

# HISTORICAL RECONSTRUCTION IN POPULAR LEGAL AND POLITICAL CULTURE

Anthony Chase\*

Journalists and university teachers—even some law school professors—have recently turned to the popular culture of American law and politics for the purpose of better understanding the complex nature of shared national attitudes toward law and the legal profession. “Something there is in the American psyche,” observes *New York Times* writer David Margolick, “that is fascinated with lawyers, and, not surprisingly, that fascination has frequently found its way onto film.”<sup>1</sup> This Essay utilizes a range of popular forms, including motion pictures, to explore popular attitudes toward law and politics. Particular focus is given to the way in which popular culture has employed historical reconstruction while addressing critical legal and political events and institutions.<sup>2</sup>

Legal historian Charles Warren adds to his description of the European settlers who founded Plymouth Bay Colony that not one among their ranks was an attorney.<sup>3</sup> That was 1620. Things would change. Even before the Puritans set sail from England to North America, playwright William Shakespeare was warning his audience against the law’s delay as well as the insolence of office.<sup>4</sup> To be sure, the theocratic society forged in New England had little tolerance for the authority of common law or the insolence of common

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\* Professor of Law, Nova Southeastern University, Shepard Broad Law Center. J.D., 1978, Wayne State University; LL.M., 1979, Harvard University School of Law.

<sup>1</sup> David Margolick, *The Cinematic Law Firm of Greedy, Vain & Immoral*, N.Y. TIMES, July 4, 1993, § 2, at 9.

<sup>2</sup> See Anthony Chase, *An Obscure Scandal of Consciousness*, 1 YALE J.L. & HUMAN. 105 (1988); Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527; Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281.

<sup>3</sup> CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 59 (1911).

<sup>4</sup> Shakespeare’s *Hamlet* was first performed in 1600. On “the law’s delay,” see WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET PRINCE OF DENMARK, act 3, sc. 1, in 1 ELIZABETHAN DRAMA 144 (Charles W. Eliot ed., 1938):

For who would bear the whips and scorns of time,  
The oppressor’s wrong, the proud man’s contumely,  
The pangs of dispriz’d love, the law’s delay,  
The insolence of office, and the spurns  
That patient merit of the unworthy takes,  
When he himself might his quietus make  
With a bare bodkin?

*Id.*

lawyers. At Massachusetts Bay Colony, magistrates were ordered to decide cases by the colony's own laws, not those of England, and where the law was unclear, the Law of God would suffice.<sup>5</sup> During this period, the church was the repository of law and, as Thurman Arnold would later observe, this situation prevailed until the church had declined in importance as a governing force.<sup>6</sup>

The religious state eventually gave way to secular rule which, in turn, took on all the trappings of a constitutional or legal state after the American Revolution. The rise of the American legal profession, while perhaps not meteoric in the sense of being allowed to chart a steadily rising curve, was at any rate relentless. There were important reservations entered by a variety of critics during the nineteenth century, as we shall see, but after the emergence of professional associations, ethical codes, law schools, a corporate bar, as well as effective monopolization of the provision of legal services by licensed attorneys, the American legal profession became one of the most extraordinary enclaves of essentially private power in the modern world. The influence of law and lawyers in contemporary American social life has done little to alter public perception that there is a disturbing inequity in access to justice, that delay remains an inescapable feature of reliance upon law, or that the technicalities of law and the specialization of legal practice make the system virtually impossible for most citizens to even understand, let alone master.

Legal sociologist Marc Galanter captures the current mood of unease when describing a *New Yorker* cartoon where a woman, apparently having been asked for her hand in marriage, responds to her suitor: "Interesting. Have your lawyer call my lawyer."<sup>7</sup> Galanter suggests that, standing behind this cartoon, one discovers concerns ranging from those about an increase in the sheer amount of law, uncontrolled litigation, and the crisis in legal liability and insurance rates, to anxiety about the "bureaucratization of the world" and the "juridification of social spheres."<sup>8</sup>

A great deal of this public attitude toward law and lawyers is, in

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<sup>5</sup> WARREN, *supra* note 3, at 63.

<sup>6</sup> THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 69 (1935); *see generally* MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1976); KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 9-48 (chs. 1 & 2) (1989).

<sup>7</sup> Marc Galanter, *Law Abounding: Legalization Around the North Atlantic*, 55 MOD. L. REV. 1, 1 (1992) (citing cartoon by Robert Mankoff in *THE NEW YORKER*, Oct. 21, 1985, at 49).

<sup>8</sup> *Id.* (footnotes omitted).

fact, justified by social reality. But in one fundamental sense, public perception of the American legal system is dead wrong. Appearances to the contrary notwithstanding, law is not out of control and the legal system does not lead a life of its own. Lawyers, however powerful, do not (as a profession) run the country. In order to locate the origins of this complex misapprehension, we must provide an initial focus on the nineteenth century critique of rising power in the common law and its practitioners, what critics perceived even then, on occasion, to represent a kind of legalization of almost everything.

### I.

In a letter published in 1819 but originally circulated during the first decade after the ratification of the United States Constitution, anti-federalist Benjamin Austin, writing under the pen name "Honestus," attacked the notion that the legal profession constituted a necessary order in a republic and, though confining his criticism to lawyers who deviated into malpractice, nevertheless provided a damning portrait of the legal system. Austin demanded to know by what authority the men of law should be permitted to complicate legal procedure inordinately, employ the art of delay, render intricate the most basic of legal propositions, and involve in great difficulty hapless individuals who merely sought advice and counsel. According to Austin, approximately ninety percent of legal disputes could be resolved by utilizing panels of impartial referees. Moreover, Austin proposed that trials in court, wherein lawyers were able to collect larger fees through procedural delays, could be improved by simply removing the lawyers. Judges and juries would decide the outcome on their own under this scheme. Finally, anticipating the novelist Charles Dickens, Austin inquired: "Is it not a disgrace to a free republic that the citizens should dread appealing to the laws of their country?"<sup>9</sup>

Most of Austin's charges are lodged against lawyers whose motives are clearly suspect. But one point he makes, which seems different in intent, goes to the question of knowledge, of adequate information. Austin questions why the public should be dependent upon lawyers who are not familiar with all commercial matters and concerns. This was a criticism to which the legal profession

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<sup>9</sup> Benjamin Austin, Jr., *Observations on the Pernicious Practice of the Law, as Published Occasionally in the Independent Chronicle in the Year 1836*, reprinted in *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 252, 253 (Stephen B. Presser & Jamil S. Zainaldin eds., 2d ed. 1989).

could respond, and change its behavior, even without sacrificing a certain respect for profits.

Austin was an opponent of federalism; Robert Rantoul wrote in 1836 as a radical or Jacksonian Democrat. In his *Oration at Scituate*, Rantoul echoed the suspicion of common law and a preference for codification of law expressed by the great continental philosopher, G.W.F. Hegel. Both Hegel and Rantoul asserted that common law, or judge-made law, was dangerous compared to statutory, or legislatively enacted, law.

In his *Philosophy of Right*, Hegel denounced the fact that the common law was no more than unwritten law, contained in judicial opinions, and thus transformed judges into legislators. Though the judges were, in theory, bound by precedent, Hegel argued that the prior law was itself the product of judges interpreting unwritten, or non-statutory, rules. Artifice to one side, the judges themselves became "repositories of the unwritten law," and were empowered to determine whether previous decisions coincided with the unwritten law or not. The United States Constitution, of course, is a written Constitution but, as we shall see shortly in a telling illustration, that Constitution's *interpretation* is no more limited in the hands of what Rantoul called a "thorough-bred lawyer"<sup>10</sup> than was the application of unwritten law by what Hegel described as practitioners of a "monstrous confusion."<sup>11</sup> What was at the bottom of Rantoul's and Hegel's hostility to common law and common lawyers? Two letters written by Thomas Jefferson in the last months of 1799 illuminate the answer that the new century would give to this shadowed aspect of the relationship between common lawyers and democratic revolution.

Writing to Edmund Randolph in August, 1799, Jefferson assailed the notion that the common law should be utilized in the new federal courts of the United States. The Bank Law, the Alien and Sedition Acts, and a host of other Federalist horrors were timid and of no consequence compared to "the audacious barefaced and sweeping pretention to a system of law for the United States without the adoption of their legislature, and so infinitely beyond their power to adopt."<sup>12</sup> Note the contrast not only between common law and legislation, between what lawyers wanted

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<sup>10</sup> Robert Rantoul, Jr., *Oration at Scituate, Delivered on the Fourth of July, 1836, reprinted in LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 255, 256 (Stephen B. Presser & Jamil S. Zainaldin eds., 2d ed. 1989).

<sup>11</sup> G.W.F. HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 135 (T.M. Knox trans., 1942).

<sup>12</sup> Jefferson's letters are excerpted in 1 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 197-98 (1908).

and what the legislature had the authority to do, but also between the plural and singular possessive pronoun; Jefferson referred to the United States in terms of *their* legislature. Two months later, Jefferson wrote to Charles Pinckney, providing what today might appear to be a scenario for an Oliver Stone film: "In short, it would seem that changes in the principles of our government are to be pushed, until they accomplish a monarchy peaceably, or force a resistance, which with the aid of an army may end in monarchy."<sup>13</sup> Jefferson, too, was through the looking glass. He could see a coup d'état coming and did not have far to seek for its authors.

It was precisely this that alarmed Rantoul, Hegel, and other opponents of the common law. "No man can tell what the Common Law is," argued Rantoul, "therefore it is not law: for a law is a rule of action; but a rule which is unknown can govern no man's conduct."<sup>14</sup> Because the common people, the citizenry, had no independent means of access to the common law, an antiquarian mystery, political reaction would find in the common law and its judicial interpreters tools of great precision as well as weapons with which to strike boldly against popular government. Legal scholar Mitchell Franklin, perhaps more than any other contemporary American writer, tried to preserve the cutting edge of this progressive critique of the purportedly undemocratic character of the common law.

Relying heavily upon a rigorously Hegelian jurisprudence, Franklin battled for abandonment of the common law tradition in American jurisprudence and its replacement by a continental system of codification, long after the choice seemed decisively made in favor of the common law, which had itself become "Americanized," and even Jefferson had conceded in his Presidential inaugural: "We are all Federalists, we are all Republicans."<sup>15</sup> Franklin illustrated his argument with invocation of the famous trial of William Penn in London in 1670.<sup>16</sup>

During the trial, Penn had asked where, exactly, the common law could be found. The court explained that years of legal decision and many cases, indeed, could not be readily summarized. Penn allegedly retorted: "Unless you show me, and the people, the

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<sup>13</sup> *Id.* at 198.

<sup>14</sup> Rantoul, *supra* note 10, at 255.

<sup>15</sup> LAW AND JURISPRUDENCE IN AMERICAN HISTORY 248 (Stephen B. Presser & Jamil S. Zainaldin eds., 2d ed. 1989) (quoting Thomas Jefferson).

<sup>16</sup> Mitchell Franklin, *Legal Method in the Philosophies of Hegel and Savigny*, 44 TUL. L. REV. 766, 789-90 n.48 (1970).

law you ground your indictment upon, I shall take it for granted, your proceedings are merely arbitrary"<sup>17</sup>—and, of course, for just that reason, entirely political. The court recorder responded: "You are an impertinent fellow, will you teach the court what law is? It is '*Lex non scripta*' that which many have studied 30 or 40 years to know, and would you have me to tell you in a moment?"<sup>18</sup>

In addition, Franklin also recalls Kafka's fable about the merchant who pleaded his case at the castle and was instructed by a guard to wait. At the eventual hour of his death, the man (still waiting) asked why he alone was thus detained. The guardian coolly stated: "This gate was made only for you."<sup>19</sup> Once again, we can only observe how remarkably contemporary these allegations against the system sound in our ears.

In conjunction with this tightly integrated ensemble of complaints about the law, Rantoul added a second tier of dissatisfaction, already implicit in Austin's disparagement of lawyer familiarity with commercial affairs. Rantoul believed that the arbitrariness and discretion built into common law adjudication threatened the authority of democratically accountable legislatures which, in his view, spoke with the voice of the public. But the common law also embodied values which "came down from the dark ages." Rantoul regarded the common law as static and unchanging, wedded to the deep past. The defects of the common law had "existed from time immemorial" and, for Rantoul, within the common law, "precedents are everything: the spirit of the age is nothing."<sup>20</sup>

One need not be a lawyer, however, to object at this point during Rantoul's unfolding analysis. Had not both Hegel and Rantoul argued that judges applied an unwritten law and thereby escaped the obligation of following precedent? As Rantoul put it, the "judge makes law, by extorting from precedents something which they do not contain."<sup>21</sup> If the law was whatever the judges said it was, why were common law judges any more locked into the past than any other sort of judges, or legislators, for that matter? The remnants of ancient legislation might well be of little practical use in Rantoul's world, as he proclaimed, but if the common law could embody whatever set of principles an elite order of lawyers and

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<sup>17</sup> *Id.* at 790 n.48.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 795.

<sup>20</sup> Rantoul, *supra* note 10, at 256.

<sup>21</sup> *Id.* at 255.

judges might impose, why should the law necessarily remain frozen in time, especially if the mandarins of the legal order wanted it changed? Rantoul concluded his address with the proposition that the only place where the common law system would make any sense would be in a society that was stationary.

In other words, Rantoul perceived stationary law for a world standing still, but a dynamic law for a world in motion, a changing world. But what if judges and lawyers used the very discretion that Rantoul and Hegel decried to adjust the law to meet social and economic change? Here we are able to perceive in outline the nagging contradiction in Rantoul's argument and, indeed, the incoherence that survives in the public's modern conception of law and lawyers as essentially conservative and stuck in the past.

## II.

Alexis de Tocqueville and Charles Dickens provide a fascinating pair of mid-nineteenth century legal observers whose popular, as well as profound, analyses of the common law preserved the very contradiction attributed above to Robert Rantoul's perspective. On the one hand, Tocqueville subscribes to an identical view of lawyers as elitists, and in the process, he reproduces rather than invents the characterization of lawyers as America's natural "aristocracy." What is different, however, in Tocqueville is his positive celebration of this separation of the legal profession from the people, now seen as something of a mob. The very distance from the people that bothered critics like Rantoul and Hegel became, for Tocqueville, the reason why lawyers could be trusted. In his most famous work, *Democracy in America*, first published in the 1830s, Tocqueville suggested that the sentiments and habits of aristocrats could be found in the characters of American attorneys.

According to Tocqueville, lawyers "participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people."<sup>22</sup> While he thus shared Hegel's notion of just where lawyers stood in the social hierarchy, Tocqueville's actual appreciation for that elevated ranking placed him at odds with the radically democratic Hegel—at any rate, with the Hegel whose work we have come to know through

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<sup>22</sup> Alexis de Tocqueville, *Democracy in America* (1840), reprinted in *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 258, 267 (Stephen B. Presser & Jamil S. Zainaldin eds., 2d ed. 1989).

the modern critique advanced by Lukács and Marcuse.<sup>23</sup>

On the other hand, Tocqueville also appears to share Rantoul's view that common lawyers are obstacles to social change, conservators of past social relations. American lawyers, he argues, are not only opposed to the revolutionary spirit but, further, such lawyers reveal aristocratic tastes and a "superstitious attachment to what is old."<sup>24</sup> They exhibit a "habitual procrastination"<sup>25</sup> and, because of their class position, have no incentive to support social change or innovation. As with Rantoul's argument, must we agree? Since when could one maintain one's class position in a business society, a commercial civilization as the United States was becoming, simply by doing nothing? Recall that, in the decade following Tocqueville's *Democracy in America*, Karl Marx and Frederick Engels published *The Communist Manifesto*, which provided an initial description of capitalism as a dynamic and revolutionary mode of social production. As Marx would later argue in *Capital*, the limit of capital is capital itself: If the system stops expanding, if it stands still, it will perish. Politics had become, in fact, a kind of battlefield where one who stood still and remained motionless would be the one who was shot. "Unless we ourselves take a hand now," states di Lampedusa's youthful Tancredi, "they'll foist a republic on us. If we want things to stay as they are, things will have to change. D'you understand?"<sup>26</sup> Tocqueville's later writing suggests that, perhaps, he came to understand what the Prince's nephew, Tancredi, was trying to explain.<sup>27</sup>

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<sup>23</sup> For Lukács's view of Hegel, see GEORG LUKÁCS, *THE YOUNG HEGEL: STUDIES IN THE RELATIONS BETWEEN DIALECTICS AND ECONOMICS* (Rodney Livingstone trans., 1976). For Marcuse's view of Hegel, see HERBERT MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* (2d ed. 1954).

On Marcuse's treatment of Hegel, see Franklin, *supra* note 16, at 766 ("In his considerations on Hegel, written in response to the presence in the world of Nazi power, Marcuse wrote in 1941 that Hegel, in contradiction to Nazi legal and social theory, was the theorist of the *Rechtsstaat*, that is, of 'the rule of law.'") On Lukács's treatment of Hegel, see MARTIN JAY, *MARXISM AND TOTALITY* 184 (1984):

In *The Young Hegel* of 1948, Lukács sought to counter the charge that Hegel was a proto-fascist idealist by de-emphasizing the religious dimension of his thought, stressing his continuity with the Enlightenment rather than the Romantics, and demonstrating his astute and realistic grasp of political economy. . . . Lukács' Hegel was a progressive critic of nascent bourgeois society who anticipated the young Marx in many crucial respects.

