Canadian Journal of Law & Jurisprudence XXX No.2 August 2017, 311-338
© *Canadian Journal of Law & Jurisprudence* 2017 doi: 10.1017/cjlj.2017.15

Unreliable Narration in Law and Fiction

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Stop judging by mere appearances, and make a right judgment.
– John 7:24[1]

Introduction

For decades, law-and-literature scholars have demanded more productive engagements between legal theory and literary criticism. Despite this, there have been few dedicated efforts to connect hermeneutics with the study of narratology, which is a branch of literary criticism that can offer useful frameworks for analyzing the language of the law. Few subjects, one knows, are harder to describe than "the complex and tangled process by which what we say—or do—takes on a meaning for another."[2] This truism applies to the interpretation of legal meaning in the common law system.

Historically, the study of narratology has supported the structuralist ambition to isolate and set out the constitutive components of literary texts.[3] The aim has been to understand the system of recurring rules which underlie the construction of literary texts and determine their possible meanings. This article applies insights from structuralist narratology to legal writing in order to reassess long-standing debates about objective interpretation in the common law system. This requires immediate explanation.

I am indebted to Richard Bronaugh, Simon Stern, Janet Halley, Alan Stone, Ryan Teschner, Trevor Guy, Morgan Vanek, Alex Howard, Max Rosen, and the Honourable John Morden for their generous and challenging comments on earlier drafts. The article benefited from feedback received at the Yale University interdisciplinary conference *Law and Fictional Discourse* in May 2015 and the Annual Meeting of the Association for the Study of Law, Culture, and the Humanities in March 2017. Above all, I owe a credit to Paul Bozzo for lighting the spark that became *R v. Lodge*.

1. According to the Gospel, Jesus Christ speaks these words at the Festival of Tabernacles to a group of disbelievers, skeptical of his claims to divine providence and persecution by Jewish leaders. The group had assumed incorrectly that Jesus Christ was demon-possessed on the basis of "mere appearances" only.
2. James Boyd White, "The Ethics of Meaning" in J Neville Turner & Pamela Williams, eds, *The Happy Couple: Law and Literature* (Annandale, NSW: The Federation Press, 1994) [*The Happy Couple*] at 269.
3. The traditional study of "formal narratology" is founded in the pioneering work of Vladimir Propp, Claude Lévi-Strauss, and Tzvetan Todorev who attempt to describe narrative possibilities in the structuralist tradition by identifying constants and patterns of articulation between works. See generally Vladimir Propp, *Morphology of the Folktale*, 2nd ed, translated by Laurence Scott, revised by Louis A Wagner (University of Texas Press, 1968); Claude Lévi-Strauss, *Structural Anthropology*, vol 2, translated by Monique Layton (Allen Lane, 1977); Tzvetan Todorov, *The Poetics of Prose*, translated by Richard Howard (Basil Blackwell, 1977). Poststructuralist narratologists have revised structuralist narrative poetics by emphasizing "contextual narratology," including the role of the reader in producing meaning. For a representative selection of the work done under this banner, see, e.g., David Herman, *Narratologies: New Perspectives on Narrative Analysis* (Ohio State University Press, 1999). For a survey of historical and contemporary trends in formal and contextual narratology, see Mieke Bal, *Narratology: Introduction to the Theory of Narrative*, 2 ed (University of Toronto Press, 1997); Suzanne Keen, *Narrative Form* (Palgrave MacMillan, 2003).

https://doi.org/10.1017/cjlj.2017.15 Published online by Cambridge University Press

Authors and readers of authoritative legal texts such as constitutions, statutes, judicial opinions, and scholarly articles engage in interpretive exercises that can be mapped onto three "narrative ordering" processes: first, the cognition process in which observations are organized into ideas; second, the communication process in which ideas are translated into written forms; and third, the comprehension process in which written forms are read and understood. Through the exercise of these processes, authors are assumed to describe laws that are objectively intelligible and accessible to readers in the common law system. However, there will always be degrees of subjective variation in these processes. Authors and readers can and often do interpret the laws in different ways.

What this article calls the imperative of "right judgment" in Part I is the practical necessity that readers should comprehend and comply with the law in the "right" way—this is to say, in the way the law is assumed to be objectively understood by the enforcing powers of the legal system. This is easier said than done. At bottom, legal authors, like literary authors, are storytellers. If their narrative ordering processes become unreliable, this can confuse readers' ability to interpret the law correctly. By comparing two texts in Parts II and III, a crime novel by Agatha Christie and a judicial opinion of the Ontario High Court, which serve similar descriptive functions within similar structural constraints, this article demonstrates that the common law assumption of objectivity is threatened by unreliable narration in the texts.

