really *are* two sides of the same coin. Oversimplifying only slightly, drug kingpins, located at the production end, and their conservative political opponents, at the consumption end, complement each other and

constitute one gigantic commercial transaction—cops and crooks need each other.

“What we wanted to do,” observed *Traffik*’s British producer, Brian Eastman, “is to treat the drug business like the car business; not show it in the usual black-and-white morality, but put in perspective of how the world drug trade looks, and force people to think a little more closely about it as a world industry.” And it is just this element of *Traffik* that drew American interest a decade later. “Laura Bickford, one of the producers for *Traffic*,” points out *filmcritic.com* writer Max Messier, “was attracted to the original miniseries because of the interesting stories, the social commentary on drug usage, and the implication of The System itself being the major perpetrator of drug addiction.”

Traffic was a huge critical success in the United States, and Soderbergh won the Academy Award for best director. While there was some criticism of *Traffic* from the left for occasional racial stereotyping, and *Salon*’s Charles Taylor was disappointed by the film because of its seeming willingness to take the government’s war on drugs seriously, critics were otherwise nearly unanimous in describing Soderbergh’s “dope opera” as, in the words of film writer J. Hoberman, “exemplary Hollywood social realism.” In the December 27, 2000, *Village Voice*, Hoberman specifically contrasted *Traffic* with the previous year’s best-picture Oscar winner, arguing that a “terse domestic squabble” between harried, upper-middle-class parents, played by Michael Douglas and Amy Irving, had a “bitterness far beyond the smarmy histrionics in *American Beauty*.”

Roger Ebert initially found *Traffic* fascinating, “simply because it shows how things work—how the drugs are marketed, how the laws are sidestepped. The problem is like a punching bag. You can hammer it all day and still it hangs there, impassive, unchanged.” Every part of the system is carefully coordinated to fit with every other part, a continuum within which crime control and due process are rendered perilously abstract reflections of outmoded legal ideologies. Only gradually did a right-wing backlash develop against *Traffic*, for purportedly declaring the drug war a failure at the very moment law-and-order advocates were arguing that America, with tougher criminal penalties and mandatory sentencing, had finally begun to win the war on drugs. Conservative Republican senator Orrin Hatch may

privately have regretted his decision to make a cameo appearance in Soderbergh's film. But it was at least as easy to argue that *Traffic* simply paralleled the statements President George W. Bush made in Mexico, characterizing illegal drug traffic as essentially a "demand side" problem, than that the film advocated surrender to the forces promoting legalization of cocaine use.

Perhaps the real predecessor for *Traffik/Traffic* was William Friedkin's *To Live and Die in L.A.* (1985). Admittedly, this visually stunning crime film—including one of Friedkin's finest automobile-chase sequences—does not have the social-realist ambition of the subsequent British and American "dope operas." But it does betray a similar fascination with technical detail (the business of counterfeiting instead of drug dealing) and, more importantly, Friedkin and writer Gerald Petievich introduce an uncharacteristic ambivalence, even a disinterest, into the kind of moral discourse that normally wraps itself like an electrified fence around crime-control and due-process narratives. "Hero and villain merge," suggests *film.com* reviewer John Hartl, in a picture where there is "little difference between the cold-as-ice criminals and their pursuers, who frequently endanger the lives of innocent citizens." Popular-culture critic John Cawelti identifies a similar "generic transformation" going on even earlier, in Roman Polanski's *Chinatown* (1974). After describing the traditional myth or formula structuring the American hard-boiled detective narrative, Cawelti argues that *Chinatown* deviates from the formula to the point that, by the end of the film, the myth is turned upside down. "Instead of bringing justice to a corrupt society," says Cawelti, "the detective's actions leave the basic source of corruption untouched."

Beyond family and social-systems theory "third models" of the criminal-justice system—and cinema—there is another alternative conception that constitutes a significant development of the crime and criminal-law motion-picture genre. There is no clear line separating this alternative cinema from the due-process dialectic and its evolution inside the crime-movie tradition, but at a certain point, the transition from defense attorneys heroically providing the wrongly accused with zealous advocacy to lawyers and their allies taking on the entire political system requires a separate category of its own—or at least separate treatment within the context of criminal-law films.

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This cinematic confrontation with ruling power represents a popular-culture equivalent of the radical arts project to which avant-garde artist Hans Haacke once referred as “framing and being framed.” Painters frame pictures of political and corporate corruption; filmmakers working in the crime genre frame images of criminal defendants, themselves framed by the very forces of law and order. Once defense attorneys are portrayed, not just as representing clients or unraveling a case, but as following deceptively innocuous leads back to an original and all-encompassing source of criminality, a central historical conspiracy, then the due-process narrative has been effectively reconstructed.