*Id.*

<sup>24</sup> Tocqueville, *supra* note 22, at 269.

<sup>25</sup> *Id.*

<sup>26</sup> GIUSEPPE DI LAMPEDUSA, *THE LEOPARD* 40 (Archibald Colquhoun trans., 1960).

<sup>27</sup> See KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (Samuel



The Revolution of 1848 seems to have had as much significance for Tocqueville as it had for his countrymen, Baudelaire and Flaubert. After what Harold Laski, in a somewhat obscure but interesting essay, describes as the grim days of 1848, Tocqueville appears to have come face to face with Tancredi's principle of unavoidable change, with what (in Hegel) became *the dialectic*, the notion that there is an inevitable tension between any form and what it is in the process of becoming. In spite of the defeats of 1848, and many subsequent historical failures and tragedies, it is still worth noting Tocqueville's observation expressed in his post-1848 *Recollections*:

Will socialism remain buried in the disdain with which the socialists of 1848 are so justly covered? I put the question without making any reply. I do not doubt that the laws concerning the constitution of our modern society will in the long run undergo modification; that they have already done so in many of their principal parts.<sup>28</sup>

Legal transformation was inevitable just as social change was unavoidable. Whatever the personal characteristics of its members, the legal profession had learned to innovate. American common law, as well as constitutional or fundamental law, had by this time been turned inside out. Simply to remain a natural aristocracy, lawyers would have to change with the times and see to it that the content of doctrinal law was likewise adjusted.

Yet Tocqueville's romantic attachment to the past, to the world that was being lost in Laslett's phrase<sup>29</sup>—to a time “before the revolution” in Bertolucci's film title<sup>30</sup>—and his pessimism about the future, ran deeper. Will the legal structure, he wondered, be destroyed and replaced by a new constitutional order? “I am tempted to believe,” Tocqueville wrote, “that what we call necessary institutions are often no more than institutions to which we have grown accustomed.”<sup>31</sup>

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Moore trans., Penguin Books 1967); 1-3 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* (Frederick Engels ed., 1912).

For the historical movement toward national unification that provides the background for di Lampedusa's narrative, see generally ERIC J. HOBBSBAWM, *THE AGE OF CAPITAL, 1848-75* (1975). For a discussion of the inherently dynamic quality of capitalist development, particularly under contemporary regimes of flexible accumulation, see generally DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989).

<sup>28</sup> Harold J. Laski, *Alexis de Tocqueville and Democracy*, in *THE SOCIAL & POLITICAL IDEAS OF SOME REPRESENTATIVE THINKERS OF THE VICTORIAN AGE* 100, 109 (F.J.C. Hearnshaw ed., 1950) (quoting Tocqueville).

<sup>29</sup> PETER LASLETT, *THE WORLD WE HAVE LOST: ENGLAND BEFORE THE INDUSTRIAL AGE* (3d ed., 1984).

<sup>30</sup> *BEFORE THE REVOLUTION* (Cineriz/Iride 1964).

<sup>31</sup> Laski, *supra* note 28, at 109 (quoting Tocqueville).

The field of possibilities in social and legal reconstruction was greater, he concluded, than "men living in their various societies are ready to imagine."<sup>32</sup> But what if such common people could imagine radical change? That is what Tocqueville, and a generation of classical liberals, most feared and, at times, even expected.

During the twentieth century, an important popularizer of national and constitutional images, Walt Disney, would argue that if you can dream it, you can make it come true. In a way, that is what Disney World is all about. But it was a somewhat more ambitious, or at least different, vision of the world that Karl Marx had in mind when he wrote, five years prior to those events of 1848 which so alarmed Tocqueville, that the "reform of consciousness consists *entirely* in making the world aware of its own consciousness . . . . It will then become plain that the world has long since dreamed of something of which it needs only to become conscious for it to possess it in reality."<sup>33</sup> Disney was fond of reminding his fans that it all started with a mouse. But for Marx, it was the dialectic of human emancipation, something built into history, that was behind it all. And it is the dialectical nature of legal development which has constituted the dynamic principle acting within the history of American law.

Edmund Burke saluted Lord Mansfield, made Chief Justice of the King's Bench in 1756, for his ability to conform "our jurisprudence to the growth of our commerce and of our empire."<sup>34</sup> Common law courts, as well as the United States Supreme Court, would perform the same function of conforming the common law to American commerce and empire. It would appear to be ignorance of this transformative principle at the heart of the common law process, sometimes actually referred to as the *genius* of the common law, that allowed Rantoul, as well as Tocqueville before 1848, to overestimate the rigidity (from Rantoul's perspective) or the stability (from Tocqueville's perspective) of the legal system. In the United States, the law demonstrated an ability to provide both a veneer of consistency and continuity as well as an instrumental commitment to social and economic change.<sup>35</sup>

In some of his fiction, Charles Dickens also reflected an inability

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<sup>32</sup> *Id.* (quoting Tocqueville).

<sup>33</sup> Karl Marx, *Letter to Ruge* (Sept., 1843) in KARL MARX: EARLY WRITINGS 209 (Rodney Livingstone trans., Penguin Books 1992).

<sup>34</sup> EDWARD J. MURPHY & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW 6 n.20 (1984) (citing HOLDSWORTH, SOME MAKERS OF THE ENGLISH LAW 161, 169 (1938) (quoting Edmund Burke)).

<sup>35</sup> See, e.g., MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

to see through the law's mystique and thus failed to reveal the law's double identity. The fog rising from the wretched courts of London and the mists surrounding the judicial process ultimately proved as impenetrable for Dickens, the social observer, as for his hapless and brutalized characters. Particularly in *Bleak House*, Dickens created a powerful and enduring portrait of the kind of injustice and delay that plague the legal system, but his contribution to the popular imagination crossed the line from fact into fantasy when his metaphors got the better of him and he began to endow the law with a life of its own. No such institution could be permitted to exist within the confines of nineteenth century industrial capitalism. That the law, as the case of *Jarndyce and Jarndyce* would prove, could be a citadel of exploitation was clear enough. But that the law could become autonomous, even as a self-contained nightmare, a dream from which no litigant could awake, was impossible.

"Many Americans," according to popular political commentator, George Will, "feel that lawyers are morally problematic. . . . Lawyer-bashing was a literary sport long before Dickens's '*Bleak House*.'"<sup>36</sup> Interestingly, Will (unlike some conservative, Republican politicians of his era) comes to the defense of those whom novelists and television producers may have chosen as a target. Dismissing the portrait of lawyers painted in *L.A. Law*, the popular dramatic television program, Will argues that the American legal system, especially its constitutional structure, "uses a physics of interests (separation of powers, rival institutions checking and balancing one another) to regulate social aggression. But Americans are and ought to be permanently uneasy about the question of limiting aggression on behalf of private interests."<sup>37</sup>

Thus, while Will admires the architectonic generated by the Miracle at Philadelphia, he deplores popular attacks on advocates of private interests, those to whom the secrets of the common law have been revealed. Like Tocqueville, who regarded American lawyers as "the most powerful, if not the only, counterpoise to the democratic element,"<sup>38</sup> Will defends the legal profession, a key element of the "physics of interest," and a reliable impediment to popular movements designed to place limits upon private aggression and the "pursuit of money." In addition to his invocation of the mechanical wizardry of the system of checks and balances, Will cites the adversary

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<sup>36</sup> George Will, *Are Lawyers Ethical?*, WASH. POST, Sept. 21, 1986, at C7.

<sup>37</sup> *Id.*

<sup>38</sup> Tocqueville, *supra* note 22, at 269.

process and "an elegant ethic of reasonableness."<sup>39</sup> The latter are, in turn, anchored in the foundation or welded to the platform of the entire legal machinery: "fidelity to precedent."<sup>40</sup>

In contrast to an elegant reasonableness, Dickens, of course, saw something very different at work in the apparatus of law, something more akin to the chains wrapped around the neck of a ghostly creature in another famous Dickens story. In *Bleak House*, it is a vision of "procedural eternity" and "majestic inscrutability" that characterize the law, in the view of Harvard psychiatrist Robert Coles.<sup>41</sup> "The fog of *Bleak House*," he argues, "after all, still obtains. The law still offers many of those caught in its exertions any number of frustrations, confusions, delays."<sup>42</sup> Perhaps, today, litigation may rarely extend for generations, as it does in *Jarndyce and Jarndyce*, yet Coles still believes it can lead to outrage, even violence and madness. Elegant reasonableness seems to discover, in such cases, its mirror opposite.

What Dickens tells us, asserts Coles, is that the one, overreaching purpose of the law "is to make business for itself."<sup>43</sup> At whatever cost to others, perplexing and crippling by turns, the law in Dickens has its own agenda, quite apart from the expectations of simple humanity or any other serious form of restraint. Oddly enough, this picture mirrors that of George Will other than merely as grotesque reversal. However highly the contemporary political moralist may value the pursuit of private gain and the protection lawyers may provide such an enterprise, the essence of Will's law is a "controlling ethic," especially the commitment to precedent. The law, for Will too, is self-contained and responds to an inner directive.

The law in *Bleak House*, from the view of literary critic Steven Connor, projects a system that draws individuals away from their moral center and into "mazes of delay and confusion."<sup>44</sup> The law courts, in *Bleak House*, adds J. Hillis Miller, are a "dance or round."<sup>45</sup> The legal decision "proceeds through interminable linguistic substitutions replacing one declaration by another and never getting closer to any end."<sup>46</sup> According to Will's critique, legal decisionmaking represents self-referential logic, while Coles, Connor, Miller, and Dickens would

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<sup>39</sup> Will, *supra* note 36, at C7.

<sup>40</sup> *Id.*

<sup>41</sup> Robert Coles, *The Keen Eye of Charles Dickens*, HARV. L. SCH. BULL., Summer-Fall 1984, at 30, 31-33.

<sup>42</sup> *Id.* at 33.

<sup>43</sup> *Id.* at 36.

<sup>44</sup> STEVEN CONNOR, CHARLES DICKENS 75 (1985).

<sup>45</sup> J. Hillis Miller, *Introduction*, in CHARLES DICKENS, *BLEAK HOUSE* 26 (Norman Page ed., Penguin Books, 1971).

<sup>46</sup> *Id.*

paint the same as being self-referential illogic. Projected as order or disorder, reason or chaos, bulwark of private liberty, or fortress of private greed, in all these scenarios it is something intrinsic to law, known only to lawyers and intelligible to them alone, which makes the system tick.

This vision is wrong in every significant particular. It is not precedent that decides legal cases. Nor is it true that the legal process fails to ever arrive at any end or goal. Most importantly, it is external, not internal, commands to which law ultimately responds and, in general, lawyers are often too close to the system, too much preoccupied with its quotidian reproduction, to be regarded as masters of its ultimate secrets, to fully comprehend its overall determination. We must turn to a different (if less familiar) school of legal observation to secure a realistic image of the legal process.

As to the question of the common law's alleged dependence upon an ancient tradition of *stare decisis*, of replication of precedent, contemporary corporations law professor Melvin A. Eisenberg, in a book devoted entirely to the technique of common law reasoning, dismisses hallowed assumptions: "[I]t would be a strange kind of interpretation that allowed the interpreter to reformulate or radically reconstruct the text." Yet, as Professor Eisenberg, argues:

that is just the power of a deciding court in dealing with a precedent . . . . [T]he role of the deciding court in determining what rule a precedent stands for is not so much to determine what the precedent was intended to stand for as to determine what it has or will come to stand for.<sup>47</sup>

Note that Eisenberg is not describing how an "activist" court functions but rather how *any* common law court functions. If Professor Eisenberg's observations are correct, so much for Robert Rantoul's remnants of the Dark Ages as well as for George Will's elegant ethic of restraint. To be sure, the proof of the pudding is in the eating: only the dense materials of legal history can demonstrate the accuracy of Eisenberg's insight.

Nevertheless, a brief illustration can be provided here, which will define Eisenberg's main point. In E.B. White's *Charlotte's Web*, Mr. Arable heads for the hoghouse with an ax. His daughter, Fern, is much distressed and demands to know what he is doing. Fern's mother tells her that some pigs were born the previous night, one of the pigs is a runt and won't amount to much, and he is about to be dispatched. Heroically, Fern runs after her father, tries to grab the ax away (in

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<sup>47</sup> MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 51-52 (1988).

Garth Williams's memorable illustration), and she appends something like a legal argument:

"But it's unfair," cried Fern. "The pig couldn't help being born small, could it? If I had been very small at birth, would you have killed *me*?"

Mr. Arable smiled. "Certainly not," he said looking down at his daughter with love. "But this is different. A little girl is one thing, a little runty pig is another."

"I see no difference," replied Fern, still hanging on to the ax. "This is the most terrible case of injustice I ever heard of."

A queer look came over John Arable's face. He seemed almost ready to cry himself.<sup>48</sup>

The phantom precedent in this case, as far as Fern is concerned, is that newborns sufficiently small and runty must be killed. Against such a rule, Fern offers a sense of moral outrage: it is not fair. Her father, on the other hand, reads the rule differently. Within the category of newborns, he believes that a distinction can be drawn between little girls and little pigs. Thus fidelity to the rule does not imply that little girls, like Fern, should also be disposed of at birth. What is a newborn? How small and runty do you have to be? Mr. Arable loves his daughter (thus distinguishing her from the pig) but Fern loves the pig, or will love it, thus putting the pig back in the category of savable newborns. Remarkably, Mr. Arable quickly changes his mind and the rest (the life of Wilbur the pig, etc.) is history.

It may be that the rule and its interpretation did not matter; Mr. Arable decided the way he did simply because his daughter asked him to change his mind. Often, legal rules are treated the same way. It may also be possible that Mr. Arable decided the way he did because he adopted his daughter's interpretation of the rule, but the precedent then became as frightening to him as to Fern. Or it might just be that, confronted by his daughter with the ambiguity of the rule on which he had sought to rely, he realized his interpretation of precedent lacked sufficient authority to dispose of his daughter's charge of unfairness. Without an unambiguous precedent, he could not justify limitation of the rule's application to runty, little pigs.

A page or so after this exchange, Mr. Arable describes the pig in his daughter's arms as "[s]aved from an untimely death. And may the good Lord forgive me for this foolishness."<sup>49</sup> Leaving to one side consideration of the rule governing "timely deaths," was Mr. Arable asking to be forgiven for sparing the pig or for almost killing it?

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<sup>48</sup> E.B. WHITE, *CHARLOTTE'S WEB* 3 (1952).

<sup>49</sup> *Id.* at 4.

All texts contain a potential for ambiguity, whether the texts are written for children or for lawyers and judges. We may hazard the opinion that Eisenberg would regard it as foolishness to claim that a certain rule, a demonstrable and binding precedent, decided Wilbur's fate. Eisenberg concludes that if the common law, "consisted only of those legal rules that are completely certain, there would be virtually no content to the common law."<sup>50</sup>

Misunderstanding the limited ability of a system based upon precedent to achieve certainty (a limit imposed by the flexible nature of rule interpretation), George Will is far too solemn about law and constitution, the machine that would supposedly go by itself. In another E.B. White story, *Stuart Little*, a mouse asks a schoolroom full of children to suggest some good laws for the world. Young Albert Fernstrom suggests a rule prohibiting the eating of mushrooms because mushrooms might be dangerous. Stuart Little, the mouse, rejects this proposal on the ground that it merely nominates some friendly advice and he draws a distinction between the latter and a real law. "Law is much more solemn than advice," says Stuart.<sup>51</sup> "Law is extremely solemn."<sup>52</sup> George Will takes this distinction seriously.

In Ivan Reitman's film *Ghostbusters*, actress Sigourney Weaver's body is temporarily occupied by demonic spirits. She throws the unsuspecting Bill Murray down on a bed in her apartment and, becoming concerned, Murray warns her, "I make it a rule never to get involved with possessed people."<sup>53</sup> She then kisses him passionately on the mouth. "Actually," he says, "it's more of a guideline than a rule."<sup>54</sup> Laws, rules, guidelines, even friendly advice, all have one feature in common: they are subject to interpretation. However elaborate or detailed a rule may be, its meaning cannot be fixed in time, once and for all.

Writing about *Bleak House*, historian Peter Hoffer suggests that the "greatest visual depiction of the civil side of the law comes from Charles Dickens's pen."<sup>55</sup> That Dickens conveys an overpowering sense of dread and hopelessness among chancery's litigants cannot be denied. But with its implication of absolute legal intractability, should we regard this image as true? Circumstance, observes Igor Webb, is itself darkly presented in Dickens's work. It is "inherently destructive" and, in *Hard Times* (which Dickens wrote immediately after *Bleak*

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<sup>50</sup> EISENBERG, *supra* note 47, at 157.

<sup>51</sup> E.B. WHITE, *STUART LITTLE* 93 (1945).

<sup>52</sup> *Id.*

<sup>53</sup> *GHOSTBUSTERS* (Columbia/Delphi 1984).

<sup>54</sup> *Id.*

<sup>55</sup> PETER C. HOFFER, *LAW AND PEOPLE IN COLONIAL AMERICA* 136 (1992).

