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3 **ETHICS, AESTHETICS, AND LAW:**  
5 ***THE THIRD MAN'S THREE PRONGS***  
7

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11

13 **ABSTRACT**

15 *The chapter explores the role of law in society and its relation to ethical*  
17 *conflicts as reflected through the prism of the film The Third Man. By*  
19 *focusing on the complexities of life in post-war Vienna, the film exposes*  
21 *dilemmas that prevail in ordinary times and in functioning democracies as*  
23 *well. Our analysis suggests that one way to manage these dilemmas and*  
25 *balance the conflicting loyalties and interests they raise is to sustain open*  
*channels between the law and other narrative-generating practices from*  
*which normative stances are evaluated. The law-and-cinema discourse is one*  
*such channel and The Third Man presents, in our eyes, the vitality of that*  
*channel, due to its rich aesthetical language and its unique representation of*  
*the ethical tensions (and their consequences) in the modern era.*

27 War and its aftermath crush all individuals, however clever they may be.

29 – Sinclair (1988, p. 1)

31 **1. INTRODUCTION**

33 This decade marks the 60th anniversary to the victory over Nazi Germany.  
35 The defeat of Nazi Germany was unique not only because it ended the

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1 massive military campaigns in Greater Europe and North Africa. Crushing  
the Third Reich in battle also marked the beginning of one of the more  
3 impressive “rehabilitation” processes carried out in the 20th century.  
Experience taught the Allies that victory in war was a necessary but not a  
5 sufficient condition for peace. Of the many dilemmas that this – and  
presumably any other – post-war rehabilitation process entails, one is worth  
7 highlighting in particular. Whether defined as occupation or liberation, war  
and its conclusion pose, by definition, a deep challenge to the formal legal  
9 system operable in the territory under belligerent occupation.<sup>1</sup> Rather than  
focusing on the traditional questions that arise when a legal layer is put in  
11 place in post-war situations (such as issues of conflict with existing laws, or  
the legitimacy of externally imposed norms) this chapter will focus on the  
13 post-war moment – or more accurately, the post-war phase – as a window  
through which interesting insights can be gleaned regarding law in everyday  
15 situations. The cracks suffered by the edifice of the rule of law at the  
aftermath of war and during belligerent occupation expose some key ethical  
17 features that often remain hidden or blurred in ordinary times. These ethical  
tensions, and the role of the rule of law in their management, will be at the  
19 focus of this chapter.

Methodologically, this chapter will steer away from the beaten path of  
21 analyzing legislation, case law, and legal proceedings (i.e., traditional legal  
methodology). Instead, the organizing source at the center of this chapter is  
23 a film. We chose to explore the relations between the law and other  
normative sources through the prism of *The Third Man* (1949), one of the  
25 prime products of British post-war cinema.<sup>2</sup> The film – precisely because it is  
not a legal source and precisely because it does not directly address legal  
27 themes – is a useful platform for examining the unarticulated assumptions  
underlying the law and for highlighting some of the tools the law uses in its  
29 “ordinary” operation.<sup>3</sup> Using a non-legal cultural artifact offers a fresh  
perspective on matters the legal world is either blind to or unable to directly  
31 acknowledge given the foundation of the practice. It also offers an  
indication of possible attitudes towards the role law plays in society.<sup>4</sup>

33 Our choice of this specific film was influenced, naturally, by the fact that  
the movie was made right after the war, and thus reflects an authentic  
35 appreciation of the post-war phase. Furthermore, the movie is structured  
around ethical dilemmas – the very same dilemmas that an operating legal  
37 system regulates either directly (through legal norms) or indirectly (through  
enabling mechanisms for private ordering or for the establishment and  
39 maintenance of background conditions that assist in mitigating or  
“managing” these dilemmas). Lastly, we chose the film for its aesthetics.

1 The famous black and white and light and shadow games played by the  
3 camera – the *noir* characteristics of the film – are an integral aspect of the  
ethical claims addressed therein.<sup>5</sup>

5 In the following sections we will briefly sketch the plot of the movie,  
elaborate on the ethical conflicts portrayed therein, and then comment on  
7 their relevance to transitional and “permanent” legal orders. We will then  
comment briefly on the aesthetical presentation and construction of these  
9 dilemmas and their relevance to our understanding of the operation of the  
law in post-war times and, by reference, in peacetimes.

11

## 2. THE PLOT

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15 Although *The Third Man* is aesthetically and cinematically sophisticated – it  
is among the clearest *exemplars* of *film noir* – its plot is rather  
17 straightforward. A small-time racketeer, engaged in one trick too many,  
causes the death and suffering of the sick by selling diluted penicillin on the  
black market, gets caught, and ultimately finds his own death while trying to  
19 escape. Here is how it transpires.

21 The year is 1949. Holly Martins, an American writer of Westerns,<sup>6</sup> arrives  
to post-war, divided Vienna on an invitation from an old childhood friend,  
Harry Lime. Lime has invited Martins to write propaganda for a volunteer  
23 medical unit Lime allegedly runs. Upon his arrival, Martins is horrified to  
find out that Lime was killed a few days prior in a car accident. Martins  
25 decides to stay in Vienna after he begins to suspect there is more to the  
accident than it appears when he meets several people who knew Harry.

27 First, Martins encounters the British Colonel, Calloway, who refers to  
Harry as “the worst racketeer who ever made a dirty living in the city”  
29 (Greene, 1988, p. 26). Calloway was investigating Harry right before Harry’s  
demise. Then Martins meets Baron Kurtz, who claims to be Harry’s good  
31 friend, and tells Martins about the circumstances of the accident. Next,  
Martins meets Anna Schmidt, Harry’s girlfriend and an actress in Viennese  
33 operettas. Anna is Czechoslovakian and, therefore, officially a Russian  
citizen. In order to stay beyond the Russian zone, she uses forged Austrian  
35 papers that Harry arranged for her. Soon enough, Martins falls in love with  
the melancholic, beautiful Anna, a feeling which she does not return.

37 As more facts are revealed, Martins becomes increasingly doubtful about  
the circumstances of Harry’s death and starts suspecting foul play. His  
39 suspicions intensify when a witness to the accident, a porter in a hotel who  
was willing to confide in him, is killed shortly before their planned meeting.

1 At this point, about 65 min into the film, the dubious Martins encounters his  
 supposedly dead friend, Harry, who, as it turns out, is very much alive.  
 3 However, Harry manages to disappear before Martins is able to speak with  
 him. Harry's "death," as Martins is now painfully aware, is part of Harry's  
 5 illegal activities. It seems that Calloway's allegations were correct and Harry  
 is a ruthless black-marketer who traffics in stolen, diluted penicillin that  
 7 caused death and deformation to many sick children.

Calloway tries to influence Martins to help the police in their quest to get  
 9 their hands on Harry Lime. Martins eventually decides to help Calloway in  
 return for Calloway's assistance with Anna's papers. The trap for Harry is  
 11 set, but upon learning the details, Anna refuses to accept Martins' help.  
 When Harry shows up, a rather dramatic chase in Vienna's long sewer  
 13 channels ends with Martins fatally shooting his friend.

In the final scene after Harry's funeral, Martins watches Anna as she  
 15 passes his car without stopping, not even to acknowledge him. Instead, she  
 continues down a long dirt road towards an unknown destination.  
 17

### 19 3. ETHICAL CONFLICTS: BEYOND 21 THE GRAY ZONES

[T]he city is divided into four zones – each occupied by a power ... [b]ut the centre of the  
 23 city – that's international. (Greene, 1988, p. 12)

*The Third Man*, as a fine example of the *film noir* genre, is not merely a  
 25 thriller; its drama characteristically contains a clash of ethically relevant  
 virtues, values, and codes of conduct.<sup>7</sup> It is not just about a chase after the  
 27 enigmatic Mr. Harry Lime, but also, if not primarily, about the ethics of the  
 different players and the moral choices they represent. Yet, in line with other  
 29 movies of *film noir* genre, the film does not attempt to demonstrate the  
 "correct" solution to these clashes, but rather applies its cinematic palette to  
 31 illustrate evocatively the emotional significance, or the "price tag," of doing  
 the "right thing" (or at least of taking the theoretically defensible ethical  
 33 choice). By inviting the audience to care about the leading characters and  
 their ethical conflicts, the film provides us with an opportunity to appreciate  
 35 the weight of the actions taken.<sup>8</sup>

The film organizes the ethical dilemmas by portraying the different  
 37 loyalties to which the characters are committed. Loyalty, by its nature,  
 places a certain demand on the subject, limiting him or her from pursuing  
 39 courses of actions that he or she might otherwise prefer to pursue. A citizen  
 loyal to her country is required to refrain from acting in a way that will

1 harm the country. This loyalty may conflict with others loyalties, such as  
 3 the loyalty to a loved one. As Sartre (1965, pp. 35–36) pointed out in his  
 famous example, the loyal citizen may face a conflict between his loyalty to  
 5 his ailing mother and his loyalty to his country, preventing him from  
 enlisting with a resistance movement to defend his country so that he may  
 care for his mother.<sup>9</sup>

7 The four leading characters in *The Third Man* – Anna Schmidt, Harry  
 Lime, Col. Calloway, and Holly Martins – face conflicting loyalties, and are  
 9 continuously forced to take a stand and make a choice that is directly related  
 to their loyalties. They are required to judge – not in a legalistic sense, but  
 11 nonetheless to judge – between their different sets of commitments. In order  
 to appreciate the film's *noir* stance regarding ethical choices – namely before  
 13 we, the audience, rush to judge the characters, we should be sensitive to the  
 “price” associated with a certain choice – it is worthwhile to examine the  
 15 conflicts of loyalties faced by the leading characters in closer detail.