Underground Film

As suggested in the previous discussion of *True Believer*, the due-process genre, pushed far enough, threatens to become a jurisprudential critique of the entire political system. Kurtwood Smith’s bone-chilling defense of his conduct, at the climax of *True Believer* (where a young gang member’s liberty is casually subordinated to reasons of state), is reminiscent of another speech Smith made while playing a CIA-linked undercover operative in William Tannen’s *Flashpoint* (1984).

Masquerading as DEA Agent Carson, Smith asks Southwest border-patrol guard Bobby Logan (Kris Kristofferson) why a rising star like Bobby had apparently exiled himself to the desert. When Logan replies, with disgust, that the reason is “politics,” Agent Carson explodes: “This whole fucking nation is politics. . . . You work for the same law that pays all our salaries: the law of supply and demand. Think about it, whiz kid. That’s the American way, pal. Supply and demand. And when the supply is lacking, you create it.” Whether it is fear of drug-related street crime, illegal immigration, or left-wing subversion, Carson contends, the government creates such anxiety—*must* create it—since one of the functions of the state is to engineer social consensus and insulate power from criticism, hopefully even from visibility.

“Who are you?” asks Bobby Logan in *Flashpoint*, as it gradually dawns on him that, in speaking with Carson, he is not talking to your

basic, dollar-a-dozen DEA agent. "I'm a fixer," says Smith, smiling obliquely, "I fix things." In *True Believer*, what is being fixed is the mess made by cops managing, rather than combating, the cocaine economy. The only eyewitness in *True Believer* who claims that Shu Kai Kim is innocent is an odd fellow confined to a mental institution, who also thinks that John F. Kennedy was assassinated on orders from the telephone company. By the end of *True Believer*, everybody in the film is wondering what the phone company had against Kennedy!

And that is exactly what Agent Carson has to fix in *Flashpoint*: an unraveling cover story about who was responsible for events in Dallas in November 1963. Some viewers or critics may regard not just assassination-conspiracy movies but also films about the criminal-justice system, in which police and prosecutors emerge as a deceitful and potentially draconian force (*The Formula*, *The Border*, *The Star Chamber*, *Suspect*, *Lone Star*), as further regrettable evidence of what Richard Hofstadter famously called "the paranoid style of American politics."

Clandestinitism, responds Carl Oglesby in his book *The Yankee and Cowboy War*, is not the figment of paranoid imagination, exploited by Hollywood like any other popular fad or frenzy, but is, rather, a "disease of republican twilight. Its coming bespeaks the degeneration of the constitutional republic into the military empire." Surely military empire could not dominate American political life without men in uniform being permitted to hold positions of substantial responsibility for the making of foreign or domestic policy. Yet was that not the case during the notorious Iran-Contra Affair? Were not key aspects of American foreign policy turned over to current or former military officers, operating on the periphery of existing institutions like the National Security Council and the Central Intelligence Agency?

Challenged by counsel for the congressional committee investigating Iran-Contra, Lieutenant Colonel Oliver North responded that he did not see how he could have acted other than in strict secrecy without the Russians finding out what the United States was doing in the Middle East or Central America. Confronted with the fact that, according to the CIA, the Russians were well aware of what the U.S. was doing, North was forced to acknowledge that this was true. Was it not, counsel asked, the American people who were supposed to be kept in the dark?

In a sharp attack upon the jury that found O. J. Simpson not guilty, former L.A. prosecutor Vincent Bugliosi said that for jurors to have returned the verdict they did, they must have been willing to believe that the whole L.A. police department and forensics unit had conspired to frame Simpson. This, Bugliosi claimed in his book *Outrage*, was equivalent to taking seriously films like Oliver Stone's *JFK*. But a lot of people *did* take *JFK* seriously and, as surely even Bugliosi is aware, a majority of Americans still do not believe the Warren Commission's lone-gunman theory as an explanation for the Kennedy assassination. So many popular television series (e.g., *The X-Files*) and motion pictures have been made to whet the conspiratorial appetite that this particular narrative disposition now deserves a category all its own.