House), "there is not the slightest possibility that one could, by one's own effort, make one's life."<sup>56</sup> Was this necessarily true of all those who sought refuge in the common law?

Frederick Engels, writing in the 1880s, argued that such a notion of law's autonomy from other social institutions (in Dickens's novels, law's uniformly perverse and immobilizing aspect) could not withstand close scrutiny. Masters of the nineteenth century capitalist social order were hardly taken prisoner by the legal system, trapped in the law courts like London's poor, or made to be the servants of arrogant lawyers. Indeed in America, by the end of the century, the legal profession worried publicly that lawyers themselves had become servants of large corporations. However persuasive the "legal world view" might become, it did not follow that lawyers were running the show. Engels made this very point, after painting with a broad brush the history of modern capitalist society:

The religious banner was raised for the last time in England in the seventeenth century, and scarcely fifty years later the new world view that was to become the classical one of the bourgeoisie emerged undisguised in France: *the legal world view*.

It was a secularization of the theological world view. Dogma, divine law, was supplanted by human law, the Church by the State. The economic and social relations, which people previously believed to have been created by the Church and its dogma—because sanctioned by the Church—were now seen as being founded on the law and created by the State. Because the exchange of commodities on the level of society and in its fully developed form . . . requires universally valid regulations, . . . people imagined that these legal norms did not arise from the economic facts of life but from their formal stipulation by the State.<sup>57</sup>

The economic facts of life were not only the source of the transition from a theological to a legal world view, but such economic facts also became the foundation of the legal system itself. It was neither to precedent (or a system of checks and balances), nor to Dickens's view of a legal order that "replaced realities by signs, substances by

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<sup>56</sup> IGOR WEBB, FROM CUSTOM TO CAPITAL: THE ENGLISH NOVEL AND THE INDUSTRIAL REVOLUTION 95 (1981).

<sup>57</sup> Frederick Engels, *Lawyers' Socialism*, in 26 KARL MARX AND FREDERICK ENGELS, COLLECTED WORKS 598 (1990). Engels became ill prior to completing *Lawyers' Socialism* and he required the assistance of Karl Kautsky, editor of *Neue Zeit*, in which the essay was published in 1887. For an interesting commentary on Engels and Kautsky's legal position, see Peter Schöttler, *Friedrich Engels and Karl Kautsky as Critics of "Legal Socialism"*, 14 INT'L J. SOC. L. 1 (1986).



shadows,"<sup>58</sup> to which Engels guided his readers' attention. In his critique of Ludwig Feuerbach, Engels railed against the inversion of legal superstructure and economic infrastructure and claims that it is "among professional politicians, theorists of public law and jurists of private law that the connection with economic facts gets well and truly lost."<sup>59</sup> Legal form, in the hands of Rantoul's thoroughbred lawyers, is "made everything and the economic content nothing."<sup>60</sup>

Replying to Anton Menger's view of law, Engels attacked the notion that law could properly be understood as a self-contained body of ideas, an autonomous science in its own right, and he declared political economy itself to be more of a science than legal philosophy, because the former was "concerned with facts and not with mere ideas, like the latter."<sup>61</sup> Further, the social theory inseparable from Karl Marx's view of law, "and this is what our lawyer finds hardest to swallow—is not simply economic research. It is essentially historical."<sup>62</sup> Marx and Engels brought to their descriptive enterprise an adequate emphasis upon the degree to which law in any society cannot be understood if artificially separated from its economic and historical context.<sup>63</sup>

### III.

Two intriguing events during the 1880s, the same decade during which Engels launched his assault on opponents of a political economy of law, deserve attention at this point. One of these events is drawn from the late-nineteenth century world of popular culture, the other from that of law. Both have had an enduring impact and each helps to shape our inquiry into the relation between law and popular culture.

Leland Stanford was a nineteenth century railroad magnate who helped to give meaning to the appellation "robber baron." Eric J. Hobsbawm indicates that Stanford, along with other California entrepreneurs (like Huntington, Crocker, and Hopkins), men who represented the highest echelons of big money and power, managed to charge without embarrassment several times the real

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<sup>58</sup> Miller, *supra* note 45, at 27.

<sup>59</sup> Engels, *supra* note 57, at 600 n.\* (citation omitted).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 601.

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

<sup>63</sup> See, e.g., MARX AND ENGELS ON LAW (Maureen Cain & Alan Hunt eds., 1979); Mitchell Franklin, *Dialectical Contradictions in Law*, in DIALECTICAL CONTRADICTIONS: CONTEMPORARY MARXIST DISCUSSIONS 149 (Erwin Marquit et al. eds., 1982).

expense of building Pacific coast railroad systems.<sup>64</sup> But Stanford was not only interested in making money. Actively involved in politics, Stanford served as the Governor of California, represented that state in the United States Senate, and earlier lobbied President Lincoln on behalf of Stephen J. Field's nomination to the Supreme Court. He was also, of course, a benefactor of higher education and engaged in the funding of elite, private institutions. Perhaps not as well known, Stanford was also a horse breeder, not an unlikely avocation for a wealthy Westerner.

Stanford believed that devices used by trainers to improve the performance of his horses were inadequate and he sponsored Eadweard Muybridge in a series of experiments designed to document photographically the actual process whereby a horse runs. Often cited as one of the foundation moments in the genesis of motion picture technology, Muybridge's experiments became famous. In his history of the documentary film, Erik Barnouw reports that by 1880, Muybridge "had learned to project sequences of his photos with an adaptation of the magic lantern, and thus to present a galloping horse on a screen."<sup>65</sup> Although, as Bordwell and Thompson point out, the kind of glass plate film used by Muybridge was impractical for the future development of genuinely moving pictures,<sup>66</sup> Barnouw credits Muybridge with having "foreshadowed a crucial aspect of the documentary film: its ability to open our eyes to worlds available to us but, for one reason or another, not perceived."<sup>67</sup>

Barnouw here raises a quite complex issue: What is the relationship between what we perceive with, and without, the aid of the documentary film camera? Barnouw believes the motion picture can help an audience see a truth that it would otherwise miss. Others have argued that film has the capacity precisely to distort or destroy the truth.

The juxtaposition of image and reality has been a source of controversy throughout the development of motion picture aesthetics, from debates surrounding the initial exhibition of D.W.

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<sup>64</sup> See HOBBSAWM, *supra* note 27, at 145.

<sup>65</sup> ERIK BARNOUW, *DOCUMENTARY: A HISTORY OF THE NON-FICTION FILM* 3 (1974). A. R. Fulton claims that Stanford initially employed Muybridge for the purpose of helping Stanford win a \$25,000 wager that all four hooves left the ground at the same time when a horse ran at full speed. A. R. Fulton, *The Machine*, in *THE AMERICAN FILM INDUSTRY* 30 (Tino Balio ed., rev. ed. 1976).

<sup>66</sup> DAVID BORDWELL & KRISTIN THOMPSON, *FILM ART: AN INTRODUCTION* 346 (2d ed., 1986); see also DOUGLAS GOMERY, *MOVIE HISTORY: A SURVEY* 5-6 (1991).

<sup>67</sup> BARNOUW, *supra* note 65, at 3.

Griffith's silent film, *The Birth of a Nation*, in 1915, to contemporary arguments about the politics of cinema. Christopher Williams asserts that film has played a special role in the debate over art's relationship to the real world for several reasons. First, movies were invented well into the modern industrial age but right at the beginning of the aesthetic consolidation of a notion of "modernism" and, second, film shares with photography a kind of naturalistic reproduction of reality, or at least the surface of reality. Third, while film shares with photography this capacity to persuade audiences and viewers that an almost scientific accuracy in visual depiction has been achieved, movies are also a hybrid art, combining elements of photography, painting, and the novel, in close conjunction with a parallel medium, television. Fourth, film is both a form of mass entertainment and an important structure within the communications industry.<sup>68</sup>

Bill Nichols, emphasizing the ideological power of the film medium, suggests that movies uniquely place their viewers in a position that constitutes "a way of seeing invested with meanings that naturalize themselves as timeless, objective, obvious. What remains hidden is the process of representation itself, the investment of meanings as a material social process."<sup>69</sup> Thus film, even more than still photography, has the capacity to inculcate ideology. Film delivers a message, or propagates a view of the world, in a particularly invisible way. Thus ideology, via the consumption of motion picture images, "appears to produce not itself, but the world. It proposes obviousness, a sense of 'the way things are,' within which our sense of place and self emerges as an equally self-evident proposition."<sup>70</sup>

While acknowledging that much of Hollywood film is ideological in the sense that Nichols argues, where a position or point of view is imposed on an audience through deployment of formal conventions, Ryan and Kellner nevertheless believe that too much contemporary film theory turns on abstract, formal categories of analysis that ignore the concrete historical moment within which

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<sup>68</sup> See generally Christopher Williams, *Introduction*, in *REALISM AND THE CINEMA* 1, 2-3 (Christopher Williams ed., 1980); see also TERRY LOVELL, *PICTURES OF REALITY: AESTHETICS, POLITICS, PLEASURE* (1980); Paul Willemen, *On Realism in the Cinema*, in *SCREEN READER 1: CINEMA/IDEOLOGY/POLITICS* 47 (1977); ROBERT LAPSLEY & MICHAEL WESTLAKE, *FILM THEORY: AN INTRODUCTION* 156-80 (1988); IAN JEFFREY, *PHOTOGRAPHY: A CONCISE HISTORY* 10-27 (1981).

<sup>69</sup> BILL NICHOLS, *IDEOLOGY AND THE IMAGE: SOCIAL REPRESENTATION IN THE CINEMA AND OTHER MEDIA* 2 (1981).

<sup>70</sup> *Id.*

films take on meaning and the diverse rhetorical strategies used in conveying meaning. Rejecting the monolithic notion of Hollywood film production embraced by many structuralist theoreticians, Ryan and Kellner offer a roadmap to the fissures within Hollywood's political landscape, a terrain marked by indications of contradiction as well as signposts of convention and conformity.<sup>71</sup>

In attempting to capture the "reality" of a horse in motion, through utilization of glass plate film technology, Leland Stanford's photographic expert tossed an initial stick of dynamite into American popular culture and what would become the battle among theories of interpretation in film aesthetics and sociology. What, after all, is the essential relationship between film and that which it seeks to interpret?

Three years after Muybridge stretched lengths of camera-attached thread across a race track, intending to provide a photographic interpretation of the galloping horse, the United States Supreme Court stretched its intellectual faculties in order to provide an interpretation of the Fourteenth Amendment to the United States Constitution, as it applied to the operation of Leland Stanford's railroads. While *San Mateo County v. Southern Pacific Railroad Co.*<sup>72</sup> was pending before the Court, Stanford hosted a dinner at Chamberlin's restaurant in Washington, D.C., to which he invited the top railroad attorneys. Among the guests was Roscoe Conkling, who had just argued to the Supreme Court that one of the purposes of the Fourteenth Amendment was to protect corporations, like Stanford's Southern Pacific Railroad, from governmental regulation. It is not surprising that Conkling would attend such a gala banquet thrown by his client. What is extraordinary, however, is that the dinner was attended by none other than Supreme Court Justice Stephen J. Field.

Justice Field's brother, David Dudley Field, who had corrupted judges while representing crooks like Jim Fiske and Jay Gould,<sup>73</sup> had played a critical role, two decades before, in Lincoln's nomination as the Republican Party's candidate for the Presidency. As Governor of California, it was Leland Stanford who had supported Stephen Field for the Supreme Court. So it came as no surprise when Lincoln named Stephen Field to the nation's highest bench.

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<sup>71</sup> MICHAEL RYAN & DOUGLAS KELLNER, *CAMERA POLITICA: THE POLITICS AND IDEOLOGY OF CONTEMPORARY FILM* 1-16 (1988).

<sup>72</sup> 116 U.S. 138 (1885).

<sup>73</sup> CARL B. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 172-73, 257 (1930); see also Helen K. Hoy, *David Dudley Field*, in 5 GREAT AMERICAN LAWYERS 125, 135-37 (William D. Lewis ed., 1908).

And it was Stephen Field, alone among the justices of the Supreme Court, who showed up at Stanford's dinner party for the big guns of the railroad corporation bar. The *San Francisco Chronicle* even charged that no other justices had been invited because it was taken for granted they would have felt ethically obliged not to attend.

The companion to *San Mateo, Santa Clara County v. Southern Pacific Railroad Co.*,<sup>74</sup> which also involved the question of whether corporations were protected as "persons" within the meaning of the Fourteenth Amendment, was chosen by the Supreme Court as the better vehicle for its decision. Ironically, although the Court *did* interpret the Fourteenth Amendment as including corporations within the meaning of the word "persons," it did not explain the ruling. Nowak and Rotunda indicate that the Court decided the issue "without discussion."<sup>75</sup> Robert McCloskey states that in *Santa Clara* the Court "conceded, rather offhandedly, that corporations were 'persons' within the meaning of the Amendment," and that concession, within a decade, was "seen to be of epic importance and of incalculable value to the business community."<sup>76</sup> Current Supreme Court Chief Justice William Rehnquist admits that *Santa Clara* decided the key issue "with neither argument nor discussion."<sup>77</sup> Given the impact of *Santa Clara*, observes Harvard legal historian Morton Horwitz, the opinion in the case appears to be "disquietingly brief—just one short paragraph—and totally without reasons or precedent."<sup>78</sup> No effort was made to square the decision pertaining to corporate personality with the "original intent" of the Constitution or of the framers of the Fourteenth Amendment itself. George Will's elegant ethic of reasonableness and precedent was nowhere to be found.

Nor should we regard *Santa Clara* as a case of merely antiquarian interest. It has been the law of the land for more than a century. Since the *Lochner* decision in 1905 and the Progressive response to a laissez faire Supreme Court, *Santa Clara* has been regarded as a symbol the Supreme Court's subordination of constitutional law to the exigencies of big business. The relationship be-

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<sup>74</sup> 118 U.S. 394 (1886).

<sup>75</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 361 (4th ed. 1991).

<sup>76</sup> ROBERT MCCLOSKEY, *THE AMERICAN SUPREME COURT* 132 (1960).

<sup>77</sup> *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting).

<sup>78</sup> Morton Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 173 (1985/86).

tween money and politics in the United States remains one of the most widely discussed public issues and has provoked fierce political controversy in recent years.

Reflecting the issue's durability, the Supreme Court, in a 1978 decision, ruled that the First Amendment, applied to the states via the Fourteenth Amendment, guaranteed the old adage that "money talks." The *First National Bank of Boston v. Bellotti* decision, which involved a bank's attempt to spend money for the purpose of affecting the outcome of a graduated personal income tax referendum, "spoke as if it were simply axiomatic that the *Santa Clara* case settled the view that the free speech doctrine had been extended to corporations."<sup>79</sup> In other words, continues Morton Horwitz, cases like *Bellotti* that recognize "a constitutional right of corporations to spend money to influence elections, *have* contributed enormously to the political and economic power of big business."<sup>80</sup> However little *Santa Clara* may be justified by precedent or legislative history, the Supreme Court in *Bellotti* merely stated that "[i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."<sup>81</sup>

So *Santa Clara* counts. To the Supreme Court in *Bellotti*, as to the *Santa Clara* Court almost a hundred years earlier, the protection of corporations under the Constitution was a self-evident proposition. The Court invested the text of the Fourteenth Amendment with meaning that naturalized itself as timeless, objective, and obvious.

The alert reader will have noticed that, in the last paragraph, we shifted the familiar language of popular culture critique into the realm of law and judicial decision. Bill Nichols's analysis of the invisibility of cinematic interpretation of reality has been used to characterize the Supreme Court's method of interpreting the Constitution. Just as movies offer a representation of reality, courts provide a representation of the law. It is important to add, right away, what Nichols adds: not only is the process of representation

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<sup>79</sup> *Id.* See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 795 (2d. ed., 1988): The Massachusetts statute invalidated in *First National Bank* represented a bold attempt to silence corporate opposition to a proposed constitutional amendment authorizing the state legislature to impose a graduated individual income tax. The law forbade certain categories of corporations to expend funds to communicate their views about any referendum subject that did not materially affect the corporate business.

*Id.* (footnote omitted).

<sup>80</sup> Horwitz, *supra* note 78, at 174.

<sup>81</sup> *Bellotti*, 435 U.S. at 780 n.15 (citations omitted).

itself obscured but, behind it, the material social process that organizes representational activity. The material social process of the film industry is not identical to that of the legal system, even if both are ultimately anchored in a single national or international political economy. Legal adjudication and literary interpretation, as Robin West has pointed out, are not the same thing.<sup>82</sup> They have different social consequences and material frames of reference. Nevertheless, in a comparison of law and popular culture, it is useful to show what the two have in common.

Citing Montesquieu's remark that judges are only "the mouth-pieces of the law and inanimate things," Franz Neumann describes a characteristically democratic "phonographic theory of the judiciary."<sup>83</sup> The law was like a phonograph record and the courts merely dropped the legal record onto the turntable and played it. How much this phonographic theory of law resembles the photographic theory of film representation! What the audience views up on the screen, so the argument goes, is simply an unmediated version of what took place in front of the filmmaker's camera.