17

### 3.1. Anna Schmidt

19

Anna Schmidt, a Russian citizen with forged documents, is an illegal  
 21 resident of Vienna, hunted by the Russian authorities. She fears deportation  
 to the Soviet zone, where life would be harsher for her, especially given her  
 23 use of the forged documents. Martins offers her a way out: tickets and  
 legitimate papers out of Vienna. She is thus placed in a tragic situation  
 25 where she must chose between her loyalty to Harry, whom she loved, and  
 her loyalty to herself. Anna suspects that Martins' aid was made possible at  
 27 the price of Martins' acquiescence to assist in the capture of Harry. When  
 her suspicion is confirmed, she rejects the offer: “If you want to sell yourself,  
 29 I'm not willing to be the price,” she tells Martins while tearing the ticket and  
 the papers into pieces (Greene, 1988, p. 108). Anna makes clear that while  
 31 she no longer wants Harry, he is still in her heart, and that is enough for her  
 to refuse to take any part in his capture. She insists the decision should be  
 33 hers, not Martins' (even though there is no real decision to be made in her  
 mind; she just will not do it).<sup>10</sup>

35 Yet the conflict Anna is facing is not only between her loyalty to herself  
 (in the sense of self-interest) and her loyalty to her loved one; it is also  
 37 a choice between her loyalty to her love and her loyalty to the well-being  
 of her fellow citizens (as represented in the movie, interestingly, by the  
 39 loyalty to the rule of law). Anna cares about Harry and feels little or no  
 commitment for the rule of law and its institutions, so her choice is easily

1 made. She will not do anything to harm Harry, regardless of the  
consequences to herself, to Martins or to the well-being of the people of  
3 Vienna. In fact, she is willing to actively lie for Harry and break the law – or  
at least defy the legal authority of Col. Calloway – by warning Harry.  
5 Between justice and love, between the claims put forward by Col. Calloway  
for the sake of the sick children and on behalf of the law, she chooses love,  
7 even if that love remains an unrealized and unreciprocated ideal. She feels  
no particular obligation to be honest or truthful nor does she feel a great  
9 need to know the truth about what Harry has done or whether Harry is  
alive. Her inner truth, it seems, is not to betray Harry’s trust regardless of  
11 whether he has betrayed hers.

13

### 3.2. *Harry Lime*

15

Harry Lime is a villain with a twist. His iniquitous activities are supplemented  
17 by a custom-made ideology that serves as a justification for his choices. While  
Harry’s long friendship with Martins demands Harry’s loyalty towards  
19 Martins, and his relationship with Anna, whom he knows is in love with him,  
demands, at least, his continuous care, his behavior demonstrates that he  
21 views both friendship and love as merely instrumental. In other words, they  
do not present any independent valid claim upon his loyalties. His only  
23 loyalty is to himself, or to be more precise, to maximizing what economists  
would call his “utilities.” He views Anna’s and Martins’ expectations and  
25 feelings as impairments from which, fortunately, he does not suffer.

Harry feels neither obligation nor urge to aid Anna in her time of need.  
27 Anna is no longer of any use to him – after all, he is “dead” and needs to  
remain dead, even to Anna – so “his hands are tied” when confronted  
29 with Martins’ persisting requests to aid her. In shirking any responsibility,  
he explains to Martins, “What can I do? Be reasonable. Give myself up?  
31 This is a far, far better thing” (*id.*, pp. 96–97). Harry’s version of  
reasonableness matches his approach to loyalties. For him, to act reason-  
33 ably is to act in pure self-interest. If disappearance was good for him, there  
is no reason why disappearance would not be good enough for Anna, even if  
35 her disappearance is not voluntary and is to the Soviet zone (from which she  
might not return).

37 Similarly, he views the demands made by the community or the state to  
abide by the law as a social construct that one should deconstruct. Having  
39 been deconstructed, the state becomes a mere mechanism for the  
maximization of power with little regard either to ethics of care or to ethics

1 of justice. Harry's moral, or amoral, attitude is best expressed in his  
 famous "Great Wheel speech." After pointing at the "people moving like  
 3 black flies at the base of the wheel" (*id.*, p. 97), Harry unfolds before  
 Martins his worldview in a nutshell: "Would you really feel any pity if one  
 5 of those dots stopped moving forever? If I say you can have twenty  
 thousand pounds for every dot that stops, would you really, old man, tell me  
 7 to keep my money – or would you calculate how many dots you could  
 afford to spare? Free of income tax, old man. Free of income tax. It is the  
 9 only way to save nowadays" (*id.*). As the wheel descends and the flies  
 transform into recognizable human beings, Harry elaborates: "... in these  
 11 days, old man, nobody thinks in terms of human beings. Governments  
 don't, so why should we?" (*id.*, p. 98).

13 Without much fanfare, Harry states that he is willing to express loyalty to  
 law and government to the same extent, no more, no less, as governments  
 15 express towards him. As governments think in masses (in five-year  
 bureaucratic plans that are detached from the humanness of the individual),  
 17 so does he; as governments calculate their gains and losses (including losses  
 in the lives of their citizens) in order to maximize their utility, so does he.  
 19 And so should Martins. To Harry, any other attitude towards friendship,  
 love, or the rule of law is misguided by a romanticized perception of  
 21 reality. "We aren't heroes, Rollo, you and I. The world doesn't make heroes  
 outside your books" (*id.*, p. 97). Not only are "moralistic" ideologies  
 23 misguided, they also do not work. The most efficient way to promote  
 prosperity, knowledge and gains in every field is through harboring  
 25 pragmatic self-interest, even if that leads to a state of constant struggle,  
 where every man is for himself, and man to man – wolf.<sup>11</sup>

27

### 29 3.3. Colonel Calloway

31 If Harry is a villain, Col. Calloway represents the quest for public interest  
 and the promotion of the good of the collective. In post-war Vienna, which  
 33 is under military governance, he represents the law. He is a soldier, in charge  
 of the British military police in Vienna. "With a background of Scotland-  
 35 yard training, he is steady, patient, and detriment in his work – a man who is  
 always kindly up to the point when it interferes with the job, who never gets  
 37 angry (because it would be unprofessional)" (*id.*, p. 8). Burdened with the  
 responsibility of combating the aftermath of the war, namely the breakdown  
 39 of social order and the rule of law, his mission is to bring Lime to justice,  
 upon which he embarks with British matter-of-factness.

1 The choices he has to make are not those that involve abusing his  
 3 authority for personal gains (such as money, love, or friendship) – that  
 5 would be acting out of character – but rather choices that involve the  
 7 conflict between adherence to the principles of fair and due process and  
 9 reaching the desired (and, if evaluated irrespective of process – just) result.  
 11 However, he is willing, when the balance appears right, to bend the formal  
 13 rules to achieve the “right” outcome. Calloway needs Martins’ cooperation  
 in capturing Lime since Martins can lure Lime in. “What price would you  
 pay?” asks Martins. “Name it,” answers Calloway (*id.*, p. 101). In the  
 immediate scene that follows, as if with a magic wand, Anna’s up-till-then  
 unsolvable immigration problems are swiftly cleared. “Well, Miss, you’ll be  
 having breakfast in the British Zone,” Anna is told. “You needn’t fear the  
 Russkies with those papers” (*id.*).

Calloway’s loyalty, then, lies with the ends of good government. He  
 clearly sees right from wrong and identifies himself as fighting for the good  
 guys, who, while sometimes forced to look the other way and cut some  
 corners, nonetheless play a crucial role in restoring the rule of law. His plea  
 to Martins is to join him, and thus join the community of people and of  
 values of which Calloway is a guardian.

21

#### 3.4. *Holly Martins*

23

Martins, as his character is portrayed throughout the film, views himself at  
 least to an extent as playing the role of the lone good guy in one of his  
 Western novelettes.<sup>12</sup> This role involves exposing the truth and thus  
 frustrating the scheme of the “utilitarian” Sheriff – in this case, Calloway<sup>13</sup> –  
 to pin the blame on the wrong guy<sup>14</sup> (or gal) just in order to calm things  
 down.<sup>15</sup> Martins initially suspects Calloway of the basic sin of police power:  
 victimizing the innocent in order to pursue a public interest (and in this case,  
 in order to restore a sense of order or a resemblance of normalcy).<sup>16</sup> Yet the  
 honest guy that Martins is, he cannot remain indifferent to the evidence put  
 forward by Col. Calloway and to the latter’s demand that Martins assist in  
 bringing to justice the people who harmed so many human lives by diluting  
 the penicillin.

Martins – the lone rider<sup>17</sup> – must choose between his loyalty to his best  
 friend,<sup>18</sup> Harry Lime, who offered him a job in Vienna and to whom he was  
 indebted since childhood,<sup>19</sup> his loyalty to his newly found love, Anna, and  
 his ethical commitments to truth and justice. Martins knows that by  
 bringing Lime to justice he will breach the loyalty he feels he owes Lime and

39

1 probably lose whatever affection he might win from Anna who is still  
devoted to Lime. Martins eventually chooses not to side with Harry. He  
3 then has to “pay the price” and lose Anna’s respect.