Even prominent philosopher and literary observer Richard Rorty feels compelled to point out that a brilliant book like *Snow Crash* capitalizes on the widespread belief that giant corporations, and a shadowy behind-the-scenes government acting as an agent for corporations, now make all the important decisions. This belief," Rorty continues, casting his net over a wider range of novels, "finds expression in popular thrillers like Richard Condon's *Manchurian Candidate* and *Winter Kills*, as well as in more ambitious works like Thomas Pynchon's *Vineland* and Norman Mailer's *Harlot's Ghost*." Is American fiction and film doing the nation a disservice by picturing the legal system or, for that matter, American government itself as "just a false front," as Rorty put it?

Before we look more closely at the nature of conspiracy films themselves, it is worthwhile acknowledging the importance of secrecy as well as briefly charting its real-world political history. Secrecy, under certain circumstances, can become a threat to democracy, the rule of liberal legalism or the rule of law, as we have described it. The three essential elements of the democratic state are popular sovereignty (and an inevitably hard-won *universal* suffrage), civil rights and liberties, and public government. The historic struggle to establish the power of parliaments and legislatures against kings and dictators and to secure such basic liberties against state power as the right to speak or organize trade unions has proved essential to the construction of modern democracy.

But the guarantee of *public*, rather than *secret*, government remains on a par with the first two components of a free society and may indeed have become the most precarious of the three pillars supporting constitutional rule in the United States. Classic authoritarian techniques of rule—attacking civil liberties or assaulting parliamentary opponents (even abolition of the legislative body itself)—have proved tempting, yet often elusive, to contemporary political leaders uncomfortable with democratic institutions.

Of course the desire to provide some sort of legal justification, however strained, for official conduct remains. After the Bay of Pigs fiasco, according to historian and biographer Richard Reeves, President John F. Kennedy turned to Richard Nixon, a bitter adversary, for advice as to what course of action to follow next. "I would find a proper legal cover and I would go in," Nixon recommended. "There are several justifications that could be used," he continued, "like protecting American citizens living in Cuba and defending our base at Guantanamo. The most important thing at this point is that we do whatever is necessary to get Castro and Communism out." Thus a perceived need to provide some semblance of "legal cover" for governmental action (however illegal the action may be) remained strong, as did willingness to employ the standard, all-purpose justification of anticommunism, at least until recently, when Western rulers were denied that excuse by an internal collapse of the Stalinist system. President Ronald Reagan and his secret government used their commitment to saving Nicaragua from communism and their support for the William Casey-manufactured Contra army (which Reagan dubbed the moral equivalent of our Founding Fathers) as justification for trading American arms for hostages held by Iran (contrary to stated U.S. policy) and for bankrolling and equipping Contra "freedom fighters" (contrary to U.S. law). The deployment of retroactive as well as "mental" presidential findings during Iran-Contra (ultimately no more credible than outright, illegal destruction of documents, which also occurred) carried the effort to fabricate legal cover stories to a pathetic, perhaps tragicomic extreme.

But to whatever lengths contemporary politicians seem willing to go in an effort to evade democratic accountability, abolition of the legislature itself (at least in the United States) appears beyond their

grasp. Admittedly, Truman and Eisenhower transformed the national-security bureaucracy into a new and competing branch of government. After John F. Kennedy was removed from power, Lyndon Johnson created his own Gulf of Tonkin incident and prosecuted a savage and unpopular "police action" in Vietnam without a congressional declaration of war. Richard Nixon had his enemies list and bugging devices, and successfully conspired to run against the opposition candidate of his choice. Reagan's "can do" National Security Council staffer Oliver North bragged of his willingness to lie to Congress if he felt the end justified the means.

But to actually dissolve the legislature seems a political gambit about which American authoritarians can only fantasize. In Gregory LaCava's film *Gabriel over the White House* (1933), the president "suspends" a deadlocked U.S. Congress for the duration of the Great Depression. And not long thereafter, with respect to the judiciary, President Franklin Roosevelt *really did* at least try to pack the U.S. Supreme Court. But by the end of the twentieth century, if not by the 1930s themselves, deployment within domestic politics of such extraordinary measures as outright redesign or elimination of a branch of government had apparently been declared off limits by the ground rules of the liberal capitalist state.

For this very reason, an historical shift in "the rules of the game," the third component of constitutional democracy has become absolutely crucial to the maintenance of a free society: *public government* is critical if secrecy is to be prevented from providing the cloak behind which those who seek democracy's subversion can achieve their main aims *without* actually having to risk construction of a police state or straightforward abolition of the legislature. Richard Nixon may have engineered the "Saturday night massacre"; George Bush may have secured the presidency in 1988 through "flagrant misrepresentations" of his part in Iran-Contra; but Nixon could not abolish the courts and Bush could not avoid an eventual confrontation with the record (and the electorate) in 1992, unless he chose (like Lyndon Johnson) not to run again. Where contemporary authoritarians have done their greatest damage to the democratic state is in secret, not in public where they realize they could actually lose. Not without reason did legislators once again, in the wake of the Clinton presidency, debate whether

legal limitations might still be placed upon the constitutional authority of the executive branch to grant pardons to individuals not yet prosecuted—pardons essentially insulating them from potential criminal liability and, at the same time, a president departing office from political accountability.