What both of these theories ignore is that all interpretation involves mediation. No matter how accurate any process of representation purports to be, no matter how convincingly it appears to hold but a mirror up to nature or to merely announce a rule written elsewhere and by others, we should not be taken in. Filmmakers and lawyers, like other practitioners of interpretation, bring with them their own particular needs and questions. Scholars ranging from Gunnar Myrdal to Lucien Goldmann have argued that all research in the social and human sciences is shaped by the questions a scholar addresses to his or her particular subject.

In a scene from Michelangelo Antonioni's film *The Passenger*, television journalist Jack Nicholson interviews an African village leader and asks him if it is not odd that someone like him, raised to be a witch doctor, spent years studying in Europe. The western reporter asks if his subject has not changed his attitude toward some tribal customs. The African responds while turning the camera on his interviewer: "Your questions are much more revealing about yourself than my answers would be about me."<sup>84</sup>

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<sup>82</sup> Robin L. West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 207 (1987).

<sup>83</sup> FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 36 (1957).

<sup>84</sup> MARK PEPLOE ET AL., *THE PASSENGER* 75 (1975).

## IV.

This brief encounter with a pair of corresponding popular misconceptions about the legal order puts readers on notice that law, whatever its pretense to autonomy, cannot be adequately understood when separated from historical context. The juxtaposition of foundational moments in cinematic and legal representation (Muybridge, *Santa Clara*) provides one avenue of approach to popular culture's reconstruction of American legal and political history. Before proceeding, however, we must further specify the notion of "historical reconstruction" itself. Where, for example, does the film of historical reconstruction stand in relation to other motion picture genres?

An obvious, if tentative, answer would be that it stands somewhere between documentary and science fiction. The documentary constitutes a film of contemporary photographic evidence. A documentary film on the history of America's space program could be distinguished from *The Right Stuff* in that the former would use actual film footage of the events whereas the latter utilizes what Leonard Maltin terms "thrillingly realistic recreations of space flights."<sup>85</sup> Thus a "documentary" on the American Revolution is, in a sense, an impossibility because motion picture photography had not yet been invented at the time of the Revolution. A film on this subject could be made, of course, using paintings, woodcuts, drawings, maps, images of surviving documents or historic battlefields, and so forth. But to film the Revolution as something actually happening before the eyes of the viewer would require historical recreation, precisely the case with, for example, D.W. Griffith's *America*.

By the same token, historical reconstruction can be distinguished from science fiction on the grounds that the former deals with something that *actually* happened in the past, rather than with something that *might* happen in the future. Interplanetary space travel by humans could someday become a reality but, until that day, motion pictures in which such travel appears will remain "science fiction."

Upon closer inspection, however, this set of distinctions does not entirely hold up. Consider, for example, Frank Capra's *Why We Fight* series created during World War II. These celebrated films are often described as the most eloquent and powerful American documentary films ever made. In terms of their intended informa-

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<sup>85</sup> LEONARD MALTIN'S MOVIE AND VIDEO GUIDE 1994 EDITION 1066 (Leonard Maltin ed., 1993).



tional or propaganda purpose, documentary historian Erik Barnouw states that the series constitutes a dramatic achievement. Colin Shindler argues that prior to *Why We Fight*, there was no national documentary tradition in the United States and thus Capra's wartime work was pioneering as well as brilliant. Outside the films of the master, Sergei Eisenstein, and Capra's own Hollywood work, according to Allen Estrin, nowhere more than in *Why We Fight* could one find evidence of the "plastic power" of motion picture art. Capra was unequalled as an editor of film images and Estrin believes Capra regarded *Why We Fight* as his best effort in a long movie-making career. Richard Barsam adds that the series is not only the most extraordinary group of films to come out of war but also the most compelling explanation of why a war was fought. The documentary credentials of *Why We Fight* are above suspicion.

At the same time, just one of the *Why We Fight* series, *War Comes to America*, includes sequences from a host of Hollywood films—*America*, *Drums Along the Mohawk*, *The Roaring Twenties*, *The Big Parade*, *Confessions of a Nazi Spy*—and, to this list, Barnouw adds that Capra employed Disney animation, combat footage from other countries' documentary filmmakers, and scenes staged for the camera but presented as real. In addition to excerpts from fiction films, there are also, according to Shindler, "reconstructed scenes of enemy schoolchildren singing hymns to their respective dictators."<sup>86</sup>

Here it is useful to quote Estrin's intriguing comment about Capra's editing technique. "It is one of the hidden ironies of Capra's cinema," says Estrin, "that this, the most patriotic of filmmakers, possessed the least democratic of *mise-en-scènes*; that is, while championing the rights of the individual to make free choices, he grants very little freedom to his audience. Our responses are very carefully guided by Capra's editing scheme."<sup>87</sup> We may question Estrin's identification of *mise-en-scène*, the arrangement and movement of objects within the picture frame, with an "editing scheme" (i.e., with *montage*). We may further question the presumed contradiction between being both patriotic and undemocratic. Patriots around the globe have, on occasion, demonstrated contempt for democracy and constitutionalism. But what is most interesting is that Estrin sees a conflict, or at least irony, aris-

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<sup>86</sup> COLIN SHINDLER, *HOLLYWOOD GOES TO WAR: FILMS AND AMERICAN SOCIETY, 1939-1952* 76 (1979).

<sup>87</sup> ALLEN ESTRIN, *THE HOLLYWOOD PROFESSIONALS: CAPRA, CUKOR, BROWN* 65 (1980).

ing from Capra's political individualism coupled with his cinematic authoritarianism, the latter revealed in his use of editing techniques which place sharp controls on the audience's freedom to respond as it likes to his images.

Indeed, one way of looking at the distinction between documentary and fiction film is in terms of this issue of relative control over the image. Bordwell and Thompson suggest that only some elements of shooting and construction are truly within the control of a documentary filmmaker whereas in a fiction film control is exerted over script, preparation, lighting, and so forth, in ways that cannot be equalled in a typical documentary. They indicate that a documentary filmmaker can, for example, control the way an interview is shot but cannot control what the person being interviewed will say or how the person may act. Accordingly, the more control that is maintained by the filmmaker, the closer the film may be to the fiction end of the spectrum. Conversely, the less control over process and product, the closer the work moves toward the documentary end of the spectrum.

In these terms, we might want to question the documentary status of even the *Why We Fight* series, a group of historical films that include excerpts from classic Hollywood movies, animated sequences, footage from other documentaries, stock combat footage, and original filming of staged events. Bordwell and Thompson carve out a further category, that of compilation film, which refers to films primarily assembled from existing film and photographs which may involve no actual shooting at all. Even newsreels, however, like the famous *March of Time* series produced between 1935 and 1951, have often included sequences staged in advance. In his history of the *March of Time*, Raymond Fielding observes that "newsreels were compromised from the beginning by fakery, re-creation, manipulation and staging."<sup>88</sup> To take just one rather grim example, Fielding described the 1938 production, *The Refugee—Today and Tomorrow*, which used the *March of Time*'s New York studios to portray Gestapo headquarters and, in addition, utilized scenes filmed on Staten Island that were represented as being concentration camp grave sites. When one of the *March of Time*'s European cameramen "shipped some very good footage of the interrogation of refugees at London's Woburn House, he enclosed a note which emphasized: 'This was *not* a re-enactment, but an authentic case.'"<sup>89</sup>

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<sup>88</sup> RAYMOND FIELDING, *THE MARCH OF TIME, 1935-1951* 5 (1978).

<sup>89</sup> *Id.* at 236-37.

President Franklin Roosevelt repeatedly complained about impersonations of him presented on the *March of Time* radio program. Roosevelt was upset that people would hear him saying things on the radio he had not said in fact, even though the *March of Time* sought to get impersonators to reflect Roosevelt's policies. In one instance, the *March of Time* "pre-enacted" an event, that of the inauguration of trans-Pacific flying boat service. A Pan American clipper was filmed making stops at Honolulu, Guam, Manila, etc., while, all the time, actors were getting on and off the plane at various locations on the Florida coast.

So it is not necessarily as easy as one might expect to distinguish the documentary from the historical reconstruction film. Nevertheless, there are significant distinctions between an event, a film of that event, and a film of that event being recreated. If bright lines between various popular genres, in this case between documentary and historical reconstruction, cannot always be drawn with certainty, perhaps that situation should be acknowledged and explored.

French film culture offers a case in point. The Lumière brothers, who produced their first films within a decade of Muybridge's California experiments, are associated with the foundation of realist cinema in France. Their work typically included films of workers leaving the factory, trains arriving at the station, and other quotidian subjects. George Méliès, on the other hand, who made films during the same early period, chose as his subject the world of magic and fantasy and even filmed *Voyage to the Moon* in 1902. This distinction between the Lumières' cinema and that of Méliès, between realism and fantasy, was, however, stood on its head in Jean-Luc Godard's film about radical French students, *La Chinoise*.<sup>90</sup>

In Godard's movie, Guillaume (played by Jean-Pierre Leaud) points out that subjects chosen by the Lumières, who set up their cameras in public gardens and at factory gates, were identical to subjects chosen by the Impressionist painters, as well as by Picasso, Manet, and Renoir. The latter even represent a certain rupture with realist aesthetics in the development of modern art. At the same time, the subjects filmed by Méliès, such as a reenacted lunar landing (or, better, "pre-enacted" in *March of Time* terminology) came to represent, over time, the "*véritables actualités*" of modern

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<sup>90</sup> LA CHINOISE (Productions de la Gueville/Parc Films/Simar Films/Anouchka Films/Athos-Films, 1967).

experience.<sup>91</sup> Thus, not surprisingly, Méliès's *Voyage* resurfaced and was shown on American television during network coverage of the July, 1969 "giant leap for mankind" taken by Neil Armstrong and Buzz Aldrin.

If, on the one side, there may occasionally be some overlap between the film of historical reconstruction and that of documentary, there may also be some overlap, on the other side, with the science fiction genre which, again in principle, would seem to represent a radically different cinematic form. And perhaps it is not merely the passage of time itself (as in the case of Méliès's *Voyage to the Moon*) which may render equivocal the precise boundaries of the science fiction category. We must return, however briefly, to our characteristic illustration of the documentary form: Frank Capra's *Why We Fight*.

Allen Estrin argues that while there is considerable diversity in emphasis and focus among the seven different films that compose Capra's wartime documentary masterpiece, the essential dichotomy running throughout all of the episodes is that the Axis powers are aligned with the anti-Christ while God is on our (i.e., the Allies') side. "In *Prelude to War*," for example, Estrin points out, "one Nazi leader tells a party gathering that 'Hitler is far too great to compare to one as petty as Christ.'"<sup>92</sup> In reality, of course, many Christian churches actively collaborated with Hitler and the Nazis were hardly interested in alienating such political support.

Bishop Wurm, the Evangelical bishop of Wurttemberg and a persistent critic of the Allies' postwar denazification efforts acknowledged to General Lucius Clay that "many clergy, including

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

<sup>92</sup> ESTRIN, *supra* note 87, at 66. See BILL NICHOLS, REPRESENTING REALITY: ISSUES AND CONCEPTS IN DOCUMENTARY 136 (1991):

The *Why We Fight* series, for example, celebrates the United States as the land of freedom and democracy in sharp contrast to the demagogic, dictatorial regimes in Nazi Germany, fascist Italy, and totalitarian Japan. The proof's ability to convince resides in its evocation of a conventional image of America, one that has a historical, factual basis but which also glosses over such severe problems as racial discrimination, inequality between rich and poor, and intolerance for opinions and practices outside an established normalcy . . . . How America can be a cherished, free democracy in the face of these problems would require a far more elaborate argument, one that would detract from the primary goal of painting a clear-cut picture of good and evil.

*Id.*; see also Michael Renov, *Toward a Poetics of Documentary*, in THEORIZING DOCUMENTARY 12, 30 (Michael Renov ed., 1993) ("[P]ersuasion is most frequently identified with projects exhibiting a singularity of purpose and tone—the stridency of Frank Capra's *Why We Fight* series from the World War II years or Leni Riefenstahl's infamous paen to National Socialism, *Triumph of the Will*").

himself, had joined the Nazis and supported Hitler in good faith, believing that 'it might produce a religious revival.' Wurm even referred Clay to *Mein Kampf*, where Hitler had written that National Socialism and Christianity could work together."<sup>93</sup>

But the U.S. government had not commissioned Capra to create images of German Christians and Nazis attending prayer breakfasts together. Reportedly stunned by the power of Leni Riefenstahl's *Triumph of the Will* when the War Department allowed him to see it, Capra was determined to outdo Riefenstahl in the art of political propaganda. Capra believed that only he would be working for the right side in the conflict. Emphasizing the regimented, even robotic behavior attributed to America's World War II enemies, Capra portrayed the essential nature of the U.S. and its citizenry as exactly the opposite.

Simplicity, honesty, heroism if necessary, were the backbone of a modest people who were perfectly willing to let church bells and liberty bells do their talking for them, symbols of the bedrock religious and political values on which the nation had been built. Here was a people who worked hard but enjoyed their Sunday ball-games, a country whose only serious fault appeared to be a kind of small town innocence. "The mass worship of Hitler at the Nuremberg Rally," adds Estrin, "the Japanese Army shouting 'Bonzai' to their emperor, and Italian crowds crying 'Duce' are all employed to reinforce one of the central themes of the series: that these people willingly gave up their freedoms as individual human beings."<sup>94</sup>

Capra, in effect, provided his audience with a very special opportunity to witness, distilled in a documentary motion picture, what we had and what we could lose, what others had *already* lost, if we did not stand up and fight. The *Why We Fight* series, of course, shows Americans "getting wise," and putting a stop to what the Axis bullies are up to "over there." But Capra first wanted to show that it *can* happen here. Freedom has a price. Maps and animated sequences are utilized to document totalitarian progress toward global conquest. A world enslaved becomes, right before the eyes of the audience, a genuine possibility. Hitler, Hirohito, and Mussolini are presented not as anti-communist, right-wing political figures (with counterparts in other nations) but rather as gangsters and masters of a slave world. Ironically, as Masao Maruyama points out, some Japanese fascists saw the Nazis this way, contrasting emperor-system fascism with "the situation in the land of the swastika,

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<sup>93</sup> TOM BOWER, *BLIND EYE TO MURDER* 190 (1983).

<sup>94</sup> ESTRIN, *supra* note 87, at 67.

in which Outlaws seized power *qua* Outlaws."<sup>95</sup> Frank Capra, committed propagandist, provided Americans with a specific assignment in case they should run into any one of this international trio of thugs: "If you ever meet them, don't hesitate . . ." *Why We Fight* provides its target audience, soldiers entering the U.S. military, with a chilling visit from the Ghost of Politics Future.

Cut to George Bailey. *War Comes to America*, the final installment in Capra's wartime documentary series, was released in 1945; *It's a Wonderful Life*, Capra's next (and ultimately most famous) film, was released in 1946. When George Bailey, played by Jimmy Stewart, stands on that lonely bridge in *It's a Wonderful Life*, he confronts a choice not very different from the one faced by the American people when they looked into the abyss and saw what the kingpins of world domination had in mind for Mainstreet, U.S.A. George Bailey dives into the water but to save a life, not to end one, and angel (second-class) Clarence Oddbody gives George a unique opportunity to embark upon what Estrin calls a "classic psychological 'night-journey' in which he learns what the world would have been like had he never existed."<sup>96</sup>

Both Estrin and Barry Gewen, the latter in his review of Joseph McBride's 1992 biography of Capra, point to Capra's reliance upon Charles Dickens and, obviously, the "classic night journey" has one source in Dickens's *A Christmas Carol*. But it is also significant to identify the similarity between *It's a Wonderful Life*, a form of Christmas carol as well, and Capra's political documentaries.

*Why We Fight* provides, in part, a classic night journey in which the American people learn what the world might be like had our will to stand up to the totalitarian bosses, as Capra portrays them, never existed. The loss of American freedom to foreign tyrants had itself become the basis for a now classic, cinematically vivid, night journey, as well as nightmare, within the political arsenal of American popular culture. Capra's contribution to the development of this dystopian vision, given its subsequent evolution in the hands of others, may seem ironic when we consider the association of Capra's fiction films, especially those of the 1930s, with a kind of populist socialism. But as Gewen observes: "Capra was a lifelong Republican who never once voted for Roosevelt. He was an admirer of Franco and Mussolini. In later years, during the McCarthy

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<sup>95</sup> MASAO MARUYAMA, THOUGHT AND BEHAVIOR IN MODERN JAPANESE POLITICS 129 (1969) (footnote omitted).

<sup>96</sup> ESTRIN, *supra* note 87, at 70.

period, he served as a secret F.B.I. informant."<sup>97</sup> It is instructive to follow the progress, during the McCarthy period and beyond, of the paranoid night journey in American politics.

## V.

Paranoia and conformity dominated the films of the 1950s, according to Terry Christensen's analysis of the politics of American film.<sup>98</sup> Almost any social criticism or dissent, writes Nora Sayre in her critique of cold war films, "could be suspected of Communist inspiration."<sup>99</sup> Interestingly enough, Peter Biskind asserts that as a result of cold war anti-communist hysteria, 1950s science fiction was actually "more concerned with Main Street than monsters."<sup>100</sup>

The monsters threatening to take over the world in Capra's *Why We Fight* series became the international communist conspiracy during the 1950s as the American national security state sought to substitute a former ally in the struggle against fascism (the Soviet Union) for the Axis powers that had threatened American freedoms in the 1942-45 period. With Hitler defeated in Europe, the U.S. no longer needed the Red Army. Left-wing governments filling the vacuum created by world war could, indeed, constitute an obstacle to U.S. economic expansion and hegemony. Thus, the evolution of cinematic genres in Hollywood nicely reflected the transition in U.S. foreign policy.