5

#### 4. LOYALTIES AND LAW

7

8 What role does law play within this ethical framework of conflicting  
9 loyalties, if at all?

11 Before we directly address this question, we have to acknowledge the  
complexity of the term “law.” The law may refer to a specific body of rules  
(positive law), to a certain set of institutions (as in the colloquial term “the  
13 legal system”), or to a certain social domain (or “system” in the  
Luhmannian sense) which infuses the institutions and practices within  
15 which these institutions operate with a certain set of ideal types,  
consciousness, and modes of communication (language). Under the latter  
17 definition, “law” is a social space, separated (one way or another) from the  
various other social domains (which are organized around their own  
19 functional kernels and which are constituted via their own linguistic and  
aesthetic modes of interaction and imagination). While we usually treat the  
21 term “the law” as a set of norms (i.e., the first meaning described earlier),  
sometimes, as the context demands, we invoke the term to denote the set of  
23 institutions or the social domain itself.

25 Having briefly attended to the complexity of “the law,” we should also  
recognize the various meanings of “loyalty.”<sup>20</sup> Some may view loyalty as an  
emotion, and would argue that law has little to do with emotions: we do not  
27 feel something towards someone because the law tells us to, just as we  
cannot cease from experiencing a certain emotion towards someone simply  
29 because the law orders us not to feel that particular emotion towards a  
particular individual. Therefore, if loyalty is indeed an emotion, akin to  
31 devotion, compassion, and the like, it is beyond the effective reach of legal  
regulation. However, even if it is true that law does not or cannot regulate  
33 emotions – and this seems to us as a bit simplistic, since the relationship  
between law and the emotions is rich and complex<sup>21</sup> – loyalty is distinct  
35 because it is not “just” an emotion (if there is such a thing). Loyalty is also a  
cognitive position informed by moral reasoning and thus subject to moral  
37 evaluation and critique.<sup>22</sup> Morality has something to say about what  
deserves our loyalty, and also about what should we do when faced with  
39 competing ethical claims, one or more of which are claims of loyalty. More  
importantly, the actions pursuant to such (morally relevant) loyalties are

1 very much the subject matter of legal norms.<sup>23</sup> Thus the relationship that  
 connects law and loyalty is important to consider.

3 The first question that arises in this context is our perception of the claim  
 that law has upon us. Two options come to mind. Under the first option,  
 5 loyalty should be to the law above all else because it is the overall balancer  
 of competing loyalties. Under this option, the law aspires to resolve the  
 7 conflicting loyalties by balancing their respective strengths under the  
 circumstances so that certain courses of action are either permitted or  
 9 required by law while others fall outside the boundaries of what the law  
 permits (and therefore would expose those who chose to pursue them to civil  
 11 or criminal liability). Under the second option, the law is of a more limited  
 scope, concerning itself only with protecting certain rights (or interests),  
 13 thereby not resolving the conflict of loyalties at all. Under this option, the  
 law presents before its subjects an independent claim of loyalty, which may,  
 15 in certain circumstances, compete with other loyalties.

Let us clarify this tension with some examples. In *The Third Man*, Anna  
 17 refuses to aid the authorities. “I wouldn’t do a thing to harm [Harry]” (*id.*,  
 p. 108), she says even after learning that not only has Harry harmed others  
 19 but has also refused to help her. Assume that pursuant to a motion by Col.  
 Calloway, a judge would have ordered her to provide the information  
 21 concerning Harry’s whereabouts. Would we see that as a case where the  
 judge has balanced all the relevant moral considerations at hand – including  
 23 Anna’s loyalty to her beloved – and therefore the judge’s order leaves no  
 room (or need) for further consideration? Or should we view the judge’s  
 25 order as demanding that Anna choose between her loyalty to the rule of law  
 and her loyalty to Harry?<sup>24</sup> A similar type of dilemma may arise in other  
 27 circumstances: Assume that the Supreme Court of the United States has  
 ordered reporters to disclose their sources if so required by a grand jury.<sup>25</sup>  
 29 Should the reporters follow the rule of law – since, after all, the court of law  
 has balanced the competing claims of loyalty? Or should the reporters’  
 31 loyalty to democratic principles and to their sources (assuming they gave  
 their word to the sources to maintain confidentiality) compel *the reporters* to  
 33 “balance” their loyalty to the law (the court order) with their other loyalties?

Our understanding of the claim the law places on us would affect our  
 35 assessment of the choice the individual in question makes. If we view the law  
 as the ultimate “balancer,” exhausting the sphere of normative debate (by  
 37 according each claim for loyalty its due weight), then we would tend to have  
 little moral patience with the reporters’ insistence to disregard the  
 39 comprehensive and nuanced balance embedded in the legal judgment. On  
 the other hand, if we perceive the legal judgment as concerned with only

1 specific rights and interests – and not with the entire normative field – we  
2 would view the legal judgment as merely putting forward another,  
3 independent claim, albeit armed with the coercive power of the state. In  
4 this case, the reporters' decision might gain some moral support.

5 Whether we view the law as aspiring to resolve such ethical dilemmas or  
6 not, it seems that the law, as argued earlier, demands our loyalty to some  
7 degree. This loyalty is not only for a certain action or performance, but for  
8 the consciousness that accompanies that action – the *opinio juris*<sup>26</sup> – namely  
9 that the action is not merely an arbitrary command of a despot, but also an  
10 element of a sovereign, reciprocal relationship between citizen and state.  
11 Just like other relationships place certain demands of loyalty, so does the  
12 state–citizen relationship; the law demands our loyalty because it is the  
13 formal medium that relates (or binds) the citizens to the state (and the state  
14 to the citizens). Put differently, for the law to be law, not just an act of  
15 power, it must provide an internal viewpoint from which we explain and  
16 justify to ourselves why we should obey the law and why the law should  
17 conform to certain norms and procedures (Hart, 1961, pp. 55–57; **AU :3**  
18 Tamanaha, 1996). This internal viewpoint, then, requires us to tell ourselves  
19 the “story” or “narrative” at the basis of law:<sup>27</sup> why it is that the law exists  
20 and demands our loyalty. There are two alternative narratives that may  
21 operate in that context.

22 First is the narrative contained within the canonic dystopian framework  
23 where, without a legal order, the “fist law” will rule whereby might makes  
24 right. This Hobbesian attitude emphasizes that law is primarily about order  
25 and the regulation of power, safeguarding against the chaos of a world  
26 based on “fist law” (Hobbes, 1991 [1651]). By establishing the monopoly  
27 over coercive power the law denounces the notion of “fist law” and  
28 expropriates to itself the position of having the ultimate fist, so to speak  
29 (Cover, 1983). This primeval fear from chaos is conspicuous in 1945 Vienna,  
30 a city that disintegrated from the “glamour and easy charm” of pre-war  
31 Strauss music into “the classic period of the Black Market” where  
32 everything was for sale and “amateurs” ended up dead, “floating in an  
33 icy river.”<sup>28</sup> Fear appears as much an ingredient of Vienna's new culture as  
34 decadence was of the old.<sup>29</sup> This fear legitimizes the quest to reestablish the  
35 rule of law. On one account it also promotes the ability to establish the  
36 cooperation necessary for a sustainable regime. Yet this might not be so; if it  
37 is the authorities that are feared, such fear may inhibit cooperation.<sup>30</sup> It  
38 should be noted that according to this narrative, the values at the basis of  
39 the legal order are secondary to the notion of order. The law need not  
40 present itself as the ultimate balancer as long as order is maintained by legal

1 norms. Our loyalty to law in this narrative, then, is merely instrumental; it is  
 2 contingent upon our assessment regarding whether the law can actually  
 3 bring about the kind of order we seek. Furthermore, as the Vienna example  
 4 makes clear, our loyalty to law (and order) may be trumped by our loyalty  
 5 to more important things than order, or more meaningful relationships than  
 6 the state–citizens bond.

7 Second is the more popular narrative which puts at the center a more  
 8 optimistic notion of cooperation; rather than fear from chaos, the rule of law  
 9 may be seen as representing a social contract that embodies the values of the  
 10 community.<sup>31</sup> Such a narrative assumes an intricate process of establishing  
 11 and reestablishing a deep accord as to the core moral values that reflect the  
 12 shared beliefs of the community. At the same time such social contract also  
 13 serves to bind the community into a polity; by enshrining the common  
 14 values, the covenant constructs a shared ethos (Post, 1993, pp. 168–169).