What brought down Nixon's regime was the bungled burglary of the Watergate complex. What Reagan and his co-conspirators did not count on was Nicaragua shooting down the Hasenfus plane. Even Rodney King's assailants ended up being convicted of felonies for one reason: someone had a video camera, ready and able to make public the secret brutality of the Los Angeles Police Department. Without the videotape, the beating would have been hard to prove. Secrecy is a final refuge for the totalitarian impulse within modern constitutional democracy.

Under the rubrics of *sottogoverno*, or subterranean government, and "cryptogovernment," Italian law professor Norberto Bobbio organized the critique of an entire spectrum of totalitarian political techniques. They range from influence by hidden centers of financial leverage and management of that part of the economy that "belongs to the sphere of invisible power, beyond the compass . . . of democratic and jurisdictional control," to "actions carried out by paramilitary political forces which operate behind the scenes in collaboration with the secret services." In spite of thousands of pages of law reviews and legal textbooks devoted to American constitutional law and its practice, as well as tens of thousands of law-school classroom hours devoted to separation-of-powers analysis and the endless parsing of Supreme Court cases, only during the last several decades has this public/secret dichotomy, what Bobbio describes in a European context as the new "opaqueness of power," been thrust onto the stage of national politics in such a way as to virtually compel its introduction within the canons of political theory. Thus only now can we acknowledge the systematic study of *subterranean government* as one of the most interesting developments in the history of jurisprudence in our time.

During the avant-garde sixties, "underground film" meant movies unlikely to be shown in regular theaters, even at midnight on a Friday or Saturday. "Underground" thus meant unorthodox, lacking com-

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mercial appeal, somehow on the periphery. Luis Buñuel's *Un Chien andalou* (1929) fit the bill, but so did Tod Browning's *Freaks* (1932) (banned for thirty years outside the United States, according to David Quinlan), as well as the daringly formalist cinema of artists like Andy Warhol. In 1969, Parker Tyler published his manifesto, *Underground Film: A Critical History*, in which underground film refers to experimental and avant-garde filmmaking arising from the same "steady pressure against the world of existing plastic forms," which had generated action painting and pop art, minimal art and color-field painting. "Underground filmmakers had always operated on the fringes of the American culture," reports motion-picture historian Douglas Gomery, "but in the 1950s and 1960s they worked with more intensity than ever before."

Lines separating underground from experimental or independent filmmaking have not always been clearly drawn. "Independence" may refer to a relation between financial backers of an individual film and the Hollywood studio system (or, today, the corporate giants that absorbed the major studios); or, for that matter, between a filmmaker and those same investors. It can imply a degree of autonomy in a film's distribution and exhibition or the distance between a film's content (or even form) and the reigning conventions of a particular film culture. "The independent producer of an iconoclastic film," argues Michael Parenti, "who might not be able to get studio financing, has to rely on personal funds and sympathetic individual investors. Sufficient backing may take years to procure, as was the case with John Sayles's *Matewan*, the story of class warfare in the West Virginia coal mines."

In fact *Matewan* (1987), as well as Martin Ritt's *The Molly Maguires* (1969)—which was made for Paramount, then a Gulf and Western corporation—represent literally *underground* film: moving pictures actually photographed beneath the earth's surface, employing a narrative derived from and designed to comment upon the social relations of the mineral-extraction industry and its history within the labor movement. This particular sort of underground film appears in many different national film traditions and reveals the extent to which film artists across cultures have found mining an inherently dramatic social context within which to situate stories about moral and political issues. From John Ford's *How Green Was My Valley* (1941) and Carol

Reed's *The Stars Look Down* (1939), to Adolfo Aristarain's *Time for Revenge* (1981), films organized around the mine itself and the lives of those who toil underground, and which focus on the conflicts generated by this often dangerous category of employment, have left their mark on film history.