The year after *It's a Wonderful Life* was shown, Richard Nixon asked Jack Warner of the Warner Brothers film studio if Hollywood had any anti-communist films in production. This was, of course, the period when Hollywood was repeatedly investigated for the purpose of unearthing communist influence in the industry. Sayre points out that no Hollywood screenwriters developed more vigorously patriotic movies during wartime than those who happened to be members of the Communist Party.<sup>101</sup>

Two writers among the infamous Hollywood Ten who had worked on *Action in the North Atlantic* included in the screenplay a

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<sup>97</sup> Barry Gewen, *It Wasn't Such a Wonderful Life*, N.Y. TIMES, May 3, 1992 (Book Review), at 3, 27. On Capra's populist films of the 1930s, see ANDREW BERGMAN, *WE'RE IN THE MONEY: DEPRESSION AMERICA AND ITS FILMS* 132-48 (1971); Leonard Quart, *Frank Capra and the Popular Front*, in *AMERICAN MEDIA AND MASS CULTURE: LEFT PERSPECTIVES* 178-83 (Donald Lazere ed., 1987).

<sup>98</sup> See TERRY CHRISTENSEN, *REEL POLITICS: AMERICAN POLITICAL MOVIES FROM BIRTH OF A NATION TO PLATOON* 85-109 (1987).

<sup>99</sup> NORA SAYRE, *RUNNING TIME: FILMS OF THE COLD WAR* 4 (1982).

<sup>100</sup> PETER BISKIND, *SEEING IS BELIEVING: HOW HOLLYWOOD TAUGHT US TO STOP WORRYING AND LOVE THE FIFTIES* 111 (1983).

<sup>101</sup> SAYRE, *supra* note 99, at 69.

statement of faith in "God, in President Roosevelt, and the Brooklyn Dodgers, in that order."<sup>102</sup> Two other members of the Hollywood Ten had written *Cloak and Dagger*, which Sayre describes as an "ode to the CIA's predecessor, the OSS."<sup>103</sup> Even Howard Koch, primary screenwriter on *Casablanca*, who had never been a member of the Communist Party, was blacklisted, mainly, in Sayre's view, because of testimony against Koch provided by Jack Warner. Warner Brothers had produced *Mission to Moscow*, and in order to avoid becoming the target of a congressional committee investigation, Jack Warner pawned off responsibility for the pro-Soviet film, which was made *during* the War while the Soviets remained a critical ally, on its screenwriter, Howard Koch.<sup>104</sup>

Head of the House Unamerican Activities Committee in 1945, Mississippi Congressman John Rankin was vigorously opposed to Jews and Communists in Hollywood and to the war crimes trials in Nuremberg. Describing the 1947 prosecution of officials of I.G. Farben Industries (eventually convicted of mass murder), Rankin referred to a "saturnalia of persecution" which was a "disgrace to the United States."<sup>105</sup> While other nations had refused further responsibility for prosecuting Nazis, Rankin was furious that "a racial minority, two and a half years after the war closed, are in Nuremberg not only hanging German soldiers but trying German businessmen in the name of the United States."<sup>106</sup> No better illustration of the shift in American political focus could be provided. Rankin felt that it was more important to investigate "a racial minority" in Hollywood (including ardent American patriots) than it was to permit that religious group, in Rankin's conspiratorial view, to persecute good German businessmen in Nuremberg. For Rankin, Sayre adds, "Jews and Communists were barely distinguishable."<sup>107</sup>

J. Parnell Thomas, Rankin's successor at the House Unamerican Activities Committee, asked Louis B. Mayer the same question

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 57-58.

<sup>105</sup> JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBEIN* 139-40 (1978).

<sup>106</sup> *Id.* at 140 (footnote omitted).

<sup>107</sup> SAYRE, *supra* note 99, at 17. For more on Hollywood and McCarthyism, see VICTOR S. NAVASKY, *NAMING NAMES* (1982); Lary May, *Movie Star Politics: The Screen Actors' Guild, Cultural Conversion, and the Hollywood Red Scare*, in *RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR* 125-53 (Lary May ed., 1989); MICHEL CIMENT, *CONVERSATIONS WITH LOSEY* (1985). For two outstanding examples of Hollywood's own "self-criticism," see *GUILTY BY SUSPICION* (Warner, 1990) and *THE HOUSE ON CARROLL STREET* (Rank/Orion, 1988).



Nixon had asked Jack Warner: Where were the movies revealing the communist threat for what it was? Was Hollywood prepared to prove its loyalty or would it continue to plead the Fifth Amendment? One of Warner's responses was *Red Nightmare*, a film classed by Nora Sayre with *Invasion U.S.A.*, *I Married a Communist*, and *Red Planet Mars*.<sup>108</sup>

Produced at Warner Brothers "under the Personal Supervision of Jack L. Warner,"<sup>109</sup> *Red Nightmare* was in fact sponsored by the United States Department of Defense. The film opens with a series of shots almost randomly depicting life in a typical, self-contented, busy little American town. In this community, however, appearance and reality are at odds.

In a voice-over narration, Jack Webb explains that, amazingly, this town is not in the United States at all. Buried deep in the vastness of the Soviet Union, it is in fact a training compound for Russian agents, a quiet "college town" for fifth columnists-to-be. It represents hard evidence of the "long-range communist conspiracy" to take over America. We are privileged to witness the teaching of "espionage as a science, propaganda as an art, sabotage as a business,"<sup>110</sup> which is presumably more dangerous than sabotage "as a hobby." A professor in tweeds directs his pointer at a blackboard covered with detailed drawings beneath the inscription, "explosives and listening devices" (a lot to cover in one class).

Suddenly, "documentary style," *our* instructor makes his appearance center screen, no longer a disembodied voice. It is *Dragnet*'s Sergeant Joe Friday himself, giving us just the facts about what those tricky Russians have got cooked up. He introduces the audience to a real American town, wherein resides Jack Kelly, who played Bret Maverick in the popular Warner Brothers television western series. Like George Bailey of Bedford Falls, Kelly is out of sorts with life and like George, who wanted to escape the small

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<sup>108</sup> SAYRE, *supra* note 99, at 78.

<sup>109</sup> RED NIGHTMARE (Warner Brothers/United States Department of Defense). A print of RED NIGHTMARE is available in VHS videotape format from Facets Video (Chicago, Ill.). For information on ordering RED NIGHTMARE, see *Facets Video Catalog*, No. 12, at 109 (1993), which offers RED NIGHTMARE as part of a compilation of United States Government films under the title: "U.S. Government Classics." The catalog explains:

This collection of instructional shorts, animation propaganda and dramatic reenactments may inspire a new Smithsonian installation: Defense Department Kitsch. With titles like *Duck and Cover*, *Red Nightmare* and *Survival under* [sic] *Atomic Attack*, this compilation of all-time greats from the U.S. Government promises to be 'a real blast from the past.'

*Id.*

<sup>110</sup> RED NIGHTMARE (Warner Brothers/United States Department of Defense).

town routine, Kelly wants to get off the merry-go-round of military reserve, P.T.A., and union committee meetings. "You don't know how lucky you are boys," but not back in the U.S.S.R. To the contrary, these fellows discover the hard way, through their respective classic night journeys, just how fortunate they are to live in the U.S.A.

Kelly argues over dinner about whether his daughter is ready to be married and then goes to bed, little expecting the "real red nightmare" which is coming. But we know because Jack Webb is standing on the lawn outside Kelly's bedroom in the twilight, casually informing us that the "Russian town we saw earlier, the town that looked like it belonged in Kansas," is about to be lifted up lock, stock, and barrel and moved into Kelly's dreams. A transition shot of Kelly in bed tossing and turning gives way to the nightmare of communist domination.

The nightmare begins in the ice cream shop, where the customers and soda jerk treat each other abusively, just like in the bar where George Bailey begins to discover that something strange is going on, and Webb tells us that Kelly is "a little confused; things seem different now, and they should because freedom has suddenly vanished."<sup>111</sup> Kelly tries to make a call from the phone booth but the operator asks him for his "permit number" (this, of course, was before telephone company credit cards). Outside the shop, a jeep drives by carrying indoctrination officials in uniform. They are on their way to an open air instruction session in the town square where they announce that "when the moral fiber of the United States weakens and the economy collapses," it will be the duty of those comrades listening to "move into every phase of American political and economic life" and "purge the minds of the reactionary Americans so they will welcome the enlightened Soviet system."<sup>112</sup>

Just your average Joe Palooka who is not about to have his mind purged, Kelly rebels against the "enlightened system," and gets betrayed by everyone, including his family, for his trouble. Storm troopers from the young communist league come to Kelly's house in order to enlist his daughter for farm work. Kelly demands to see a search warrant but these thugs have never heard of the Fourth Amendment, assuming it still exists, and it turns out they don't need a warrant because Kelly's daughter (totally brain-washed) has actually volunteered to join the people's collective.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

The young man who wished to marry Kelly's daughter in real life now reappears, in his dream, as a state functionary stealing her away, in her classy safari outfit, and she rebukes her father on the way out the door for his lingering belief in the "bourgeois values of family life."

Kelly's wife, who earlier in the film had impressed upon him his responsibility for community affairs, now turns against him by providing evidence for the prosecution in Kelly's trial for subversion, deviationism, and treason. The charges remain abstract and he demands to know how he can prove his innocence if he is unaware of what he has done wrong. Interestingly, at this point, he does *not* ask to be represented by counsel, a seemingly obvious request under the circumstances. Perhaps it was felt that identifying democracy with the Parent Teacher Association was one thing; identifying it with the legal profession and the right to counsel was going too far.

In any event, Kelly's wife testifies that he tried to turn their children into enemies of the communist state. Kelly is stunned by her abandonment, just as is George Bailey by his wife's incomprehension when he embraces her in the street on her way to work at the Pottersville library or, for that matter, as is Kevin McCarthy in that heartbreaking moment in *Invasion of the Body Snatchers* when he realizes to his horror that Dana Wynter has become one of the "pod people." Kelly is convicted of being an "ugly remnant of the diseased bourgeois class"<sup>113</sup> and is strapped to a chair, then shot at close range. From the swirling gunsmoke into which the executed American rebel vanishes, Jack Webb emerges, once again standing in the neat yard in front of Kelly's familiar frame house.

Webb reassures the audience that even though greater brutality is taking place behind the Iron Curtain, what we have just witnessed has been only a dream from which Kelly is now waking. Again, the transitional shot of Kelly rolling uncomfortably, followed by the jolt of recognition as he finds himself back in his old bedroom, then a predictable sigh of relief. Kelly does not run to the window and ask a boy in the street to fetch a Christmas goose for the Cratchit family; he does, however, go downstairs and, to her surprise, gives his wife a very serious kiss. "Good morning," he says, rather slyly. The little kids roll in with requests for new toys, he promises his daughter he'll reconsider her marriage plans but she and the lucky guy have already decided to wait until he finishes his "hitch in the service." Jack Webb returns for closing comments:

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<sup>113</sup> *Id.*

responsibilities are a privilege and paramount among them, one suspects he believes, is watching propaganda films like this one. "Freedom has a price," Webb warns, "and its price is vigilance." It became vigilantism, to be sure, during the McCarthy Era.<sup>114</sup>

Another film from this period, *The Whip Hand*, also opens with a communist using a pointer to direct attention to the wall. Only this time, it is a huge map of the United States with place names in Russian. The Soviet officer points to a town in central Wisconsin and it is here that the film will take place. However popular this wall chart and pointer sequence became with fiction filmmakers, Wisconsin Senator Joe McCarthy had his own version of the wall chart-pointer concept.

In Emile de Antonio's documentary, *McCarthy: Death of a Witch Hunter*, the anti-communist senator from the heartlands is shown pointing to a map of the U.S., with states colored in or crossed by lines, arguing that anyone who can add two and two knows the war with communism will end in either victory or death for American civilization. The Reds would not be taking over any Wisconsin towns, if McCarthy had anything to say about it, but that was high on the agenda set for America by the communist conspirators in *The Whip Hand*.

A genial big-city newspaper man on vacation in the Wisconsin backwoods runs across a peculiar town that seems unusually concerned about its privacy. Just as Nazi agents use the abandoned town of Soda City as a meeting place in Hitchcock's *Saboteur*, communist agents have come to this out-of-the-way, rural location in order to prepare a germ warfare assault on American democracy. Climbing over some rocks, the reporter starts taking pictures of zombie-like creatures on the property down below, a retreat run by recent arrivals to the empty resort town. A similar scene appears in Hitchcock's *Topaz*, where western agents are taking photos of missile installations in Castro's Cuba and are apprehended by communist forces. The resourceful journalist here, however, manages to hide his camera just in time and stonewalls the communist guards who interrupt his attempt to document something fishy going on by the lake.

Soda City in *Saboteur*, an abandoned resort in *The Whip Hand*, the hidden missile site in *Topaz*, a remote military base in *Seven*

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<sup>114</sup> For overviews of the McCarthy period, see WILLIAM A. WILLIAMS, *AMERICANS IN A CHANGING WORLD* 354-83 (1978); STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982); DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* (1978).

*Days in May*, the town filled with dead people in another movie about a kind of germ warfare, *The Andromeda Strain*, a rural Iowa town taken over by terrifying cultists in *Children of the Corn*, even Bodega Bay in Hitchcock's *The Birds*—all reveal the convergence of natural disaster, science fiction, and political or psychological conspiracy films around the geographic center of an eerily abandoned or distorted outpost of Americana which, for one reason or another, is not quite right. Our country was supposed to be immune to this sort of thing.

*The Whip Hand* reveals how a Nazi biological warfare expert has been enlisted by the communists to run experiments on human beings, eventually producing a virus the Russians can use to take over the United States. With the help of both the F.B.I. and a young woman who falls in love with the newsman/hero, the communist plot is foiled and the head commie scientist is set upon by his "patients" (on whom he had been experimenting), with a vengeance. This scene is derived from *Island of Lost Souls* (Leonard Maltin refers particularly to the "grisly finale"<sup>115</sup>), from Franju's *The Eyes Without a Face* (where Dr. Genessier is ripped to shreds), and no doubt other movie celebrations of the doctrine of precise retribution. The "whip hand" is, to be sure, deployed by novelist Alan Sillitoe, in *The Loneliness of the Long-Distance Runner*, as a metaphor illuminating the nature of Britain's social system, not that of the Soviet Union. It was the Americans, not the Soviets, who provided a safe haven for Werner von Braun, creator of the V2 rocket used so effectively against Britain's centers of civilian population during World War II. And it was the Americans, not the Russians (or even the Nazis), who engaged in the largest experiment ever conducted in biological and genetic warfare: the use of nuclear weapons against the residents of Hiroshima and Nagasaki.<sup>116</sup>

During the Gulf War, Americans condemned Saddam Hussein for having used biological weapons against his own people, yet it was the Americans whose chemical weapons, including Agent Orange, not only affected thousands of peasants but, ultimately, their own soldiers in Vietnam.<sup>117</sup> Near the end of *The Whip Hand*, during his futile negotiations with an F.B.I. SWAT team, the communist doctor of disease threatens to blow up the entire compound rather than allow his work on a killer virus to fall into American hands—

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<sup>115</sup> MALTIN, *supra* note 85, at 626.

<sup>116</sup> See generally Sadao Kamata & Stephen Salaff, *The Atomic Bomb and the Citizens of Nagasaki*, in *THE OTHER JAPAN* 60-71 (E. Patricia Tsurumi ed., 1988).

<sup>117</sup> On U.S. chemical warfare in southeast Asia, see GABRIEL KOLKO, *ANATOMY OF A WAR* 144-45 (1985).

not an altogether irrational concern, given the history of the United States's own radiation experiments.

Two Reagan Era films represent perfect companions to *Red Nightmare* and *The Whip Hand*. From today's vantage point, Leonard Maltin describes *The Whip Hand* as "campy, but not campy enough."<sup>118</sup> Some critics regarded *Red Dawn* as already campy when it was made. While acknowledging its anti-communist intentions, Terry Christensen argues that *Red Dawn* employed communists as "convenient enemies; the bad guys had no perceivable political ideology and could just as easily have been from outer space."<sup>119</sup> He adds that inclusion of Latin American communists among the invaders differentiated *Red Dawn* from "anti-communist movies of the 1950s, but otherwise it was no more politically sophisticated."<sup>120</sup>

His concluding observation is interesting because it can be argued that the influence of the anti-communist films of the 1950s arose precisely from their *lack* of sophistication, from their propagandistic simplicity and clarity. Frank Capra's *Why We Fight* films were cinematically, but not politically, sophisticated. Nuance and ambiguity—permitting the audience to see things from the opponent's point of view—are hardly trademarks of propaganda.

In *Red Dawn*, Cuban and Nicaraguan paratroopers land in a schoolyard outside what Lenny Rubenstein calls a "typical American town in the foothills of the Rockies—Calumet, Colorado. A sequence of postcard shots of farms, main street, the local high school, and a statue dedicated to the 'Rough Riders'"<sup>121</sup> reveals the same arcadian vision of American life that helped shape the *Why We Fight* series and many classic anti-communist films of the 1950s. It is this same vision that *Red Dawn*'s director, John Milius, sees threatened by subversion and military conquest.