15 This appealing, if somewhat romantic, narrative receives a rather cold  
 16 shoulder in *The Third Man*. Fragmented Vienna highlights the difficulties  
 17 inherent in adopting such narrative as a basis for our loyalty to law. In  
 18 Vienna of 1945 it is apparent that people’s values differ greatly.  
 19 Furthermore, the aftermath of the war exposes the rough stitches that keep  
 20 the “community” together. Who is the relevant Viennese community? The  
 21 native residents?<sup>32</sup> The immigrants? The war refugees? The occupying  
 22 powers?<sup>33</sup> Whose interest should such social contract represent? If Austrians  
 23 are not allowed into the famous Viennese hotel – The Sacher’s Hotel  
 24 (Greene, 1988, p. 32) – and if demonstrations are not allowed (*id.*, p. 66), it is  
 25 no wonder that solidarity with the “visitors” is not taken for granted. In  
 26 that context, Col. Calloway’s proposal to adopt a certain notion of the  
 27 public good – as a basis for reestablishing the social contract – is received  
 28 with a considerable degree of suspicion. The people of Vienna want little to  
 29 do with the authorities, skeptical as to the good such loyalty will bring.<sup>34</sup>  
 30 The only Viennese who agrees to help the authorities – the old porter – was  
 31 fatally failed by the system: He was murdered.<sup>35</sup> It seems, then, that *The*  
 32 *Third Man* portrayed a community of individuals kept together by their  
 33 location and by remnants of a past culture, a community that is bound  
 34 together – if at all – by the almost instinctive rejection of the notion of a  
 35 collective. Loyalty to law as representing a collective social contract, then, is  
 36 almost ridiculed by the people of Vienna as nothing but a manipulative  
 37 slogan.<sup>36</sup>

38 The loyalty that the members of the community supposedly feel for their  
 39 fellow individual members raises the question of the attitude towards the  
 “other,” namely the “non-member.” Is there also a loyalty claim towards

1 the “other”? And in law, what legal protections are non-members entitled  
to? Where do Anna’s interests fit in as a Czechoslovakian – and thus  
3 officially a Russian citizen – with forged Austrian papers? Harry’s critique  
regarding the lack of “true” solidarity is biting. His claim is that the  
5 social contract narrative and the care that should be at its core are merely a  
façade. Such a narrative’s main use is to obscure the reality by distorting  
7 the fact that the law is being used by those in power for their own ends, ends  
for which the individual members of the community are merely numbers  
9 and dots.<sup>37</sup>

This distrust towards the prevalent legal narrative – that the law  
11 represents a social contract that forms a collective and that the law is  
inclusive – is reflected also at a deeper level: Is our loyalty to law expected  
13 because it reflects “our” norms – and therefore we “owe” it, in the Socratic  
sense, a duty to uphold it as it “upholds” us? (Santas, 1979, pp. 11–29). Or  
15 does the law represent the values of the international community and  
humanity at large, values that may be “more just” than the organic values  
17 that have contingently developed in a specific community but cannot be  
justified on the world stage? For example, World War II was a war between  
19 right and wrong, just and evil. The narrative underlying the drive of the  
Allied Forces – of which Austria of course was not a part – was that the  
21 Nazi values should be rejected, not necessarily because they were not an  
authentic representation of German (and Austrian) community values, but  
23 because these community values violate “the norms of humanity itself” and  
thus they deserve no loyalty.

25 What would be the foundation of the “norms of humanity itself”? One  
way is to turn to an external order altogether: natural law, divine law, or any  
27 other such metaphysical source.<sup>38</sup> As we know, the claim that “nature so  
required” was used by both sides of the struggle between Nazism and  
29 Liberalism. The film itself raises questions whether nature, including the  
nature of human beings, is a sound enough moral basis upon which to  
31 ground the commitment to the rule of law. As for religion, the film portrays  
men of cloth as absents and to the extent they are referred to, it is with irony;  
33 they present no greater claim for pursuing justice than the claim presented  
by anyone else, if they present one at all.<sup>39</sup>

35 Another way to ground the core of “the norms of humanity itself” is to  
expand the notion of community to encompass the human race, by  
37 suggesting that the social contract is a contract “signed” or entered into by  
all humans. Yet under such conception, an individual in Vienna feels she has  
39 very little influence. Her ability to participate in shaping the “norms of  
humanity itself” is limited and it is unclear whether these laws really care for

1 her and her authentic expression of autonomy. Under these circumstances,  
the Socratic demand of reciprocal loyalty is weakened.

3 If indeed “the norms of humanity itself” are a manifestation of the social  
contract narrative (or a variation thereof), the role the international  
5 community plays as the caretaker of this contract is significant. Yet the  
international community and its ethical stance, if it has one, are portrayed in  
7 *The Third Man* as rather crude. “The centre of the city – that’s  
international,” explains the narrator at the opening scene (Greene, 1988,  
9 p. 12), establishing the centrality of the commitment to humanity at large.  
But the film is quick to dispel any notion that the laws governing the  
11 behavior of the international community are necessarily more just towards  
the individual, as is clear from Anna’s case and from the general restrictions  
13 placed on the movement of residents in their own city. It is therefore quite  
unclear whether the movie embraces the notion that one should relocate his  
15 or her loyalties from the domestic legal system to international law.<sup>40</sup>

Similarly, to the extent that the Allies have fought a war against the Nazis  
17 in the name of “universal” law (premised on a moral rejection of Nazism),  
the movie demonstrates the discrepancy between such noble ideals and the  
19 realities of the occupying powers (in specifically, their military police forces).

In short, whether the norms of humanity itself are based on natural law or  
21 are the manifestation of the global social contract, the film seems to suggest  
that embedding our loyalties in the international sphere is problematic  
23 because this sphere merely imports the ailments of the national (or  
communal) order.

25 But the movie presents an even deeper challenge to our loyalty to  
international law. In the real world, according to its cinematic representation  
27 in *The Third Man*, fates of individuals, such as Anna, are not governed  
by the commitment to the “norms of humanity” itself at all, but by a highly  
29 pragmatic (if not cynical) notion of the “social contract” approach:  
Calloway “contracts” with the Russians, by way of bargaining, and thus  
31 the fate of Anna is determined. This somewhat Machiavellian view of  
governance is difficult to reconcile with the romantic notion of the  
33 social contract theory, and thus the question of the source and scope of  
our loyalty to the international order remains open. While this depiction of  
35 international law is tied to international politics in the first half of the 20th  
century, some might say that modern day globalization cannot be fully  
37 understood without noting this heritage.

An alternative way to address the above-mentioned tension between the  
39 two narratives and between the national and international spheres would be  
to shift our focus: To what is the law loyal? Is the law loyal to principle or is

1 the law loyal to power and its social manifestation? Whereas Dworkin  
2 (1988) would claim that Law's Empire is based on a system of coherent  
3 principles, Machiavelli (1988) would certainly view law as a system of  
4 manipulation set to achieve a result that serves the governing elite, cloaked  
5 by legal jargon so as to adorn it with legitimacy, and a demand for  
6 compliance. The tension between the opposing narratives is clearly  
7 demonstrated by the current contradicting perceptions regarding globaliza-  
8 tion. According to one line of rhetoric, globalization manifests the  
9 aspirations of the entire humanity to work in tandem for the principled  
10 benefit of all. In this perception, law plays a crucial, unifying role by  
11 establishing the mutual framework that binds humanity together and  
12 enables the amalgamation of nations around shared principles (economic or  
13 otherwise ideological). According to the alternative line of rhetoric,  
14 globalization is a tool of the powerful to increase their domination over  
15 the less powerful.<sup>41</sup> Under this perception, the law is an instrument that  
16 conceals the use of crude power and thus it is not clear whether it deserves  
17 our sincere loyalty at all. Harry Lime sought to expose this precise  
18 camouflage.<sup>42</sup> The question of whether Harry Lime is right or wrong is left  
19 unresolved in *The Third Man*.

20 It seems that *The Third Man* challenges our unarticulated attitudes  
21 towards the law most pointedly when there is an altogether absence of an  
22 operating legal system. Where does our loyalty to law lie when there is no  
23 functioning legal system? To what is an absent law loyal? In post-war  
24 Vienna the legal absence is reflected in the disconnection between the  
25 governmental institutions (including the legal ones) and the community they  
26 should be serving. Furthermore, it is not clear that a distinct "Viennese"  
27 community exists. It may very well be the case that such a fractured and  
28 disillusioned community is incompatible with the idea of law. The  
29 untethering of the social fabric inflicted by the war results in a social  
30 situation antithetical to the notion of law. This is so not only because some  
31 degree of order has to exist for law to function, but because some degree of  
32 cohesion – a sense of shared responsibility – has to exist for there to be a  
33 sense of sovereignty. Vienna, a paradigmatic locus of culture, civility, and  
34 governance, is transformed to a mere shell; in these circumstances it is no  
35 surprise that the legal system is but a shell too.

36 As mentioned, the movie addresses a rather extreme situation in which the  
37 underlying social, cultural, and moral foundations upon which legal  
38 institutions rest become partially undone as a consequence of the devastation  
39 wrought by the war. The movie allows us to inquire whether in relatively  
cohesive society with operating legal systems and with relatively clear notions

1 of sovereignty a certain degree of “legal absence”<sup>43</sup> – i.e., areas of social life  
2 where the law is less present – also exist.<sup>44</sup> The idea of “legal dearth” is not  
3 new. One way to understand law is as a collective practice for mediating and  
4 managing collective decisions over which the collective assumes jurisdiction.  
5 The collective may thus “zone” certain types of decision to (nearly) private  
6 domains where, for example, loyalties to love and friendship are “left” to the  
7 individual. The “geographical” understanding of social life, according to  
8 which some “areas” are regulated effectively by law while other are not (or  
9 may not) raises the possibility of a quilt: In some areas we can talk about the  
10 rule of law as present – and thus inquire about our loyalties to it – and in  
11 other areas the law may be only somewhat present – in which case we ought  
12 to inquire where our loyalties lie.