The master discourse in this particular area of cultural expression, however, almost certainly was inscribed more than a century ago by the French novelist Emile Zola, in his famous *Germinal* (1885). Zola's avant-garde naturalism, a "stylistic exaltation of the material universe," in Sandy Petrey's phrase, proved an incomparable means of conveying the actual experience of being inside a mine. The opening pages of *Germinal*, where Zola initially situates his reader within the alternative universe of "Le Voreux," the world of the mine, of its workers and owners, of the system of industrial capitalism itself, are unforgettable. "While Etienne lingered by the fire warming his poor raw hands," writes Zola, "Le Voreux began to emerge as from a dream."

It is this dream, with all of its strangeness and violence and mystery, that French film director Claude Berri manages to capture from the very first frames of his own motion-picture adaptation, *Germinal* (1993). Reviewing Berri's film, Jill Forbes suggests that for "late-twentieth-century audiences, the mining environment of 'Germinal'—like the lost countryside of the Pagnol films—is highly exotic. It is not just that the pits have closed (earlier in France than in Britain), but the culture of solidarity they generated has all but disappeared too." Zola acknowledged that the central drama of *Germinal* was the struggle between capital and labor, and F. W. J. Hemmings, like Forbes in her observation on the contemporary fate of proletarian solidarity, remarks in his introduction to the Everyman Library edition of Zola's most famous work that the "struggle between capital and labour has lost its priority over the years, to be replaced by others more urgent."

We might paraphrase Forbes and Hemmings by suggesting that the character of social conflict within a world organized along capitalist lines has indeed been transformed during the past century, and that the very nature of societies governed by capital, especially in terms of new networks of flexible accumulation, has been reconstituted almost from the ground up. Certainly, during the period when Zola wrote, it was still possible to construct convincing archetypal representations—

images of the "capitalist system"—which were instantly recognizable and carried with them a profound capacity to express the essence of the social regime for which they provided a basic metaphor. The mines and furnaces, pits and smoking chimneys of capitalist industry provided, perhaps, an illustration without parallel. But the task of coherently representing the modern world-system of control in literature and film has been rendered infinitely more complex, precisely as a result of the social restructuring alluded to above.

Immanuel Wallerstein even suggests that "urbanization of the world and the increase in both education and communications" have made it much more difficult for ideology and security managers, the politicians and public-relations people employed by any society, to come up with new justifications for persistent and dramatic disparities in wealth and power. The old apologies, a century after they were initially skewered by novelists like Balzac, Hugo, and Zola, seem to work no more. "Such political awareness," concludes Wallerstein, "is reinforced by the delegitimization of any irrational sources of authority." Though this may be a somewhat optimistic view of "political awareness," the fact remains that the modern state has been compelled to resort more and more to secrecy, to the deployment of invisible power, in order to preserve its paramount position.

Advances in popular sovereignty, political suffrage, and legislative representativeness, accompanied by a deepening of demands for human rights and civil liberty, have all put considerable pressure on the state to accomplish traditional managerial (and repressive) tasks under infinitely more democratic and thus constraining conditions. The now commonplace globalization of poverty and violence, by themselves, would cause Zola's Etienne Lantier to find the "social problem" unrecognizable today. Thus the current predicament of the progressive writer or filmmaker: how to render the unrecognizable visible, to capture an image of a system whose control tower seems to be located nowhere, to render in fiction or film a system almost without transparent reference points, frequently organized out of the way, from below, by an invisible state.

A link was forged between the world of Zola and our own, between the capitalism of late-nineteenth-century France and that which emerged victorious by the end of the twentieth century, in a lecture delivered by University of Wisconsin social historian Harvey Gold-

berg at the time of the Watergate crisis. Discussing Zola's famous involvement in efforts to uncover the truth in the notorious Dreyfus Affair, Goldberg observes that "the Dreyfus Affair is a kind of trial run for Watergate, a kind of trial run for those 15 or 20 years of CIA covert operations, a trial run if you please for a whole schema of political assassination of foreign revolutionaries or uncomfortable political leaders at home." Then, with characteristic melodramatic flair, Goldberg drives home the political conclusion: "The point is that with the Dreyfus Affair you are into a very continuous exercise in *raison d'état*, in public lying, into what we now call cover-up. You are into a kind of conspiracy to protect the establishment from too much open and critical thinking, from too much public discussion, from too much intervention by the popular classes into the political process."

All the techniques of the clandestine state, the technology of state secrecy whose historical outline was sketched in the earlier political analysis grounding our critique of cinema, the foundation for an inquiry into the form and content of the underground film—all of that Goldberg sees as already implicit in the tentative machinations employed by the French government in its effort to disguise the savage injustice perpetrated by its conviction and imprisonment on Devil's Island of the army officer Alfred Dreyfus. But how can contemporary motion-picture directors find just the right image, a calculated visual means of conveying the experience of conspiracy and cover-up, designed to reveal the technical apparatus of government secrecy on which authoritarian rulers have come to depend? What would an underground film tracking the emerging system of subterranean government actually look like?