Ironically, *Red Dawn* also opens with an instructor standing before a huge wall chart, lecturing his students. The teacher describes the Great Hunt of the Han Period, illustrated by pictures of warriors and a map of East Asia that briefly fills the screen, and explains that the ritual killing would last for months until "the young son of the Khan asks his father that the last creature alive . . . be allowed to go free . . . . Well now, my friend . . . ." <sup>122</sup> The history

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<sup>118</sup> MALTIN, *supra*, note 85, at 1410.

<sup>119</sup> CHRISTENSEN, *supra* note 98, at 201.

<sup>120</sup> *Id.*

<sup>121</sup> Lenny Rubenstein, *Red Dawn*, CINEASTE, vol. 13, no. 4, at 41, 41-42 (Film Review) (1984).

<sup>122</sup> RED DAWN (MGM-UA/Valkyrie, 1984).

teacher begins to lose his train of thought as he walks along a row of windows facing the schoolyard and, looking out, discovers armed soldiers falling from the sky.

Man is made for war, woman for the warrior's rest, and what remains is folly, or so Nietzsche is alleged to have said and John Milius would appear to believe. This opening sequence, during which communist commandos launch a violent assault on unarmed high school students and their teachers, represents the director's moral as well as visual signature. Young sons of the Khan themselves, a band of heroic young men escape the initial attack on their school and retreat to the mountains where they form a guerilla unit that will ultimately find its purpose. The guerrillas receive their inspiration when they secretly return to visit a "reeducation camp" constructed by the now Colorado-based Russians. Father of two of the boys, Harry Dean Stanton sets the tone for the film when he speaks to them through a wire fence, his words hanging in the cold night air: "I was tough on both of you and I did things that made you . . . made you hate me sometimes. But you understand now, don't you?"<sup>123</sup>

On the one hand, if you identify Harry Dean Stanton with the kind of roles he played in *Escape from New York* and *Repo Man*, you can appreciate why the Russians might want to put him in a reeducation camp. On the other hand, when the boys ask what happened to their mother during the communist "incursion" (as the late President Richard Nixon might have put it), Stanton looks off into the blackness and says nothing, blood streaking the side of his face. The boys understand only too well what this must mean and when they show their feelings, Dad interrupts them: "We can't afford to be cryin' anymore, now."<sup>124</sup>

Indeed, with the contest of world systems having finally achieved that measure of adversity where pure masculine resolve can be permitted to determine the outcome, there is no further need for mothers or sweethearts. Women are sidelined in this martial vision of political and human relationships, just as they were sold into household slavery during the Han dynastic rule of imperial China, a domination from whose perspective John Milius has drawn inspiration just as these ragged boys cling to a cyclone fence, seeking a stern command from their father. It is their right of passage into manhood, their opportunity as well as danger. Against the Reds, they pursue a triumph of the will.

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Rubenstein sees *Red Dawn* as a rather pathetic attempt to ingratiate its authors with the Reagan Era's powers that be, a cardboard cutout of right-wing paranoia. He regards the insertion of Latin American shock troops among the first wave of invaders as evidence that "Milius certainly knows which side of the federal bread to butter and he puts it on thick . . . ." <sup>125</sup> The incoherent explanation of how the Russians prepared their invasion of Colorado (apparently nuclear weapons were used against the nation's capital and communist agents swarmed across the border from Mexico) sounds to Rubenstein like "a scenario drafted by a Reagan appointee to the disarmament agency." <sup>126</sup>

Michael Parenti associates *Red Dawn* with *Rambo* as characteristic "Reaganite Cinema." <sup>127</sup> He makes the appropriate historical observation that films like *Red Dawn* (or, it could be added, *Red Nightmare* and *The Whip Hand* earlier) turn the actual record on its head because it was the United States that helped invade the Soviet Union after the Bolshevik Revolution, not the other way around. One wonders what percentage of the thousands of viewers of *Red Dawn*, in the movie houses and then on cable television, were even *aware* of the western expeditionary force that sought to overthrow Lenin's government. Few American secondary school textbooks make mention of the event, just as Japanese and German school books often omit key parts of any actual historical account of World War II. It comes as no surprise to Parenti that *Red Dawn*, the work of a "self-described 'Zen fascist' and war lover," <sup>128</sup> should conform to the cold war pattern.

Emphasizing the subordination of democratic values *within* the guerilla group itself and the "blood and soil" approach to the film's Rocky Mountain terrain, Michael Ryan and Douglas Kellner suggest that *Red Dawn* is "distinguished by certain ideological motifs that hark back to fascist and national socialist ideologies of the twenties and thirties." <sup>129</sup>

In addition to standard right-wing ideology, as well as the primitivist, warrior mentality that structures the film, Ryan and Kellner argue that the "authoritarian camp in the mountains is not much different from the totalitarian 'camp' in the town." <sup>130</sup> In

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<sup>125</sup> Rubenstein, *supra* note 121, at 41.

<sup>126</sup> *Id.* at 42.

<sup>127</sup> MICHAEL PARENTI, MAKE-BELIEVE MEDIA: THE POLITICS OF ENTERTAINMENT 51 (1992).

<sup>128</sup> *Id.* at 50.

<sup>129</sup> RYAN & KELLNER, *supra* note 71, at 213.

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



other words, the nucleus of American resistance to communism manages to organize its own internal society not very differently from that of the system which has sponsored an invasion of the U.S. and against which the "Wolverines" (as the rebels style themselves) wish to defend their homeland. Ryan and Kellner neatly fit this dichotomy to the one between mere authoritarianism (capitalist and necessary) and totalitarianism (communist and evil) popularized by Reagan minister Jeane Kirkpatrick during her day in the sun.<sup>131</sup>

Another Reagan era production that can be compared to the anti-communist films of the 1950s was made for television. *Amerika*, a fourteen-hour not so "mini" series, was shown every evening for a full week by the American Broadcasting Company (ABC) in February, 1987. ABC had produced *The Day After* in 1983, a three-hour dramatization of what the day following a nuclear exchange might be like, and the network had received sufficient criticism of its alleged "defeatism" that *Amerika* was designed partly as a response to conservative pressure. The program, which once again depicts a Soviet take-over of the United States, was certainly calculated to satisfy even the most ideologically strict, right-wing critic of Hollywood liberalism.

Todd Gitlin refers to *Amerika* as "the right wing paranoid's dream."<sup>132</sup> Michael Parenti documents the "sensationalistic anticommunism"<sup>133</sup> that animates the miniseries while other television critics even argue that ABC had specific financial reasons for trying to please the Reagan administration. During President Reagan's first term, Douglas Kellner explains that ABC "was interested in a lucrative merger it was negotiating and, because of its business interests, might have killed stories that could have endangered Reagan's reelection or angered him."<sup>134</sup> Nevertheless, the off-year elections of 1986, in which Democrats began to make their first significant gains in six years of conservative Republican rule, may have helped create a political environment which contributed to *Amerika*'s disappointing performance. ABC certainly had reason to be disappointed.

Michael Winship argues that the "enormous costs of some of the more elaborate miniseries, especially costly flops such as ABC's

<sup>131</sup> *Id.* at 213-14. For further incisive political critique of RED DAWN, see STEPHEN PRINCE, VISIONS OF EMPIRE 56-59 (1992).

<sup>132</sup> Todd Gitlin, ABC's "Amerika": *The Right Wing Paranoid's Dream*, TIKKUN, vol. 1, No. 2., at 14.

<sup>133</sup> PARENTI, *supra* note 127, at 201.

<sup>134</sup> DOUGLAS KELLNER, TELEVISION AND THE CRISIS OF DEMOCRACY 172-73 (1990).

*Amerika* in 1987, have threatened the genre's survival."<sup>135</sup> J. Fred MacDonald observes that "*Amerika* averaged mediocre ratings" and, having cost \$41 million to produce, the show "returned only \$22 million."<sup>136</sup> The entertainment industry newspaper *Variety* described this bottom line as "a big loss to swallow."<sup>137</sup> In spite of its clout, ABC could not escape the combination of hostile critical reviews and the fact that the show "got a big audience the first night then dropped drastically in ratings for the rest of the week."<sup>138</sup>

Noted journalist Harrison Salisbury had written in the widely read *TV Guide* that, in effect, it could not happen here—at least not the way *Amerika* intimated. Parenti points out that *Amerika* provoked "public protests against its inflammatory, cold-war mongering."<sup>139</sup> Confronted with such intense adverse publicity, according to Gitlin, ABC adopted the position that its miniseries textbook on American patriotism was, in fact, just entertainment and ABC was forced to offer "a public denial that the miniseries had any point of view at all."<sup>140</sup>

The problem was that *Amerika's* point of view, which had seemed so promising earlier in the Reagan administration's tenure, became increasingly difficult to sell. After Democratic electoral gains in 1986, mentioned above, it became clear that Ronald Reagan might not be the "teflon President" after all. Partly for fear that journalists were very close to discovering its covert operations, the Reagan administration decided to beat the press to the punch and broke the Iran-Contra story itself.

Peter Dale Scott, describing "the flood of Iran-Contra revelations which embarrassed and weakened Reagan in December 1986," suggests a link between Iran-Contra and the subsequent Bank of Credit and Commerce International (BCCI) scandal and argues that "drug trafficking and money-laundering were a central factor"<sup>141</sup> in both events, which should be understood as one elaborate conspiracy. The Iran-Contra/BCCI network, without any legal or constitutional foundation, included as many hucksters and private profiteers as anything else, cold war entrepreneurs as willing

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<sup>135</sup> MICHAEL WINSHIP, *TELEVISION* 136 (1988).

<sup>136</sup> J. FRED MACDONALD, *ONE NATION UNDER TELEVISION* 238 (1990).

<sup>137</sup> *Id.* at 238 (quoting *VARIETY*, Mar. 4, 1987, at 1.)

<sup>138</sup> PARENTI, *supra* note 127, at 201.

<sup>139</sup> *Id.*

<sup>140</sup> Todd Gitlin, *The Talk About Amerika: Post Mortem on the Politics and Antipolitics of Network Television*, *TIKKUN*, vol. 2, No. 2, at 14, 15.

<sup>141</sup> PETER D. SCOTT, *DEEP POLITICS AND THE DEATH OF JFK* 303 (1993). See THEODORE DRAPER, *A VERY THIN LINE: THE IRAN-CONTRA AFFAIRS* (1991).

to mark up prices for the struggling contras as for the oil rich Iranians. The Reagan regime appeared to be as dependent upon crooks and con artists as the Russians, portrayed in *Amerika*, were dependent upon collaborators and stooges.<sup>142</sup> It was into this type of media market that the big-budget ABC civics lesson was launched. Little wonder then that ABC ended up measuring its millions of dollars lost on this unlucky project in double digits. Miniseries scheduling, like stand-up comedy, would seem to be all a matter of timing.

Identifying some of the thematic tensions in *Amerika*, Gitlin points to one misconceived segment where a "youth riot was instigated by punk provocateurs acting out a KGB scenario."<sup>143</sup> Because it did not work at all in terms of the show's premises, this became *Amerika*'s finest moment, a heavy metal assault on authority in general, an incandescent plea for "anarchy in the U.K." and anywhere else you have in mind, a challenge to those in power from Tokyo to the Berlin Wall. Michael Parenti was not alone in suggesting the similarity between ABC's *Amerika* and Ronald Reagan's America. The only inspirational aspect of *Amerika* was a scene that backfired.

Strikingly, what the miniseries had most in common with *Red Nightmare* and *Red Dawn* was its extreme equivocation about how the Russians managed to take over at all. As aired, *Amerika* provides no explanation of how the Soviets accomplished their invasion. The initial script, and the paperback "novelization" of the miniseries, suggest that "a vast electromagnetic pulse (EMP)" was created by the Russians in order to destroy America's overcomplicated electronic communications system and thus, somehow, render (in a stroke) the entire nuclear defense capacity of the United States unusable.<sup>144</sup> Even in the days of Reagan's Star Wars lunacy, such an explanation was likely to impress most viewers as ridiculous, something straight out of a dubbed Japanese monster movie. Understandably, the "EMP theory" was removed from the screenplay prior to production but nothing was put in its place. The audience was left to fend for itself regarding the precise means by which the enemy invasion had succeeded.

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<sup>142</sup> The most comprehensive analysis of the Iran-Contra affair can be found in LAWRENCE E. WALSH, I - III FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS (United States Court of Appeals for the District of Columbia, Division for the Purpose of Appointing Independent Counsel, Division No. 86-6, Aug. 4, 1993, Washington, D.C.).

<sup>143</sup> Gitlin, *supra* note 140, at 15.

<sup>144</sup> BRAUNA E. POUNS, AMERIKA 1-3 (1987).

If there is an original contribution to anti-communist television and feature film production to be found in *Amerika*, it is the characterization of the United Nations. This represents, in fact, one of the program's most controversial elements. The military aspect of the Russian occupation is actually enforced by United Nations Special Service Unit (UNSSU) troops. In short, the Soviets managed to secure a dominant position in the U.N. and turned the organization into an enforcement arm of Russian policy. The occupation forces fly the white-on-blue U.N. flag and are commanded by an East German communist. ABC may have believed that presenting the U.N. this way would mesh nicely with the position of the Reagan administration, often given expression by the government's own U.N. ambassador, which was highly critical of supposed left-wing and Third World influence within international organizations. Though the bizarre explanation for Soviet domination within the U.S. was taken out of the screenplay, substantial prior criticism did not deter ABC from leaving in this portrait of the United Nations.

"As in the script," recounts Todd Gitlin, "the UNSSU troops raped, burned, slaughtered the homeless, and eventually blew up the U.S. Capitol and massacred Congress."<sup>145</sup> *Amerika* may have turned out to be oddly prophetic on this particular score, if one substitutes the United States for the Soviet Union. United Nations troops, or at least forces deputized by the U.N., under U.S. command, killed thousands of Iraqi civilians as well as soldiers in the 1991 Gulf War. As some law professors have pointed out, including Ohio State University's John Quigley, the U.S. bombing not only exceeded any authorization provided by the U.N. but, further, the military force resolution adopted by the U.N. Security Council arguably violated international law.<sup>146</sup> The U.S. dropped more than eighty thousand tons of bombs during almost one hundred thousand air sorties. Napalm and cluster bombs were deployed and the Chief of Staff of the U.S. Air Force admitted that "70 percent of the bombs the Air Force dropped on Iraq missed their targets."<sup>147</sup> Because "much of the bombing was conducted in urban areas," concludes Professor Quigley, "many of the errant bombs fell on civilians."<sup>148</sup> The Secretary-General of the U.N. complained during the War that "'civilian casualties are mounting and . . . damage to

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<sup>145</sup> Gitlin, *supra* note 140, at 15.

<sup>146</sup> John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1, 18-19 (1992).

<sup>147</sup> *Id.* at 17-18 (footnote omitted).

<sup>148</sup> *Id.* at 18.

residential areas throughout Iraq has been widespread.”<sup>149</sup>

Even setting aside the kind of bribery used by the U.S. to obtain votes (or an abstention) on the military force resolution, its legality is questionable. To take just one example, when the U.N. initiates military action, the Security Council “must decide the specific parameters and must retain control over the action taken. It may not give states a blank check to take military action.”<sup>150</sup> This, however, is exactly what happened in the Gulf War. Such a critique of the War’s relationship to international law is not a rather easy, after-the-fact assessment, but was articulately presented, during the events themselves and within the Security Council, by the Cuban delegation. Cast by John Milius as invaders of the U.S. in *Red Dawn*, in reality the victims of a U.S. invasion at the Bay of Pigs, it fell to the Cubans to make the argument *for* international law and *against* unlawful military force in the U.N. Security Council debates.<sup>151</sup>

After citing the failure of a U.N. negotiator to stand up to the American Management Association on environmental issues (during preparations for the 1992 Rio conference), James Ridgeway and Sabine Guez suggest that this “sell out” on the environment is “symbolic of what the United Nations is fast becoming.”<sup>152</sup> Regarded as an enemy of capitalism and U.S. global ambitions as recently as the Reagan ambassador’s threat to send the institution packing, the United Nations today “is emerging from the shadows of the Cold War as a new, unexpected, and potentially disastrous presence in world politics—the instrument of Pax Americana in the New World Order.”<sup>153</sup> Perhaps *Amerika*’s picture of the U.N. as a surrogate for neo-imperialism was not entirely off the mark.

## VI.

The paranoid night journey in American politics constitutes a form of popular culture that provides insight into successive peri-

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<sup>149</sup> *Id.* (footnote omitted).

<sup>150</sup> *Id.* at 20 (footnote omitted).

<sup>151</sup> See FIDEL CASTRO & RICARDO ALARCON, U.S. HANDS OFF THE MIDEAST! CUBA SPEAKS OUT AT THE UNITED NATIONS (1990). On the Gulf War generally, see NOAM CHOMSKY, DETERRING DEMOCRACY 179-214 (1991); THE GULF WAR AND THE NEW WORLD ORDER (Haim Bresheeth & Nira Yuval-Davis eds., 1991).