13 A similar point arises with respect to the enforcement of the law. When  
14 legal norms are systemically underenforced it is difficult to ignore the  
15 lurking legal absence even though the law is present in the books and even if  
16 there is a slight chance of actual enforcement. When individuals encounter  
17 substantial difficulties asserting their rights – either because access to state  
18 agencies (executive or judicial) is hindered or because the authorities are  
19 highly selective in their enforcement – it appears that the law is neither  
20 totally present nor totally absent; in such cases the legal phenomenon could  
21 be understood as a continuum. In these circumstances – which need not  
22 occur only in times of war – questions regarding the loyalty to law may  
23 arise, especially given law’s inherent difficulty with the notion of shadows,  
24 or degrees of presence.

25 The law in *The Third Man* appears absent. Officers of the Austrian law are  
26 nowhere to be seen, nor are legal procedures depicted on screen or  
27 contemplated by the characters. The war, apparently, has destroyed the  
28 legal system not just the buildings of Vienna. Yet the *idea* of law is not  
29 absent: that lack of legalism highlights that which is missing: a well-  
30 functioning, just, system, organized around sound principles which make  
31 moral sense. The zones in Vienna – a legal construct designed to separate  
32 powers – are artificial; they are not an authentic source of authority. Yet  
33 their unauthentic presence emphasizes the absence of the authentic; the  
34 zones are thus a shadow of a sound structure, where powers and legal  
35 authority are divided accorded to principles other than mere power. By  
36 raising the possibility of a continuum between total absence and total  
37 presence, *The Third Man* prompts us to wonder to what extent our own,  
38 contemporary legal system – on the local, national, and international  
39 dimension – is present and what type of loyalty claim this state of affair  
places upon us.

## 5. AESTHETICS

1  
 3 Having addressed the ethical pulls *The Third Man* raises and their relevance  
 5 to our thinking about the law, it seems timely to turn to the medium through  
 7 which the dilemmas are presented – a feature film. At this stage, the general  
 9 discourse on law and cinema is sufficiently developed.<sup>45</sup> The general  
 11 contours of the propositions this discourse can support (as well as its  
 13 methodological limits) have been already noted by scholars.<sup>46</sup> Since law is a  
 15 culturally embedded practice,<sup>47</sup> and since culture is represented and  
 17 constructed also by aesthetical means, it follows that aesthetics plays a role  
 19 in the operation and representation of the law.<sup>48</sup> Stripping the law from its  
 21 aesthetical devices – such as the architecture of the courtroom, the attire of  
 23 judges, the language (and rhetoric) of the different players, etc. – would  
 result in a practice quite different from the one familiar to us.<sup>49</sup> The  
 medium, after all, affects the message,<sup>50</sup> and the medium is affected by its  
 aesthetics. Rather than re-elaborating on these general themes, we wish to  
 focus on two points that call for attention in the context of the ethical  
 conflicts dealt with above. The first is the relation between the ethical world  
 and the genre of the movie – *film noir*.<sup>51</sup> The second is perhaps more than  
 “merely” aesthetical: the locations chosen for the salient end scenes in which  
 the actual clash of the conflicting loyalties takes place and their relevance to  
 our understanding of yet another dimension of the intricate social  
 geography.

### 5.1. *Film Noir, Ethics, and Law*

27  
 29 *Film noir*, of which *The Third Man* is a renowned exemplar, is characterized  
 31 not so much for presenting a stark distinction between *noir* and *blanc* but by  
 33 its presentation of the infinite shades of gray.<sup>52</sup> While there is “light” and  
 35 “dark” there is a much richer spectrum of variegated combinations in  
 37 between. Technicolor allows us to present matters – such as reality and  
 39 ethical choices – in greater contrast since each color has its contours; black  
 and white allows us to appreciate the gradations that actually connect the  
*noir* and the *blanc*. Furthermore, the movie’s use of light and shadow and  
 their interplay demonstrates that what may appear white may turn out black  
 (or vice versa) and both may turn out to be gray; the *noir et blanc* are  
 dynamic. This dynamic use of the camera and lighting plays an important  
 role in establishing our attachment to the different characters and sets up  
 their ethical dilemmas as authentic.<sup>53</sup> It also reflects – if not constructs – the

1 ethical world as a domain that contains right and wrong but also extensive  
domains of semi-shadows.

3 The use of the black and white style in the *film noir* genre, and especially  
in *The Third Man*, takes this theme a step further by the interplay between  
5 the seen and the unseen. Often, a significant portion of the scene is left  
hidden – behind the scenes or simply in the dark. We are aware that at any  
7 given moment what we see is only part of the picture and that what meets  
the eye is not necessarily a credible reflection of reality.<sup>54</sup> The gloomy aura  
9 of the genre,<sup>55</sup> therefore, is achieved not only because its themes evolve  
around disenchantment and disillusion, but because the human condition is  
11 represented as something we can see only partially and, even then, not in  
bright colors, but in dim light (or in light that never lets go of its shadow).<sup>56</sup>  
13 Aesthetics and message, therefore, converge.

The perception that what you see is not necessarily all that is there, that  
15 parts of the picture remain behind the scenes even though these parts may  
play a leading role in charting the course of events, and that happy endings –  
17 justice (and camaraderie) for all – are not necessarily guaranteed by the  
system, are among the main characteristics of the *film noir*.<sup>57</sup> In this respect,  
19 the *film noir* genre is considered “realistic.”<sup>58</sup>

The “realist” perception is not confined, of course, to the cinema; the  
21 realization that important interactions take place “behind the scenes” and  
are not fully disclosed is apparent in the realist approach to the law. Trends  
23 within legal realism – which gained prominence around the second third of  
the 20th century, and presumably drew from cultural sources similar to  
25 those that nurtured the *film noir* – highlight the importance of factors that  
are not explicitly mentioned in judicial decisions.<sup>59</sup>

27 Legal realism would prompt us to recognize the limits of the “official”  
legal aesthetics, and specifically, judicial rhetoric. More accurately, legal  
29 realism urges us to recognize the official, namely the “presented” legal  
aesthetics as a *mise-en-scene*: only a part of a greater design. According to  
31 legal realist approach, judges are influenced by a myriad of factors  
(including their unarticulated and individually-held set of values, economic  
33 and social pressures, and sometime even their mood). Therefore, some  
argue, just as it would be impossible for the cinematic world to collapse the  
35 “behind the scenes” into the “scenes,” so it would be impossible for judges  
to expose all the factors that influence their decisions.<sup>60</sup> The law, under that  
37 conceptualization, is not only the illuminated rules, it is comprised also of  
*law noir*:<sup>61</sup> the shadows and ambiguities the norms (and the legal order as a  
39 whole) cast.<sup>62</sup>

1 A legal realist, it would seem, would be equally suspicious of law's  
aesthetical tools designed to establish authority, such as the elevated dais,  
3 the gravel, and the judicial robe. These aesthetical tools aim to demarcate  
clear boundaries between the person and the judge (or between law and  
5 other normative domains) and empower the latter to draw bright lines  
between the *noir* and *blanc*, the legal and the illegal (or the extra-legal). Yet,  
7 as mentioned earlier, the judge is but a person, and thus the realist approach  
encourages us to recognize the person behind the robe (and the interplay  
9 between the legal domain and other domains). At the same time, legal  
realism – just like the *film noir* – does not aspire to deconstruct aesthetic  
11 tools altogether; such an endeavor would result in the disintegration of the  
legal process (and of the cinema); it would undermine the distinctiveness of  
13 law and risk its collapse. On a more abstract level it could be argued that  
this ambivalence is another aspect of the *noir et blanc* interplay, apparent in  
15 *film noir* and in legal realism.

It is further interesting to note that both *film noir* and legal realism do not  
17 absolve us from our duty to seek doing the morally right thing.<sup>63</sup> Realism –  
cinematic or legal – recognizes the problematic ethical dimension of power-  
19 infused social practices such as the law, war, or even the cinema, and also  
recognizes our limited ability to act justly. Yet legal realism and the *film noir*  
21 genre do not embrace nihilism, apathy, or selfishness. The clash of loyalties  
in *The Third Man* must, at the end of the day, be solved by each of the  
23 characters.<sup>64</sup> Some options are more morally defensible than others, even if  
the price of the clash cannot be ignored. Similarly, in legal realism, some  
25 legal options are more defensible than others,<sup>65</sup> even though the law is not  
determinate and thus it might not necessarily present a clear-cut, neat, and  
27 cost-free solution to clashes of legal rights. Metaphorically speaking,  
shadows will remain and the gloom that accompanies such struggles cannot  
29 be fully extinguished.