What we are seeking here, in short, is the cinematic expression of what Fredric Jameson calls "totality as conspiracy," in his book *Geopolitical Aesthetic: Cinema and Space in the World System*. "Archetypal journeys back beyond the surface appearance of things," suggests Jameson, "are also here dimly reawakened, from antiquity and Dante all the way to Goffman's storefront/backroom" and even to Marx's request that we follow the captains of industry "into the hidden abode of production, on whose threshold there hangs the notice 'No admittance except on business.'"

Jameson proposes the thriller genre as the perfect medium to perform tasks assigned to a contemporary version of underground film,

arguing that the “promise of a deeper inside view is the hermeneutic content of the conspiracy thriller in general,” and in fact nominates Sydney Pollack’s *Three Days of the Condor* (1975) as a prime candidate. The “representational confirmation” in *Condor*, asserts Jameson, “that telephone cables and lines and their interchanges follow us everywhere, doubling the streets and buildings of the visible social world with a secondary secret *underground* world, is a vivid, if paranoid, cognitive map.” As we shall see, it is the *legal* “conspiracy thriller” that delivers one of the most compelling versions (and visions) of contemporary underground cinema.

Sydney Pollack directed the first Grisham film, *The Firm* (1993); the second, released later the same year, was made by Alan Pakula. The book Pakula brought to the screen was virtually written for him to direct: *The Pelican Brief*. Even a cursory review of Pakula’s “conspiracy trilogy” (*The Parallax View*, *All the President’s Men*, *The Pelican Brief*) will demonstrate why a focus upon the spatial or architectural properties of his movies may qualify Alan Pakula as the contemporary underground filmmaker par excellence.

The Parallax View (1974)—at least until appearance of Oliver Stone’s controversial *JFK*—has been generally regarded as the most interesting of the Kennedy-assassination-inspired films. Warren Beatty plays the role of Joe Frady, a newspaper reporter who reluctantly comes to believe in the existence of a professional organization of assassins called the Parallax Corporation. This company is available to handle the kind of assignments that the modern corporate state occasionally requires and yet cannot publicly employ legitimate governmental entities to handle. The investigative journalist manages to infiltrate the organization in search of his headline, but realizes too late that he is in over his head and, in the end, is made a “patsy” for the film’s violent conclusion.

Formally, Pakula utilizes a “multiplicity of landscapes,” following in the footsteps of Hitchcock’s *Saboteur* (1942) and *North By Northwest* (1959), in order to geographically situate the conspiracy thriller within the quotidian discourse of the travel brochure and, in Jameson’s apt phrase, “the meanings of the space of daily life as such.” Other formal devices, however, cause Michael Ryan and Douglas Kellner to fault *Parallax* as political cinema: “The members of the corporation are depicted as faceless businessmen, the dark lighting and

extreme long shots of the concluding tribunal scene make the commission of inquiry into impersonal functionaries of corporate society. . . . [A]rchitectural space and scene construction operate to make Frady seem overwhelmed.”

That, one could rather easily reply, is the whole idea. Surely, between the Rolling Stones’ “Shout it out, who killed the Kennedys . . . well, after all, it was you and me,” and *JFK*’s rather concrete evocation of identifiable suspects, there is plenty of room for a film like Pakula’s, which asserts, however abstractly and metaphorically, that it is the system itself that constitutes (and thus alone can accurately represent) *the system*, with conspiracy seen (or, where successful from the system’s point of view, the Parallax view, *not* seen) as the totalizing moment of contemporary history.

Jameson describes *All the President’s Men* (1976), which we have already discussed in the context of realism and film, as “that muted new version of *The Parallax View* which is Pakula’s Watergate film.” The formal bridge between the two films is an architectural one: the “wings and causeways of the sports arena in which the second senator has just been shot,” and from whose inadequately lit, concrete and steel suspended ramps Joe Frady emerges, only to be himself eliminated, open directly into the “cavernous parking garages” where Bob Woodward (Robert Redford) will surreptitiously meet an invaluable (still unnamed) source from deep inside the Nixon-Haldeman conspiracy. Like Jameson in his identification of a “light-dark axis” around which *All the President’s Men* is organized, Ryan and Kellner observe a symbolic opposition between the film’s shadowy underground parking garage and the fluorescent lighting of the *Washington Post* newsroom.