<sup>152</sup> James Ridgeway & Sabine Guez, *Triumph of the Will: The United Nations Joins the Trilateral Commission*, VILLAGE VOICE, May 19, 1992, at 19.

<sup>153</sup> *Id.* The United Nations’s disturbing indecisiveness with respect to more recent events in Bosnia appears to be a direct translation of not just U.S. but, specifically, the Clinton Administration’s contradictory foreign policy positions and uncertainty about what steps to take next in dealing with internecine conflict in Eastern Europe.

ods of American historical development. It stands in sharp relief when compared to such *utopian* political projections as Edward Bellamy's *Looking Backward*. Published in 1888, Bellamy's Rip Van Winkle tale casts its protagonist, Julian West, more than a century into the future where he discovers a post-revolutionary America in which social classes have been transcended and Marx's notion of the withering away of the state has been realized. The biggest single improvement he discovers is the expansion in women's rights and the achievement of equality between the sexes.

We may argue over whether Orwell's vision of 1984 was realized by that date; Bellamy's positive portrait of society certainly will not be anytime soon. But it is a remarkable fact, nonetheless, as Franklin Rosemont points out, that *Looking Backward* may have been "the most widely read and influential book of the late nineteenth century."<sup>154</sup> And it was not written as an apology for American politics—far from it. *Looking Backward* and its sequel, *Equality*, were designed to present a concrete picture of a socialist America and thus inspire opposition to the reigning system. As Rosemont says, "*Looking Backward* put utopia on the map in the U.S."<sup>155</sup> It was a very different picture of a future America that Sinclair Lewis put on the map in the 1930s. Sharing many of Bellamy's political values, Lewis nevertheless feared that during the Depression, forces of change were moving in the opposite direction from which Bellamy had hoped.

In *It Can't Happen Here*, Lewis wrote about an America, as Andrew Bergman says, where "politics were an organized violence, secret police and concentration camps, the sure ends of a nation's search for authority."<sup>156</sup> Bergman insightfully compares Lewis's depiction of an essentially fascist United States with the Metro-Goldwyn-Mayer motion picture of the same period, *Gabriel Over the White House*. The latter, however, in Bergman's view, "carried the search for authority to the point of a ringing endorsement of an American dictatorship."<sup>157</sup> This is just what worried Lewis.

Because of Roosevelt's personal approach to politics, as well as campaigns by figures like Huey Long, Father Charles Coughlin, and Gerald L.K. Smith, and most significantly, the failure of Roosevelt's New Deal programs to solve the problem of economic

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<sup>154</sup> Franklin Rosemont, *Free Play and No Limit: An Introduction to Edward Bellamy's Utopia*, in *POPULAR CULTURE IN AMERICA* 26, 28 (Paul Buhle ed., 1987).

<sup>155</sup> *Id.*

<sup>156</sup> BERGMAN, *supra* note 97, at 111.

<sup>157</sup> *Id.* at 115.

crisis, it is not inconceivable that America's ruling elites might have opted for an "exceptional state" solution.<sup>158</sup> It is worth observing, however, that the corporate capitalist state that emerged from depression and war was itself quite different from the political institutions that it replaced. Perhaps another film made during the first half of the 1930s, *The President Vanishes*, in which the chief executive stages his own kidnapping, came closest to reality in portraying a President "willing to do the drastic, skirt the edges of the Constitution and work his will."<sup>159</sup>

In his book about Depression era movies, Bergman includes *Gabriel Over the White House* and *The President Vanishes* in a chapter entitled, *The Mob and the Search for Authority, 1933-1937*.<sup>160</sup> Roger Dooley includes the same two films, in his exhaustive catalog of 1930s Hollywood movies, under the heading, "Films of ideas."<sup>161</sup> What kind of films are these, and where do they stand in relation to the documentary and the film of historical reconstruction? As we have already suggested, it makes sense to consider popular novels like *Looking Backward* and *It Can't Happen Here*, films like *Why We Fight* and *It's a Wonderful Life*, McCarthy period pieces like *Red Nightmare* and *The Whip Hand*, and more recent productions like *Red Dawn* and *Amerika*, as more revealing about the world from which they have come than about the world they indicate we may be entering. In other words, such works of popular culture constitute, first and foremost, invaluable artifacts of the society that created them.

But our reason for taking them up, at this point, is to define more carefully the boundaries of the documentary and historical reconstructive projects within American popular culture. Should these works of political imagination be regarded as a kind of social science fiction? What is the difference between a television miniseries like *Amerika*, which purports to look into the near future, and the *Why We Fight* series which was willing to imagine the destruction of American liberty in order to warn of the consequences of failing to respond to expansionary totalitarianism? Was

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<sup>158</sup> On the "exceptional state," see NICOS POULANTZAS, *FASCISM AND DICTATORSHIP* (1979).

<sup>159</sup> BERGMAN, *supra* note 97, at 118. For observations on post-war evidence of this form of deviation from constitutional democracy, see Anthony Chase, *Introduction: Unwritten Constitution, Invisible Government*, 18 NOVA L. REV. 1703 (1994).

<sup>160</sup> BERGMAN, *supra* note 97, at 110.

<sup>161</sup> ROGER DOOLEY, *FROM SCARFACE TO SCARLETT: AMERICAN FILMS IN THE 1930s* 579 (1981).

that not also one of the original motives behind the screening of ABC's *Amerika*?

*Amerika* did not use documentary footage but probably could have gotten away with it (e.g., shots of the U.N. building in New York). *Why We Fight*, as we have seen, did not shy away from using staged sequences, a common practice even in the case of the *March of Time* newsreels. Discussing Michael Apted's 1991 documentary, *Incident at Oglala*, Georgia Brown writes that "Apted has adopted a few tricks from Errol Morris's *The Thin Blue Line*—like repeating sound effects and stylized enactments of disputed events."<sup>162</sup> A film that has received considerable popular as well as critical attention, *The Thin Blue Line* is a documentary that uses "stylized enactments" (a host of fictional stagings of critical evidentiary circumstances, including repeated reenactments of the murder of a Dallas police officer) in order to argue that an actual individual, sent to prison for life and nearly executed, was the victim of a real life frame-up, essentially staged by the Dallas County Prosecutor's Office. Where do we draw the lines?

In his study of Hollywood genres, Thomas Schatz does not include "science fiction," let alone a subcategory of political or social science fiction.<sup>163</sup> The useful *Anatomy of the Movies* does include an entry by John Fleming under "Science Fiction," but in the subsection titled, "Definition and history," there is nothing even remotely resembling a definition of the genre.<sup>164</sup>

In an interesting attempt to distinguish the horror film from that of science fiction, Patrick Lucanio argues that horror presents us with an "alternate world" while science fiction depicts a "continuous, or historical, world."<sup>165</sup> Lucanio believes that science fiction monsters "are not magical or supernatural" but, instead, "are presented as living beings from a disjunctive reality, be it another planet or a scientific laboratory."<sup>166</sup> Or another ideological system? "The horror film," concludes Lucanio, "offers a super-natural force grounded in a theological, closed world; the science fiction film offers a natural force grounded in a physical, historical context."<sup>167</sup>

Because of its grounding in an actual, historical context, sci-

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<sup>162</sup> Georgia Brown, *American Nightmare*, VILLAGE VOICE, May 19, 1992, at 60.

<sup>163</sup> See THOMAS SCHATZ, HOLLYWOOD GENRES: FORMULAS, FILMMAKING, AND THE STUDIO SYSTEM (1981).

<sup>164</sup> ANATOMY OF THE MOVIES 272, 275 (David Pirie ed., 1981).

<sup>165</sup> PATRICK LUCANIO, THEM OR US: ARCHETYPAL INTERPRETATIONS OF FIFTIES ALIEN INVASION FILMS 11-12 (1987).

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

<sup>167</sup> *Id.*



ence fiction provides a location within which it is possible to explore that which is both real and strange, a political and yet simultaneously “disjunctive reality.” All motion pictures, according to Terry Christensen, “even those intended as pure entertainment, send messages about politics and society.”<sup>168</sup> This broad, if initial, definition of the political film, coupled with Lucanio’s conceptualization of science fiction, make it clear why these two genres are so hospitable to each other.

A film such as Don Siegel’s *Invasion of the Body Snatchers* would seem to be positioned right on the borderline between them. Nora Sayre, in her discussion of *Invasion*, argues that the “political forebodings of the period spilled over into science fiction, where subservience to alien powers and the loss of free will were so often depicted, and the terror of being changed into ‘something evil’ became a ruling passion.”<sup>169</sup> Peter Biskind has a slightly different take on *Invasion*. While acknowledging that pod people, mind control, and body snatchers might constitute a metaphor for communist infiltration, he nevertheless concludes that “[c]ommunism was somewhat of a diversion. It allowed those films to attack extremism in the guise of attacking the Red menace . . . .”<sup>170</sup> *Invasion*’s director indicates that we are culturally dominated by “pod people” without a soul; he also suggests his film is an attack on Hollywood producers (he was particularly angered by Allied Artists’ interference with the final cut of *Invasion*). Putting together these various readings of the film, we might conclude that it warns against body snatchers who are a metaphor for communists who stand in for extremists who represent the Hollywood studio moguls.

Films of historical reconstruction are different from both documentary and science fiction movies but it is not always easy to specify that distinction in adequately concrete terms or reliable rules. As if a further illustration might be required, consider Oliver Stone’s motion picture, *JFK*. Stone’s most furiously debated work includes a great deal of documentary footage, seamlessly woven into the movie as a whole, and also features the Zapruder film, one of the most famous segments of contemporary photographic evidence ever shot. Yet *JFK* is not a documentary. Stone’s film about the Kennedy assassination is also, in important respects, similar to films we have located in the social science fiction subgenre. It is a kind of paranoid night journey, again, “through the looking

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<sup>168</sup> CHRISTENSEN, *supra* note 98, at 2.

<sup>169</sup> SAYRE, *supra* note 99, at 201.

<sup>170</sup> BISKIND, *supra* note 100, at 140.

glass." It is, of course, not anti-communist or right-wing in perspective but it should not, for that reason, be disqualified.

To the film *Seven Days in May*<sup>171</sup> and Lewis's novel *It Can't Happen Here*, we should add *The Manchurian Candidate*, with its remarkable view of McCarthyite jingoism, a film made in 1962 and rereleased for theatrical exhibition in 1987. Ryan and Kellner devote an entire section of their work on Hollywood ideology to liberal "conspiracy" films.<sup>172</sup> But they also add an interesting comment, revealing in its implications for locating *JFK* on the genre map.

The authors point out that science fiction films may seem "aloof from contemporary social problems" and yet, in fact, they "frequently are characterized by radical positions that are too extreme for Hollywood realism."<sup>173</sup> What Oliver Stone has done in *JFK* is to bring the radicalism of social science fiction directly to bear on the film of historical reconstruction and, in the process, has managed to create a kind of political controversy that the movies have not known since, perhaps, the first showings of Griffith's *The Birth of a Nation*.<sup>174</sup> *JFK*'s point is not, like social science fiction, that it *can* happen here but, rather, that it *did* happen here and the nation continues to suffer from an inability to come to terms with that truth.<sup>175</sup>

## VII.

Another form of "paranoid night journey" was experienced on

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<sup>171</sup> It is occasionally forgotten that the extraordinary screenplay for *SEVEN DAYS IN MAY* was written by one of Senator Joe McCarthy's early critics, Rod Serling. See GORDON F. SANDER, *SERLING: THE RISE AND TWILIGHT OF TELEVISION'S LAST ANGRY MAN* (1992). *SEVEN DAYS IN MAY* was:

about a hypothetical American coup d'etat. . . .

In many respects, the project, inspired by the criticism that the Kennedy Administration had been getting from the military over the proposed nuclear disarmament treaty, was tailor-made for Serling. . . .

[I]t was about two of his favorite subjects, the power of the military and nuclear disarmament.

*Id.* at 188.

<sup>172</sup> RYAN & KELLNER, *supra* note 71, at 95-105.

<sup>173</sup> *Id.* at 254.

<sup>174</sup> See NICKIEANN FLEENER-MARZEC, D.W. GRIFFITH'S *The Birth of a Nation: CONTROVERSY, SUPPRESSION, AND THE FIRST AMENDMENT AS IT APPLIES TO FILMIC EXPRESSION, 1915-1973* (1980); Peter D. Scott, et al., *JFK: The Assassination, the Movie, and the Attempt to Discredit the Movie*, 7 *TIKKUN* 37-55 (Mar./April 1992); Robert Hennelly & Jerry Policoff, *JFK: How the Media Assassinated the Real Story*, *VILLAGE VOICE*, Mar. 31, 1992, at 33; *Through the Looking Glass: A Critical Overview of Oliver Stone's JFK*, *CINEASTE* vol. 19, no. 1, at 9 (1992).

<sup>175</sup> See generally CARL OGLESBY, *WHO KILLED JFK?* (1992).

March 3, 1991, by Rodney King in Los Angeles, California, and his experience represents, in many ways, the liberal legal system's worst nightmare: armed officers of state power out of control.<sup>176</sup> What was unique about what happened to Mr. King is that *it was photographed*. A short film, a minor masterpiece, revealed what the police were actually capable of doing, what ghetto residents claimed the police had been doing for years. *Court TV*,<sup>177</sup> the new twenty-four hour, basic cable service channel, provided live broadcast coverage of the trial of four police officers accused of using excessive force in their treatment of Rodney King. This was the initial, state criminal prosecution of the officers involved.

Reducing 150 hours of footage shot during the actual trial of *California v. Powell* to two hours of courtroom coverage and legal commentary, *Court TV* was able to release its documentary videotape, *The "Rodney King" Case: What the Jury Saw in California v. Powell*, in the fall of 1992, only a few months after the verdicts of not guilty were registered and the subsequent Los Angeles riot erupted. Hosted by former CBS News legal correspondent Fred Graham, *The Rodney King Case* can be compared to other legal affairs television news with which *Court TV* competes, with daytime programs like Judge Wapner's *The People's Court*, with primetime dramas like *Law and Order*, and with other efforts to "document" famous trials (e.g., several versions of the Leopold and Loeb case) or appeals (*Gideon v. Wainwright*, *Brown v. Board of Education*).

Like Kurasowa's *Rashomon*, *The Rodney King Case* looks at a specific violent incident over and over again, from different perspectives and, like Antonioni's *Blow-Up*, it repeatedly examines frozen-frame images, photographic enlargements, obsessively seeking the solution to a mystery: Did the officers who beat Rodney King use excessive force? How did the jury in the case reach not guilty verdicts? As *Newsweek* magazine put it, "How could the camera lie?"<sup>178</sup>

The problem of visual interpretation (what is the relation between image and reality?) and that of legal interpretation (what is the relation between abstract law and concrete facts?) converged in

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<sup>176</sup> See JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993); Mike Davis, *Who Killed L.A.? A Political Autopsy*, 197 NEW LEFT REV. 3 (Jan./Feb. 1993).

<sup>177</sup> See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993); Joshua Lazerson, *Court TV: What Value for the Classroom?* 7 FOCUS L. STUD. 9 (Spring, 1992).

<sup>178</sup> Bob Cohn & David A. Kaplan, *How the Defense Dissected the Tape*, NEWSWEEK, May 11, 1992 at 36.

this trial of four police officers in Los Angeles in 1992 and the verdicts reached underscore the crucial significance for both law and visual representation of *point of view*. "From the point of view of its politics," writes film theorist Annette Kuhn, "the women's movement has always been interested in images, meanings, representations—and especially in challenging representations which, while questionable or offensive from a feminist standpoint, are from other points of view—if they are noticed at all—perfectly acceptable."<sup>179</sup> From what point of view could the blows directed against Rodney King by the LAPD hardly be "noticed at all?" From whose point of view could such official use of potentially deadly force be regarded as "acceptable" rather than excessive, indeed criminal?

Fred Graham opens *The Rodney King Case* by briefly setting the factual scene, then inviting viewers to place themselves in the position of jurors in *California v. Powell* and, after listening to trial testimony and the judge's instructions, decide for themselves how the jury reached its verdict. Next, Officers Powell, Koon, Wind, and Briseno are introduced and the charges against them (variously, assault with a deadly weapon, excessive force by an officer, filing a false police report, and trying to conceal the alleged crime) are outlined. Deputy District Attorney Terry White then presents his opening statement and it is here, at the outset, that the prosecutor acknowledges Rodney King was speeding and that he initially resisted arrest. Nevertheless, White argues, California Highway Patrol officers had apprehended King and were about to handcuff him when LAPD Officer Koon interfered saying, "Stop. We'll handle this," and King was subsequently beaten.

Koon's defense attorney argues that though his client was the supervisor on the scene, "the evidence will show you that he's not in charge of this situation. There's only one person in charge of this situation and that is Rodney King." At this point, in voice-over, Fred Graham interjects that "as a former LAPD officer himself, defense attorney Darryl Mounger is in a good position to steer attention to the officers' *perception* of King. While there never was any proof that King was on the powerful drug PCP, the officers say they *thought* he was." Thus the point of view of Koon's attorney, a former police officer, and of the defendants themselves is, from the very beginning of the trial, the particular angle of vision from which the jurors are asked by the defense to view the events which they must evaluate. Was this strategy successful?

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<sup>179</sup> ANNETTE KUHN, *THE POWER OF THE IMAGE: ESSAYS ON REPRESENTATION AND SEXUALITY* 3 (1985).