31

### 5.2. The Location of Ethics and Law

33

As mentioned earlier, the film does not necessarily resolve the ethical  
35 dilemmas arising from the conflict of loyalties; it only portrays the different  
courses of action taken by the characters and the “price” of these  
37 actions. A revealing element of that portrayal is the locations in which the  
actions are taken<sup>66</sup> – that is, the locations in which the different characters  
39 ultimately chose (and accept the “price” of their choices). Matters are not

1 decided in a court of law, couched in legal arguments based on reason,  
 3 nor are they taken in the corridors of the executive or the halls of  
 the legislature. Rather, the decisions are executed in the gutters and at the  
 5 graveyard.<sup>67</sup> Harry Lime meets his destiny, meted by Martins' action, in  
 the underground sewerage tunnels that run beneath the city of Vienna.  
 7 Martins later faces the consequences of his action after Lime's funeral – this  
 time, the real funeral – when Anna ignores him as she walks out of the  
 9 cemetery. Such locations could be seen as the negative – in the cinematic  
 sense – of the “upper” world. While the “upper” world portrays itself as the  
 11 location where important decisions are made – policy formulated, laws  
 enacted, cases adjudicated – one cannot understand the upper world, the  
 13 film suggests, without the “underworld”; each can be understood only with  
 reference to the other.

This aesthetical representation of the different localities informs us, the  
 15 legal realists would say, that the law is not confined to the courtroom.  
 Understanding the law would entail understanding its operation in all  
 17 localities, some of which are as removed from the courtroom as possible.  
 And at some point we reach law's geographical limit; the sewerage system  
 19 beneath Vienna knows not the artificial boundaries placed by the Allies  
 above the grounds, nor does it know other legal or ethical impositions. The  
 21 urban space thus includes a domain that – although man-made – resembles  
 in a way the Wild West.

23 Expanding the term “location” to include the characters that ultimately  
 are called upon to take the decisions and the procedures through which  
 25 these decisions are made, the film suggests that it is not only the figures of  
 authority (and power) that are the relevant moral agents. Matters are not  
 27 decided by high officials as a product of learned deliberation. They are taken  
 by individuals, often as a result of “traps” and manipulations.<sup>68</sup> Some  
 29 decisions – including those which aim is justice – are taken altogether  
 outside the domain of law (i.e., the world of legal norms, procedures,  
 31 authorized agents of states, etc.).<sup>69</sup>

While *The Third Man* portrays a fictional tale in post-war Vienna, its  
 33 choice of locations (and their aesthetical representation) may be relevant for  
 our appreciation of law in contemporary western societies. The cracks in the  
 35 edifice of an operating system that typify the post-war phase allows us to  
 appreciate the locations of decisions taken in the phase but – if indeed the  
 37 post-war phase in part of a continuum – also allows us to peek into the  
 limits of law in ordinary times, and note the different locations (and  
 39 procedures) of decision-making in our everyday lives.

## 6. CONCLUSION

You have to break the rules sometimes; humanity's duty.<sup>70</sup>

Carol Reed's adaptation of Greene's novel, *The Third Man*, is interesting, we submit, precisely because it resists the temptation to paint the struggle between good and evil as monochromatic.<sup>71</sup> The Allies – who fought and won one of the darkest evils, Nazi Germany – are not the knights in shining armor portrayed in other cinematic representations of that era.<sup>72</sup> This film lacks the types of heroes that never descend from the moral high ground. Harry Lime – technically speaking a citizen of the Allied forces – could be seen as representing pure *laissez-fair* capitalism that demonstrates little or no care for human rights. However, the film's claim is broader: It presents systems *qua* systems, especially in the modern, technological era as wanting. Col. Collaway is not a bad person; he just has to manipulate those around him for the sake of justice when he operates within the British military system. The partition of Vienna into zones is not done as an infliction of hardship on the residents but as a bureaucratic compromise regarding conflicting claims, yet its effect is that of the former. The prohibition against the presence of Austrians in the Sacher Hotel is understandable, yet it catches innocent citizens as well. The regime that coerces Anna to become a Soviet citizen and to relocate to the Soviet zone in spite her clear preference to the contrary is designed to keep the order and avoid chaos, but it has its price. Reed thus presents an ethically complicated picture. This ethical complexity sharpens the conflicts faced by the characters. It does not provide them with an easy outlet – the world is corrupt and thus permission to be corrupt is granted; rather, one's loyalties are tested again and again including one's loyalty to one's beliefs.

If Reed's point is sound, this ethically complex view is relevant for our appreciation of the law as well. We should be suspicious of any legal system that either portrays itself as the bastion of pure justice or excuses itself too easily from the quest to achieve justice by stating that the system has its failings and therefore “we do only what we can do.” As the bastion of justice the law would demand our full and complete loyalty, having balanced all competing loyalties, thus leaving no room for external considerations. This view is unattractive, the film suggests, because the law is a bureaucratic system, and as such, lacks the necessary care for each and every individual. Moreover, what the law portrays as the ultimate balance may very well be systemic bias that caters to governmental power

1 preferences. On the other hand, approaching law as putting forward a claim  
 3 for our loyalty on par with competing claims is equally unattractive because  
 5 it might lead to the kind of chaos and manipulation depicted in post-war  
 7 Vienna. Moreover, it might release law from its duty to aspire to achieve  
 9 overall justice. The legal system is thus treading a tightrope between  
 11 portraying itself as the ultimate balancer of all loyalties and presenting an  
 13 independent claim for our loyalty. Put differently, the law is both part of the  
 15 problem and part of the solution; because it is a system, it should be viewed  
 17 with suspicion, as Harry Lime suggests. Yet precisely because it is a system,  
 19 it provides a necessary societal infrastructure for ameliorating the types of  
 21 conflicts faced by the characters in *The Third Man* (and, by analogy, by  
 23 individuals in modern society).

13 The ethically complex picture portrayed by the shades of *noir et blanc* of  
 15 *The Third Man* suggests that we ought not rely solely on the law nor are we  
 17 at liberty to dispose of it. Instead, we are left with the somewhat unsettling  
 19 notion that in order to manage our conflicting loyalties an almost impossible  
 21 balance of faith in the system and a critical evaluation of it is called for. One  
 23 way to manage this impossible balance is to sustain open channels between  
 25 the law and other narrative-generating practices from which normative  
 stances are evaluated.<sup>73</sup> The law-and-cinema discourse is one such channel  
 and *The Third Man* presents, in our eyes, the vitality of that channel,  
 because of, among other reasons, its rich aesthetical language and its  
 representation of the ethical dilemmas (and their consequences) in the  
 modern era.

25

27

## UNCITED REFERENCES

29 Herbert (1961); Schlag (2002); Convention Respecting the Laws and  
 Customs of War on Land (1907).

31

33

## NOTES

35 1. Article 43 of the 1907 Hague Convention (IV) (Convention Respecting the  
 37 Laws and Customs of War on Land) deals with this issue by limiting the power of the  
 occupying party through the affirmation of the local legal system of the state under  
 occupation. However, the reality is that during hostilities, and often after the actual  
 39 hostilities are over, the local legal system is not functioning or not to the same extent  
 as before. See Sassòli (2005).

1        2. It may be that the film's lasting power derives also from a rare cooperation of  
international talents. James Naremore claims that "*The Third Man* is one of the best  
3 and most representative films of a period when 'European sobriety and American  
entertainment sometimes worked in tandem.'" See Naremore (1988, p. 80).

5        3. For an elaboration on law's unarticulated assumptions, see discussion under  
"aesthetics" later, and especially pp. 185–188.

7        4. For the relationship between law and popular culture, see Asimov and Mader  
(2004, pp. 6–7), Moran, Sandon, Loizidou, and Christie (2004), Mussawir (2005),  
and Reichman (2008).

9        5. Yet our claim goes a step further by suggesting that the relationship between  
ethics and aesthetics is not limited to the artistic arena such as film, but may be  
examined in other expressive practices including the law. The relationship between  
11 ethics, aesthetics, and the rule of law, which currently is underexplored, will receive  
some attention in this chapter. However, there are few who deal with this issue. See,  
13 for example, Rush and Kenyon (2004a), Rush and Kenyon (2004b), and Schlag,  
(2000).

15       6. Or "cheap novelettes," according to Martins' own sober description. See  
Greene (1988, p. 25).

17       7. The exact characteristics of *film noir* are not beyond dispute. *Film noir* – so  
named by French theorists (Borde & Chaumeton, 2002) – connotes specific visual  
images (stark lighting effects which consist of darker images and the use of shadows,  
19 unique shooting angles – slightly tilted at times) and an aura of post-war cynicism,  
disenchantment, and disillusionment without succumbing to overall nihilism. The  
play of light and shadow reflects the collective sense of uncertainty, fears emanating  
21 from the Cold War, and a sense that society and government are infused with  
corruption without adopting a misanthropic approach. In dealing with a collapse of  
23 a pre-war, romanticized way of life that no longer exists, there emerges "the America  
of film noir: modernized, heartless, coldly efficient, and blasé about matters such as  
political corruption and organized crime" (*Film Noir, Encyclopedia Britannica*,  
25 2008). We suggest that a certain ethical component is part of that parcel.

8. Cf. Reichman (2006).

27       9. Technically speaking, Sartre brings this case as an example to a moral dilemma,  
defined as a situation in which the actor is faced by two or more possible ways of  
action, is unable to ascertain with a reasonable degree of certainty the consequences  
29 of the action, yet realizes that each path includes a real risk of causing harm. We do  
not claim that each character in *The Third Man* is faced with a moral dilemma that  
31 meets these formal conditions, yet Sartre's general point about the conflict the actor  
faces illustrates our general point regarding conflicting loyalties. For moral dilemmas  
33 in general, see Statman (1995).