One of the most satisfying moments in Pakula’s Watergate film, in the view of Jameson, occurs just after Bob Woodward meets with his underground (and unidentified) source for one of the last times. “Woodward breathlessly turns to confront his pursuers,” says Jameson, “only to find the lights of the empty streets of a sleeping Washington staring him in the face.” Whether or not one prefers, like Jameson, to describe this climax in terms of the “empty Mallarmean category of an encounter with the absolute Other,” it effectively consummates the film’s formal project of locating purely cinematic means for portraying the invisibility of government by conspiracy—what

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Norberto Bobbio, as we have seen, described as the opaqueness of power. We may also utilize this scene as a bridge into our final architectural site, so to speak, the visual structure around which *The Pelican Brief* (1993), the final panel of Pakula's conspiracy triptych, is built.

Woodward's source, the character played so sardonically by Hal Holbrook, has just finished running through a list of a dozen crimes committed by the Republicans trying to get Richard Nixon reelected, when Woodward, momentarily stunned, asks, "Do the FBI and Justice know this?" Pakula cuts from a close-up of Redford to one of Holbrook, smoking a cigarette, and before the source can answer Woodward's question, as if on cue, there is suddenly the sound of a car nearby with the ignition switch turning, roar of the engine, then tires squealing as the car bursts into gear and out of the underground parking facility at high speed. There follows a shot of Redford's head spinning to see what's happening, then a shot of Holbrook, then of the car itself, back to Redford, and finally a terrific, almost abstract-art shot of a bare concrete wall and single light fixture (cf., Mondrian and Rothko): Holbrook has disappeared. The sequence Jameson describes, out on the wet streets after Woodward laboriously climbs to the main level, follows this scene immediately but does not come close either in terms of sheer terror or ultimate meaning. Back in the garage, the underground itself, is where it is at.

Besides turning it into a film, the single most important contribution Pakula made to Grisham's novel *The Pelican Brief* was the addition of a harrowing sequence, near the end, in the bank's parking garage. Reporter Gray Grantham and law-student extraordinaire Darby Shaw are nearly victims of a deadly car bomb only moments after heroically tracking down and getting their hands on precisely the political dynamite they were after. Fortunately Darby picks up the cue, either from earlier in this film, when her constitutional-law professor was murdered, or from the previous Pakula film about Watergate, which dealt in a sense with the same conspiracy. It's what turned Woodward's head, too: the sound of a car key in the ignition. The vicious dog in *Pelican*, barking at such an inopportune moment for the bad guys, is just extra, perhaps the evil twin of the president's own dog: biting the hand that feeds you. Woodward said, after all, that he too was a Republican.

“The existence of this lower level,” says Rosalind Williams in her cross-disciplinary *Notes on the Underground*, “is revealed gradually, through mysterious occurrences and accidents.” Williams’s remarkable book assays the literary and political force field wherein secrecy and the underground, conspiracy and the topography of power, intersect. From Zola’s *Germinal* and the mines and furnaces of industrial capitalism’s nineteenth-century landscape, through the surreal modern concrete and glass cityscape of John Boorman’s *Point Blank* (1967) or Errol Morris’s *The Thin Blue Line* (1988) and the sinister parking structures of John Frankenheimer’s *Seven Days in May* (1964) or Alan Pakula’s “conspiracy trilogy,” the architectural rendering of political space has remained a crucial focus of social critique in the arts. One need only recall the “mysterious occurrences and accidents,” the gradual process by which young physician Hugh Grant in Michael Apted’s *Extreme Measures* (1996), is drawn from his promising medical practice into the lower depths, through which flow “dark conspiratorial waters,” as *TimeOut*’s Trevor Johnston says, in “parts of the city he didn’t even know existed.” From Edgar Allan Poe and H. G. Wells through Pakula and Apted, the subversive attraction of the underground metaphor has been hard to resist.

In perhaps the most exhaustive treatment of the subject imaginable, *Conspiracy Theories: Secrecy and Power in American Culture*, Mark Fenster acknowledges that “[t]here are elements of secret treachery in the contemporary political and economic order.” But in his chapter dealing specifically with conspiracy theory as narrative, “*JFK*, *The X-Files*, and *Beyond*,” Fenster compellingly identifies fundamental contradictions within conspiracy theory as a narrative form. “Conspiracy theory represents the desire for,” says Fenster, “and the possibility of, a knowable political order; yet, in its disturbing revelations and uncertain resolution it also implicitly recognizes the difficulty of achieving transparent, equitable power relations in a capitalist democracy.” In other words, conspiracy theory as narrative or cinematic genre tends to tie itself in knots. “Despite its professed intentions of uncovering the plot,” concludes Fenster, “the classical conspiracy narrative is inherently ambivalent about uncovering ‘the truth’ of power and the possibilities of a different future.” Would not any conceivable political resolution simply set the stage for another round of crime and cover-up?