"One juror told talk-show host Larry King," according to *Newsweek*, "that the video was 'ludicrous.' She argued that Rodney King had 'dictated all of the actions.'"<sup>180</sup> This comment would certainly seem to suggest that the defense argument did, indeed, get through to the jury. Using the same videotape as the prosecution, but isolating selected frames blown-up and examined one at a time, defense attorney Mounger asserts that Rodney King appeared uncontrollable and "when he starts to rise, Sgt. Koon believes, based upon observing his body actions, cocking his legs and drawing them up, holding his arms in, he's attempting to get back up to attack. Based upon that, he believed his actions—the actions of his officers—were reasonable." Thus it is from the point of view of the officers themselves that the defense wishes to have the jury consider the threat posed by Rodney King.

The "reasonableness" of their response to King is swallowed up, in the defense argument, by a desire to place individual jurors in the shoes of these officers, in the mean streets of Los Angeles. Michael Stone, Laurence Powell's attorney, concluded the case for his client by pointing to the irony that it was Officer Powell, not Rodney King, who sat in the defendant's seat accused of crime. This diverted attention from the fact that no one had claimed Rodney King was free from blame. Stone implied that the jury's verdict might hinge on who they thought was "worse" or more dangerous, King or Officer Powell. In fact, the only issue before the jury was whether Powell and the others exceeded legal limits on the use of force against any suspect. But the average person was not pictured by the defense as a likely victim of police brutality.

"What do we, ladies and gentlemen," asked Stone in closing, "as members of the community, expect from our police? What is it that we want them to do? These officers, these defendants, do not get paid to *lose* street fights. They don't get paid to roll around in the dirt with the likes of Rodney Glen King." John Barnett, the lawyer for defendant Briseno, told the jury in his closing argument: "You've got to get into Officer Briseno's shoes, at 12:45, and judge his actions from that perspective . . . . You're to determine what was in his head, what was in Officer Briseno's heart, what was in his soul . . . ."

Soul searching, however, has to be done from someone's point of view and the defense attorneys zealously represented their clients' interests when they demanded that the jury evaluate the conduct of the defendants from the perspective of the officers

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<sup>180</sup> Tom Mathews et al., *The Siege of L.A.*, NEWSWEEK, May 11, 1992, at 30, 33.

themselves. To be sure, the prosecution presented considerable evidence that might have been used to convict the officers of excessive use of force and criminal assault.

As *The Rodney King Case* records, both the Highway Patrol team first on the scene and the LAPD's own expert on the use of force testified that the beating which was inflicted on Rodney King the night of March 3, 1991, could not be legally justified. Hospital employees testified that King had been taunted by Officer Powell when he was brought in for emergency treatment by the arresting officers. An LAPD Communications Department employee acknowledged that immediately after attacking King, Powell sent headquarters the message that "I haven't beaten anyone this bad in a long time." An audiotape of Powell's contemporaneous request for an ambulance revealed Powell himself referring to King as the "victim of a beating (laughter) numerous head wounds (laughter) . . . ."

At this point in *The Rodney King Case*, a shot of Fred Graham (in suit and tie, standing before a wall of TV monitors) is intercut, and he explains that this evidence has been introduced by the prosecution to demonstrate "Powell's inappropriate behavior." Further evidence shows that Officer Koon sent in a computer message that his unit "just had a big time use of force; tased and beat the suspect . . . ." In voice-over, Graham observes that it is the prosecution's argument Koon has here admitted, in effect, "that the use of force was excessive." Expert medical evidence confirms the seriousness of King's injuries and, having presented what it regards as proof beyond a reasonable doubt of the officers' guilt, the prosecution rests its case.

In his closing argument, prosecutor Terry White tells the jury that they "have to determine what a reasonable person acting as a police officer would have done in this particular situation. So it is objective. Not only do we find out or determine what the officer was thinking but then you have to determine as the trier of fact, was the officer's actions objectively reasonable?" Indeed, Judge Stanley Weisberg of the Los Angeles County Superior Court instructed the jury that when a police official uses force that "would no longer appear to a reasonable peace officer in the same or similar circumstances to be necessary, the right to use reasonable force no longer exists and the use of such force is not reasonable." In other words, according to both the prosecutor and, crucially, the judge in his instructions, the test the jury should employ was an objective one. Not only did the jury have to decide whether these

officers were in fear for their lives but, further, whether a hypothetical *reasonable* police officer would also have been as threatened as they claimed to have been and whether the reasonable officer would have been willing to use the same degree of force which they used against Rodney King.

The panel of attorneys interviewed live on *Court TV* while the jury was out, whose commentary is selectively included in *The Rodney King Case* prior to the documentary's own return to hear the final verdicts (the ones that count), underscores the strength of the prosecution's case. The lawyers seemed generally to agree that whatever the police officers may have believed, it was unlikely a jury would find reasonable justification for the degree of force used in this case. Defense attorney Raymond Brown observes:

Certainly the category of defendants most likely to be the beneficiaries of nullification in which the jury ignores the law and maybe the facts, is police officers. Briseno made it hard because Briseno attacked the others and said there was excessive force used there. That coupled with the tape made it hard. It was an arrogant defense but one which had a decent shot of winning.<sup>181</sup>

Brown's sober assessment turned out to be most prescient. On the one hand, if even Officer Briseno admitted on cross-examination that the use of force against King was unreasonable (and Briseno was shown on the videotape grabbing Powell's baton in an effort to protect the suspect from further harm), how could the beating of Rodney King be objectively defended? On the other hand, if the jury effectively "nullified" the objective, or reasonable peace officer test and simply substituted a subjective examination of the officers' state of mind, then these particular police officers might become the kind of "beneficiaries" to which Brown referred. Under a subjective approach, the jury would not require the defendants to have exhibited that reasonable degree of self-control the law expects but, instead, they would only be required to be genuine in their defense, sincere in their assertions that they *thought* Rodney King was under the influence of PCP, they *believed* he could take their guns away and kill them. The external measuring stick, society's right to demand a reasonable use of force standard, is cast aside.

We have already seen how vigorously defense attorneys in the Rodney King case pursued the subjective approach in their presentation of direct testimony by the defendants and in their closing argu-

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<sup>181</sup> The "Rodney King" Case: What the Jury Saw in *California v. Powell* (Courtroom Television Network Broadcast, 1992).

ments to the jury. What the officers saw, what they felt, what they believed to be the case (reasonable or not) is what the defense constantly sought to drive home in the jurors' minds. The jurors were implored to stand in the officers' shoes—who were they to say they might not have reacted as did these men in blue? Just as significantly, these jurors were chosen by the defense in the hope they would sympathize with white police officers, on trial for having beaten an African-American. As Fred Graham reports in *The Rodney King Case*, the defense scored an “early success” in getting the trial moved out of L.A. County and into Simi Valley. “This move,” says Graham, “made months before the trial started was as important as anything the defense would do during the trial.”

This brief but important commentary on the “change of venue” in the Rodney King case is provided over a series of camera shots that contrast the court where the case might have been tried with where it was tried, the urban congestion of downtown Los Angeles with the suburban tranquility of Ventura County; there is even a “Welcome to Simi Valley” sign pictured, like nothing so much as the entrance to a state park, as Graham repeats the devastating demographic statistics. “Of the twelve jurors picked in this trial,” he concludes, “not one is an African-American. The question observers pose is whether a jury from this predominantly white community can fairly judge four officers accused of beating a black man.” The “observer” posing this essential question is, of course, Graham himself.

No matter how many “observers” posing questions of this kind there may be, they do not get the chance to put their questions to the viewers of television or motion pictures unless a decision is made by the people in charge to include such concerns. Perhaps national focus given to the racial composition of the Rodney King jury was sufficiently intense that there was no way the issue could have been ignored in *Court TV's* documentary. But it is to their credit that they did not exclude a legal “technicality” with such enormous political import. Had the defense attorneys who represented Officers Powell and Koon been in creative control of *The Rodney King Case*, surely they would not have used the sort of visual juxtaposition that the documentary employs in contrasting the world where Rodney King was beaten with the one where his assailants were fortunate enough to be tried.

There is a remarkable similarity between the Rodney King case and the trial of Bernhard Goetz in New York in 1987. Goetz was not a police officer and he was charged with attempted murder; nevertheless, he was white, he had seriously injured black victims who were themselves engaged in criminal conduct, and his defense (like that of



the police officers in Simi Valley) was that he had used only that force which was proportionate to the situation that confronted him. Most interestingly, the jury in both cases had to decide whether to use an objective or subjective approach to determine if the force used was excessive under the circumstances. In his exhaustive and wonderfully intelligent critique of the Goetz case, law professor George P. Fletcher observes:

As a result of admitting a subjective theory of self-defense by the back door, the jury abandoned the task of judgment that the Court of Appeals had laid before it. They were supposed to consider not only whether Goetz had good motives, but whether he overreacted in formulating those motives. Their job was to get behind his intention and judge whether a reasonable person would have found shooting necessary under the circumstances.<sup>182</sup>

What is important to point out here is how closely Fletcher's description of the Goetz jury may fit the jury that exonerated the police officers who beat Rodney King. If the California Highway Patrol officers, the Singers, did not feel compelled to use excessive force, if indeed Officer Briseno tried to *stop* Officer Powell's use of force, how can it be said that the officers who brutally beat Rodney King acted *reasonably*? On the other hand, if the jury admitted a *subjective* theory "by the back door," then the officers on trial in Simi Valley could be found not guilty on the ground that, however unreasonable, their use of force was the product of "good motives." As defense attorney Michael Stone reminded the jurors in his closing argument: "These are not robocops, ladies and gentlemen. They hurt, they feel pain, they bleed, and they die—just like everyone else. And we leave it to them to take care of the mean streets so that we can safely enjoy our lives." Our safety, our ability to enjoy our lives, is not threatened by aggressive police officers or subway vigilantes, on this view, but rather by ghetto youths and what Stone called "the likes of Rodney Glen King." Maybe they went a little farther than the rules say they should but Officers Powell and Koon, citizen Bernhard Goetz, these are people who are on our side, the side of the community, who think the way we do. They share our motives, they are like us. The defense in *California v. Powell*, at any rate, got the jury they wanted.

A decade before the Bernhard Goetz case in New York, Dan White assassinated the mayor of San Francisco, California, and gay political activist and member of the Board of Supervisors, Harvey

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<sup>182</sup> GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 188 (1988).

Milk. Charged with murder, White raised a diminished capacity defense which permitted the jury to use a subjective rather than objective approach to the question of White's culpability. The jury was allowed to take into consideration White's extremely agitated emotional state at the time of the killings, even his apparent addiction to junk food that was high in sugar content. The jury may also have sympathized with White's homophobia and his general disgust with the direction San Francisco politics were taking.

As reported in the award-winning documentary, *The Times of Harvey Milk*, when the prosecution played in court the audiotape of White's emotional confession, some jurors broke down and cried because of their identification with White, if not with his criminal conduct. In spite of the fact that White had surreptitiously entered the city building before shooting Mayor Moscone and Supervisor Milk, thus evading the metal detector, and carefully reloaded his gun after killing Moscone but prior to executing Milk (evidence which might have supported a first-degree murder conviction under California law), the jury found White guilty of manslaughter only. White served less than six years in prison before being released, having "paid his debt to society." Some right-wing politicians privately argued that he had done San Francisco a favor.

There remains considerable controversy over whether an objective or subjective approach should be employed when juries are weighing questions of excessive force, adequate provocation, extreme emotional distress, diminished mental capacity, and so forth. In addition, as Professor Fletcher points out, it "is difficult to know how much of the instructions the jury . . . absorb[s] simply by having the arcane and convoluted legal phrases read and reread to them."<sup>183</sup> For the moment, however, two points need emphasis.

First, it is a matter of more than passing interest that the outcome of three of the most politically charged criminal trials of the last twenty years may have turned on the point of view taken by the jury. The jury's ability to take a subjective rather than objective (or "reasonable person") point of view—putting itself in the defendants' shoes while seeing the situation from the defendants' perspective—may have been key in the exculpation of Bernhard Goetz and the officers who beat Rodney King, as well as Dan White's conviction of manslaughter only. The irony, of course, pointed out by *Rolling Stone* magazine in its initial coverage of the Moscone and Milk homicides, is that the subjective approach taken by the jury in these three cases has always been an anathema to crime control conservatives, bitterly hostile

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<sup>183</sup> *Id.*

to any legal approach to determination of criminal responsibility which takes into consideration special circumstances in the defendant's background, individual characteristics which might cause a jury to be forgiving toward some defendants.

In the "affirmative action" field as well, constitutional conservatives have strongly opposed any consideration of race or gender, any willingness to cut through the rhetoric of "blind justice" in order to fashion a socially-conscious legal remedy. But no sooner are figures like Dan White and Bernhard Goetz, or police officers who have beaten suspects, placed in the dock than the wall of conservative resistance to "bleeding heart liberalism" and its jurisprudence comes tumbling down and an "individualized justice" is the order of the day. Suddenly, from nowhere, conservatives applaud juries who are bold enough to "do the right thing." Where are these same conservatives when women who are placed on trial for murdering their husbands seek to bring in expert testimony on the "battered-woman syndrome?"

Are rioters charged with arson in the wake of the civil disorder in Los Angeles likely "beneficiaries of nullification" of law, in the words of attorney Raymond Brown? Why do some defendants merit a subjective legal approach to their case "by the back door," as Fletcher describes it, while others do not even get a trial, but are instead the victims of summary execution of punishment in the streets, at the end of a police truncheon?

Second, if point of view in law is not only socially constructed but, at times, outcome determinative, the same can be said of popular culture. Both legal and cinematic representation can be portrayed as turning upon the issue of point of view, on the question of from what or whose perspective an event will be viewed or a text interpreted. The law governing use of deadly force by police officers in California was to be interpreted from an objective, or "reasonable peace officer," point of view according to the judge in the Rodney King beating case. Yet the jury, following the defense strategy, appeared to employ a subjective approach, viewing events as well as the defendants' conduct from the perspective of the officers on trial.

Just as jurors were compelled to make a choice in *California v. Powell*, as in the Bernhard Goetz case, whether or not to follow the judge's instructions (assuming they could understand them), whether to utilize an objective or subjective point of view in their deliberations, a filmmaker is also compelled to make a choice as to point of view. The motion picture camera must be placed *somewhere*, a film necessarily reflects someone's point of view. Underscoring a similar observation made throughout our critique of cinematic reconstruction, even

when a motion picture appears to be value free, even when it aspires to "point of viewlessness" (perhaps especially then), it must still be distinguished from the reality which it, in some way or other, reflects.

Amy Taubin of the *Village Voice* provides a telling comment on the Rodney King videotape itself:

There were several factors that made the notorious 81 seconds particularly trustworthy. First, they were shown "real-time" (i.e., had not been manipulated by editing) and second, they were shot from an "objective" point of view (i.e., showed the event from neither the subjective point of view of Rodney King nor that of the cops who were beating him.)<sup>184</sup>

Nevertheless, as Taubin makes clear, the objectivity or "trustworthiness" of the videotape as evidence of criminal conduct by the police was effectively undercut by the way defense attorneys "took the motion out of the motion picture" by having the jury view isolated, individual frozen-frame images, a tactic upon which Fred Graham also pointedly comments in *The Rodney King Case*. "The defense also refused," Taubin continues, "to admit the objectivity of the angle from which the tape was shot. Instead it asserted a single subjectivity—that of the police."<sup>185</sup> Analyzing the interpretive strategy used by the defense with regard to the video tape, Taubin has (perhaps unintentionally but accurately) characterized the defense strategy for interpreting the legal test for excessive use of force by police. And it was, as we have argued, this strategy that proved so successful in the defense's efforts to avoid criminal sanction in California. Significantly, jurors in the subsequent federal prosecution of the LAPD defendants<sup>186</sup> reportedly viewed quite differently an enhanced version of the famous videotape of Rodney King being beaten. Ironically, eighty-one seconds of

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<sup>184</sup> Amy Taubin, *Control Freak*, VILLAGE VOICE, May 19, 1992, at 47.

<sup>185</sup> *Id.*

<sup>186</sup> Stacey Koon and Laurence Powell, unquestionably the two officers most culpable in the beating of Rodney King, were convicted by the U.S. government of having violated King's constitutionally protected civil rights. Even though federal prosecutors, in contrast to attorneys for the State of California, "had a more difficult legal task this time because they had to show that the cops maliciously intended to rough up King," they nevertheless "started with the advantage of hindsight." David A. Kaplan & Donna Foote, *King II: What Made the Difference?*, NEWSWEEK, April 26, 1993, at 26. Equally important, the U.S. Attorneys "benefited from getting a racially diverse jury from an urban area." *Id.*

A year later, King emerged victorious from a civil suit arising from the same criminal conduct by Los Angeles police officers; see John L. Mitchell & Shawn Hubler, *King Gets Award of \$3.8 Million*, L.A. TIMES, April 20, 1994, at A1 ("Three years after the 1991 beating that made him a national symbol of police brutality, Rodney G. King on Tuesday was awarded more than \$3.8 million in damages from the City of Los Angeles.").

amateur video may have presented as complex a problem of interpretation as the fiction of great novelists or the classics of world cinema.