10. Her stance is thus radically different from the behavior of another heroine of  
that epoch – Elze, in *Casablanca* – who insists Rick would make the decision for  
35 them and who cares about the battle between good and evil. See Epstein, Epstein,  
and Koch (1992).

11. In the film, Harry adds this famous parting speech: "In Italy, for thirty years,  
37 under the Borgias, they had warfare, terror, murder, bloodshed – they produced  
Michelangelo, Leonardo Da-Vinci, and the Renaissance. In Switzerland, they had  
39 brotherly love, 500 years of democracy and peace, and what did that produce . . . ?

1 The Cuckoo Clock” (Greene, 1988, p. 100). However, it should be noted that this  
 idyllic depiction of Swiss politics as a stronghold of democracy for 500 years is  
 3 somewhat dubious. Since this speech was very much inspired by Orson Wells himself,  
 one can only guess whether Wells sought to portray Harry as less than an expert in  
 Swiss issues or to portray the Swiss in a less than favorable light (Sinclair, 1988, p. 6).

5 12. See Naremore (1998, p. 77).

13. Martins associates Col. Calloway’s role with that of a Sheriff:

7 You some sort of a policeman?

Mmm.

9 I don’t like policeman . . . I have to call them Sheriffs. (Greene, 1988, p. 26)

11 14. Martins’ starting point is that Col. Calloway is pinning the blame on innocent  
 Harry:

13 I guess there was some petty racket going on with gasoline and you couldn’t pin it on  
 anyone, so you picked a dead man. (*id.*)

15 15. When finding the cops at Anna’s, Martins asks, “Pinning things on the girls  
 now?” (*id.*, p. 45).

17 16. Martins describes the plot of his book *The Lone Rider of Santa Fe*: “A Story  
 about a rider who hunted down a Sheriff who was victimizing his best friend.” In the  
 19 original script Martins said, “This lone rider has his best friend shot unlawfully by a  
 Sheriff. The story is how this lone rider hunted that Sheriff down” (*id.*, p. 32).

21 17. One pull that was spared from Martins is the pull towards an entity  
 representing or embodying a “collective,” such as an institution, a nation, or a  
 23 system (as in “the legal system”). He is a “lone rider.” This does not blunt, of course,  
 the edge of his other conflicting loyalties.

25 18. “Best friend I ever had” was the description Martins gave to Col. Calloway  
 about his relationship with Harry (Greene, 1988, p. 25).

27 19. Harry apparently rescued Martins from his loneliness at school: “Never felt so  
 damn lonely in my life – and then Harry showed up” (*id.*, p. 24).

29 20. The Merriam Webster dictionary defines “loyal” as “faithful in allegiance to  
 one’s lawful sovereign or government; faithful to a private person to whom fidelity is  
 31 due; faithful to a cause, ideal, custom, institution, or product.” Loyalty, it appears, is  
 an emotion-infused sense of obligation to an entity or an ideal to act (or to remain  
 33 inert) for the benefit of the subject of one’s loyalty (or at least to avoid harming that  
 entity). The term loyalty is helpful, we think, precisely because it captures the  
 emotional and cognitive elements of such obligation. We are grateful for the  
 anonymous reviewer for the contribution on this point.

35 21. See, for example, Bandes (1999). We can imagine examples that would lead us  
 to the conclusion that in fact law has a lot to do with shaping, constructing, and the  
 37 regulation of the external expression of our emotions. In many jurisdictions the law  
 encourages love and care between parents and children, and extracts sanctions  
 regarding the expression of hostile emotions. The law takes into account people’s  
 39 passion – such as in the concept of crimes of passion, or the defense of heat of  
 passion – whereby recognizing that the breach of “conventional” loyalty (fidelity) in

1 some circumstances, if of legal consequence. Some suggest that law itself conveys a  
 2 certain kind of hope while others lament that this hope is hollow (see, e.g.,  
 3 Rosenberg, 1991). Compare: "In any event there is nothing judicially more unseemly  
 4 nor more self-defeating than for this Court to make *in terrorem* pronouncements, to  
 5 indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be  
 6 disappointing to the hope" (dissenting opinion in *Baker v. Carr*, 1962, p. 270); "But  
 7 it is the function of the courts to provide relief, not hope" (Justice Scalia dissenting in  
*Vieth v. Jubelirer*, 2004, p. 304).

22. For an analysis of the relationship between emotional attitudes, moral ideals,  
 and practices, see Ben-Ze'ev (2000, pp. 259, 444–445) and Mitchell (1999).

23. As the famous myth surrounding Socrates' death reveals, even unjustified laws  
 demand our loyalty (to the death). Modern thinkers, such as Rawls, suggest that if  
 the law's are deeply immoral, civil disobedience is morally legitimate, but  
 acknowledging that it would be legitimate for the law nonetheless to punish those  
 who chose that cause of action. In this respect, our loyalty to the law is not so  
 dissimilar to our loyalty to an individual, who might (on occasion, or, as Harry Lime  
 demonstrates, generally, act immorally).

24. Or put slightly differently, assuming that the judge uses the rhetorical devise of  
 the "reasonable person" in order to decide a legal question, is the legally constructed  
 reasonable person one that is sensitive to *all* loyalties, and therefore her decision is  
 the reasonable one *all things considered*, or is the reasonable person one that cares  
 only about parts of reality – the parts deemed relevant by the law? For an  
 examination of "the reasonable person" in a similar context – one dealing with the  
 spousal loyalties to the law, to the spouse, and to self-interest, see Regan (1995) and  
 Warner and Luzzi (2006).

25. See, for example, the incident in 2004 when the *New York Times* reporter  
 Judith Miller did not reveal her sources. The last procedure on this matter is *In re*  
*Grand Jury Subpoena, Miller* (2005).

26. See Lauterpracht (1982, pp. 379–381).

27. Cf. Brooks (2002).

28. Voice-over, Greene (1988, p. 12): Facing such disorder, the occupying  
 powers sought to establish order. Yet since order required control, and there was  
 agreement as to which power should be granted such control, the city was divided  
 into zones – American, British, Russian, French, and to ensure a balance of power  
 amidst these powers, an International Zone, at the center of the city. While achieving  
 a certain degree of order, this "crazy patchwork" of zones nonetheless ensured that  
 another manifestations of chaos emerged, as people and goods negotiated between  
 the zones.

29. The film's opening scenes pay homage to Vienna's great cultural symbols – the  
 architecture and the statues – only to depict the decline of the culture into  
 racketeering and lawlessness.

30. In this case, people could refrain from any assistance to the authorities, as the  
 situation in post-war Vienna reveals.

31. See Lessnoff (1986) and Skyrms (1996).

32. A reference to the cultural norms of the "old days" is apparent by the  
 intervention of Anna's neighbor, who laments, in German, that it is uncivilized that  
 men enter in the middle of the night to a lady's domicile, pursuant to Colloway's visit

1 to Anna's apartment. Her intervention is portrayed as almost irrelevant, given the  
 new realities and the lack of cohesive community norms (Greene, 1988, p. 44).

3 33. "All strangers to the place, none that could speak the language." This is how  
 the occupying powers are described at the outset of the film (*id.*, p. 12).

5 34. Even Martins expresses such suspicions regarding Collway's standing as  
 the representative of the rule of law. "You some sort of policemen?" Martin asks the  
 Colonel upon their first meeting. "I don't like policemen" (*id.*, p. 26).

7 35. "The porter knew so little and they murdered him," says Anna (*id.*, p. 68).  
 The old residents of Vienna prudently care more about the lack of decorum. The  
 9 repeating complaints of an old woman about the noise and the manner in which the  
 British conduct their business – "The way they behave – breaking in like that . . ." –  
 are more typical of the community members' response to the situation (*id.*, p. 47).

11 36. The difficulties facing law in fractured communities is not confined to post-  
 war Vienna. See Keitner (2003).

13 37. Harry could have reacted in the same manner in which Col. Calloway  
 disposed of Anna's problems. Harry could have claimed that Anna was used as a  
 15 tool by Col. Calloway and therefore Harry's own treatment of Anna deserves the  
 same moral evaluation; he treated her no worse.

38. See, for example, Aquinas (2006).

17 39. See also Naremore (1998, p. 76).

19 40. The tension between the loyalty to law as representing "our community  
 norms" and the law as representing "the norms of humanity itself" is very much with  
 us today. This matter is demonstrated in questions such as the legality of the war in  
 21 Iraq, the legality of the fence between Israel and the West Bank, and the legality of  
 the Iranian program to enrich uranium. As these matters are debated in international  
 fora invested with legal authority under international law, the national communities  
 23 reject their determinations at least in part because it is supra-national, that is, not  
 stemming from a conception of a sovereign.

25 41. For anti-globalization and pro-globalization reviews, see Bhagwati (2004),  
 Madeley (2003), Mandle (2003), and Gwynne, Klak, and Shaw (2003). For general  
 law and globalization discussion, see Santos and Rodriguez-Garavito (2005) and  
 27 Slaughter (2004). For a unique aspect of the problem, see Reichman (2001, pp. 96–97).

29 42. "In these days, old man, nobody thinks in terms of human beings.  
 Government don't so why should we?" (Greene, 1988, p. 98).

31 43. For an interesting discussion of "legal absence" and its application to  
 international law, see Lauterpacht (1933, p. 64). For an analysis of this position, see  
 Koskenniemi (1997, pp. 226–227).