Actual Innocence

Motion-picture audiences themselves may already have begun to resist an increasingly predictable conspiracy narrative. The basic pattern has now been repeated in fiction, film, television, video games, and almost every form of popular entertainment. Within just a year of his comments on *Extreme Measures*, Trevor Johnston could describe Richard Donner's appropriately named *Conspiracy Theory* (1999)—in spite of having Julia Roberts and Mel Gibson in the cast—as plagued by “increasingly desperate chases” designed simply to mask a “lack of confidence in a narrative with too few suspects and the same old CIA bad guys behind it.”

So the crime-film and criminal-law genres may, once again, be compelled to revise themselves and reorganize the structural elements of the crime narrative sufficiently to pour some new wine into old wineskins. If systems theory (crime as an autonomous and self-contained business operation) and underground conspiracy (crime as contemporary political metaphor) have, to a point, provided useful patterns for a third model of criminal-justice film—beyond crime-control and due-process cinema—perhaps other alternatives are already visible on the horizon.

The classic due-process movie, narrating a gripping story of how an innocent defendant is narrowly saved from prison or the gallows by a gritty reporter or gutsy lawyer, represents a cinematic vehicle badly in need of having its battery recharged. “Of the traditional crime genre films,” Nicole Rafter points out in *Shots in the Mirror: Crime Films and Society*, “courtroom dramas have the dimmest prospect for revival.” They have, in her view, devolved “into witless reliance on depleted traditions, so much so that even the advent of women lawyers has been unable to resuscitate them.” What, if anything, could? They just might get a much needed shot in the arm from new perceptions of social reality. Rafter does acknowledge, in her insightful study, that “new social issues” will always constitute an important source of material for the revival of crime films and, however ironic it may seem, it is no longer possible to ignore “actual innocence” as a new social issue in American life.

We may all have become accustomed to the kind of argument advanced for years by Alan Dershowitz—that most criminal defen-

dants are guilty and that defending the guilty is not a less important job than defending the innocent, it is just harder. But something new has indeed been discovered under the sun of criminal justice: innocent people get convicted in American courts every day. The unbelievable has become scientifically irrefutable, as Barry Scheck, Peter Neufeld, and Jim Dwyer make transparent in their best-selling exposé, *Actual Innocence*. What made all the difference, as documented in A&E's *The Hunt: DNA* (2001), is the dramatic reduction in the cost of state-of-the-art DNA technology and its increasingly routine use both at trial and as a device for checking results previously obtained under conventional procedures within the criminal-justice system.

The DNA revolution in criminal-justice technology is not, of course, the only possible "new social issue" which could both recast and reinvigorate the crime film genre. Jim Dwyer, co-author of *Actual Innocence*, co-wrote another book, in 1994, that, at least in retrospect, points toward a different way in which social reality has helped criminal-justice cinema achieve a new lease on life. That book, *Two Seconds Under the World: Terror Comes to America*, dealt with the first World Trade Center bombing; and the culmination of the events which it describes, on September 11, 2001, has not only paved the way for a generic reconstitution of criminal-law films but, in fact, a need to review the existing subgenre of motion pictures about terrorism.

Watching Edward Zwick's *The Siege* (1998), for example, after witnessing what initially appeared to be a Roger Corman or Tim Burton-style science fiction movie with airliners crashing into the World Trade Center, provides an eerie experience indeed. Visual truth can clearly be stranger than matinee-movie fiction. "Which poses the larger threat to democratic institutions," asked Richard Schickel, in his 1998 *Time* review of *The Siege*, "terrorism or the hysterical response to it?" In *The Siege*, wrote *USA Today* critic Mike Clark, "[h]ate crimes go up, retail sales go down, [and] Wall Street closes" after terrorists "kill and maim scores of Manhattan society's finest." Audiences that craved motion-picture realism and believable action, and rewarded them at the box office, had not necessarily wished to have their future foretold on film, to see the silver screen turned into a crystal ball.

"Crime movies of the early twenty-first century," predicted Nicole Rafter, will "fill our mental reservoirs with a vast supply of imagery

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for thinking about crime, criminals, and the role of criminal justice institutions in society.” Her prediction is already coming true, underscoring once again the significance of popular culture as a record of our time.