33 44. By "law" here we do not mean only the presence of legal norms, but refer to  
 the scope of the legal domain as such. The question we address is thus sensitive not  
 only to the sparseness of legal regulation of a certain social area, but also to the  
 question of whether that area is "captured" by the legal domain at all.

35 45. For a general review on Law and Film, see Machura & Robson (2001, pp. 3–8),  
 Bergman and Asimow (1996), Black (1999), Greenfield, Osborne, and Robson (2001),  
 37 Denvir (1996), Kozinski (2001), Brooks (1997), Kamir (2000), Mezey and Niles (2005),  
 and Reichman (2008).

46. See Almog and Aharonson (2004).

39 47. Rosen (2006) and Sarat and Kearns (1998).

1 48. For an in-depth discussion of the relationship between the aesthetical  
dimensions of law and cinema, see Mussawir (2005).

3 49. Cf. Heerey (2003).

50. Cf. McLuhan and Fiore (1967).

51. For the history of the *film noir* genre in the United States, see Dickos (2002),  
5 Biesen (2005), and Selby (1984). For a discussion of the relationship between film  
noir and the law, see Rosenberg (2001).

7 52. *The Third Man* places itself as part of the tradition by including attributes –  
akin to footnotes – to previous films of the genre. Notable among these is the  
9 attribute to Fritz Lang's *M* (1932): in *M* the murderer carried balloons (with which  
he seduced little girls), his shadow looming large. While the trap for Lime is ready to  
11 spring in *The Third Man*, a balloon-man appears, his shadow large and looming  
(Greene, 1988, p. 111).

13 53. The cinematography plays a crucial role in framing and constituting the  
ethical dilemmas: With the light, music, close-up, the use of the voice-over, the  
subjective camera, and choice of location we frame our feelings or attachment  
15 toward the different characters as a basis to our empathy and loyalty. See Telotte  
(1989, pp. 88–102). We sense the possible gradations of grey and, to an extent, of evil  
itself.

17 54. The use of the camera and light in the movie is often an indication that we see  
only part of the “real” picture. This is often achieved by introducing visible shadows  
to the frame – that is, treating the shadow as an entity or veiling the object with a  
19 shadow – or by changing the angle of the camera so that the frame is slightly  
diagonal thereby causing a degree of disorientation. A close examination of the  
21 scenes reveals that the cinematography of the film is rather consistent: Whenever the  
film alludes to Lime's clandestine and criminal operations the camera participates in  
the discussion by raising on shadows and skewing the frame. This is true from the  
23 first conversation Martins has with Lime's neighbor to the last scene of the chase.  
Perhaps the scene where this is most apparent is when Lime is revealed: A shining  
25 shoe is sniffed by Anna's cat; the figure is dark and suddenly the face is revealed by  
the lights of a passing car, half-smiling, only to disappear in the ensuing darkness.  
27 Critics have also noted the film's fast-cutting rate (an average shot length of 5”, and  
of its 1,253 shots only a handful – approximately 9 – can be considered long takes).  
29 See Totaro (2002). This effect contributes not only to the film fast pace, but also to  
the sense that in any given moment we are not privy to all the information as the shot  
cuts and takes us somewhere else.

31 55. Needless to say, a different use of black and white cinematography can  
generate a rather different representation of the human condition as demonstrated  
33 by westerns, melodramas, comedies, and other genres prevalent in the black and  
white era.

56. See Place and Peterson (1974).

35 57. It should be noted that Greene's ending differs from Reed's. In the  
original ending, Martins and Anna hug in the cemetery. In Reed's, Anna walks  
37 past Martins without looking at him at all. It is unclear whether Greene's  
ending is necessarily “happier,” since the final hug could in fact be melancholic,  
signifying loss and appreciation that their love could never be fulfilled given  
39 Lime's shadow, but nevertheless, Greene's is at least consoling while Reed's ending is

1 colder, detached, and more in keeping with the film's *noir* character. For  
elaboration of the differences between the novel and the film, see Naremore (1998,  
p. 80).

3 58. Realism in general is tightly connected to the *film noir* genre. *Fancy and*  
*fantasy*, the opposite of realism, brought with them the decline of the *film noir* genre.  
5 See Richardson (1992, p. 2). However, *film noir*, loyal to its interplay between the  
seen and the unseen, the light and the shadow, is not fully committed to realism in  
7 the sense of documenting reality; the *noir* artistic conventions make use of the *mise-*  
*en-scene* in order to alert us that we are not privy to all that takes place, and that the  
cinematic scene we are observing is, to an extent, staged.

9 59. For a general call to expose law's operation beyond its black letter, see  
Llewellyn (1960). For an analysis of the relationship between the cultural study of  
11 law and legal realism, see Sarat and Simon (2001).

60. See Shapiro (1987), Altman (1990), and Hellman (1995).

13 61. The term *law noir* was coined by Rosenberg, to denote a subset of *film*  
*noir* movies that depict law or legality in a *noir* fashion. See Rosenberg (1994,  
pp. 343–344), note 9. We take the term a step forward by removing it from the  
15 cinematic set and suggesting that *law noir* is an approach to the practices of law itself.  
This approach is sensitive to the presence of shadows and ambiguities – linguistic and  
17 moral – and to a certain mental state of disillusionment regarding some of the legal  
myths. On a grander scale, *law noir* suggests that the presence of “the law” at large  
19 could also be understood as casting shadows on neighboring domains, thereby  
obfuscating the boundaries between law and other domains and suggesting that  
21 areas of intersection may exist, where normative reflections (or poetic sensitivities)  
may overlap.

23 62. Put differently, the *noir* aesthetics sheds light on the importance of shadows.  
While for there to be a message (or distinct meaning) some communicative elements  
must be “seen” (i.e., be illuminated), each statement also casts a shadow on its  
25 surrounding, thereby placing elements in its vicinity in darkness. This representation  
of social reality is, of course, relevant to our understanding of law as a normative  
27 order. For the law to operate it must convey rules – bright rules – that aspire to  
clarify the social sphere under regulation and remove doubt. However, a *noir*  
understanding of the legal domain (and, for that matter, of any domain), suggests  
29 that the presence of a legal norm also cast shadows, namely generates areas of  
ambiguity. Such shadows, or ambiguity, refer both to the meaning of the legal  
regulation on point, and to the moral evaluation of the norm (on its face or as  
31 applied). Whereas from an internal viewpoint the legal domain seeks to eradicate  
these shadows of ambiguity (or to ignore their existence), the claim of *law noir* is that  
33 such ambiguities are part and parcel of the legal domain and the normative legal  
order.

35 63. See the famous words of Leff (1979, pp. 1248–1249), arguing that legal  
realism, while shaking the foundationalist approach to the law, nonetheless seeks to  
retain assumed ethical foundation.

64. See Gribble (1998, p. 239).

65. See Seidman and Tushnet (1996, pp. 117–140).

39 66. It should be noted that the film was one of the first to be shot on an outdoor  
location and not in a fancy indoor studio (Sinclair, 1988, p. 5).

1 67. Paul Schrader wrote about the post-war realism of the *film noir* "... Placing it  
 2 where it more properly belongs, in the streets with everyday people." See Grant  
 3 (1995, p. 216).

4 68. Martins is made to change his mind and aid the authorities after Collaway  
 5 "casually" stops on the way to airport and shows Martins the result of Lime's  
 6 crimes. The camera takes part in the manipulation *by not* showing us what Martins  
 7 sees, only his reaction. Thus, we are left to imagine the horrors Martins' eyes have  
 8 witnessed. If Martins was trapped by his sense of justice coupled by his desire to  
 9 assist Anna, Lime was trapped by thinking that his friend Martins shares his self-  
 10 interested approach to life or, at the very least, shares the common attitude in Vienna  
 11 of minding one's own business and not going out of one's way to help the authorities.  
 12 The camera's role in Lime's trap is also obvious: The town is empty but full of  
 13 shadows, silent but ominous and ready to spring. This is achieved by a set of shots –  
 14 again, with a skewed angle – that portrays all the elements of the trap set in place  
 15 Greene (1988, p. 6).

16 69. The theme that the law is limited, and justice is to be found outside the law, is  
 17 a common theme in non-noir post-war movies, and has received a notably warm  
 18 embrace by Hollywood Westerns. See, for example, *To Kill A Mockingbird* (1962)  
 19 and *The Searchers* (1956). But see the interplay in *Three Godfathers* (1948), a remake  
 20 of a 1916 film.

21 70. Popescu to Martins, explaining that he helped Harry fix Anna's papers. "Not  
 22 the sort of thing I should confess to a total stranger, but you have to break the rules  
 23 sometimes. Humanity's duty" (Greene, 1988, p. 59). It is clear that Popescu's notion  
 24 of "humanity's duty" is not necessarily related to high ethical standards or the  
 25 requirement to protect human rights. He could be understood as suggesting that  
 26 rules have to be broken simply for the sake of breaking them. In any event, it appears  
 27 his reference to "humanity's duty" in the context of the film is cynical.

28 71. Compare Schwab (2000, pp. 2–3).

29 72. See, for example, *The Guns of Navarone* (1961), and somewhat ironically, *The*  
 30 *Dirty Dozen* (1967).

31 73. See Almog (2001).

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