While literary and legal authors may not intentionally or self-consciously deceive their readers, the potential for interpretive disconnect between them means there can be no essential quality that self-evidently marks a text's meaning as objective. Taken to heart, this demands that common law judges write opinions in a manner that mitigates the vagaries of narration and enables readers to make the right judgment when it matters most.

Part I: The Imperative of "Right Judgment"

At the most basic level, authors of literary and legal texts make sense of their worlds through what are called "narrative ordering" processes.[4] Observations are

4. Susan Bandes, "Empathy, Narrative, and Victim Impact Statements" (1996) 63 U Chi L Rev 361 at 382-84. Bandes is one of the few legal scholars who have drawn on the work of cognitive narratology. See also Philip M Weinstein, "The Exploitative and Protective Imagination: Unreliable Narration in *The Sacred Fount*" in Morton W Bloomfeld, ed, *The Interpretation of Narrative: Theory and Practice* (Harvard University Press, 1970) at 193 (suggesting the source of the analogy between the narrator and the novelist is that both seek to comprehend and shape the experience around them in intelligible forms); Steven L Winter, "The Cognitive Dimension of the *Agon* Between Legal Power and Narrative Meaning" (1989) 87 Mich L Rev 2225 at 2228 (explaining that narrative plays a role in how "the human mind makes sense of experience."); Catharine Wells, "Situated Decisionmaking" (1990) 63 S Cal L Rev 1727 at 1743-44 (arguing that factual observations and normative judgments cannot be distinguished because judgments are influenced by perceptions within a cognitive framework); Jane B Baron, "Intention, Interpretation, and Stories" (1992) 42 Duke L J 630 at 658-59 (connecting the interpretation of written documents with prior comprehensible "story-types"); J Christopher Rideout, "Storytelling, Narrative Rationality, and Legal Persuasion" (2008) 14 J Legal Writing Inst 53 at 58 (canvassing theories that narrative structures are "endogenous," or embedded in the structure of the mind and language).

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discrepant and undefined until they are ordered into stories with protagonists, antagonists, and a supporting cast who enact a series of events in an arching plot from beginning to end.[5] This cognitive structure is determined by the authors' unique frames of reference aligned by their personal histories and made consistent within the logic and ambivalences of their own lives.[6] Once authors have organized events in this way, their ideas can be made external through linguistic, semiotic, and gestural forms. In written communication, letters, numbers, symbols, and other signs combine to form words, equations, and codes in sequence, which further combine with narrative qualities including mood, tone, voice, and diction to create literary and legal texts.

Structuralist theory argues that there will always be interpretive variation in these narrative ordering processes. Different people will use different forms and qualities depending on cultural conventions.[7] As Susan Bandes states, who authors *are* determines what they notice, what seems important, how they react to it, what connections they draw, what meanings they attach to things, and how they choose to convey those meanings to others.[8] On this account, narrated texts are frequently said to be versions—and only versions—of facts in nature as seen by the mind, involving the translated, transformed, or otherwise modified retellings of prior cognitive organizations of the outside world.[9]

Given these ordering processes, the imperative of "right judgment," as this article calls it, arises in political communities which are organized around the shared production and consumption of authoritative texts. These communities are defined by jurisdictions in which authors and readers, literary or legal, have agreed to adopt specific interpretive methods regulating their engagement with the texts. The benefits of political membership and/or the threats of social isolation or sanctions imposed for non-compliance with these methods must be sufficient to dictate the terms of participating in the enterprises of reading and writing. In one of its literary applications, authors of genre fiction are expected to write novels in ways that conform to readers' expectations about the form and structure of texts enjoyed by the community. In one of its legal applications, lawyers, judges, legislators, constituents, and commentators are

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5. Bandes, *supra* note 4.

6. *Ibid*. This builds on John Locke's theory that individuals annex forms to ideas, suggesting that meaning is always attributed to observations of the human mind in a way of fashioning the universe, rather than being inherent or already contained within these observations. See John Locke, *An Essay Concerning Human Understanding*, vol 2, ed by Alexander Campbell Fraser (Dover, 1959) at 23.

7. Saussure's pioneering work in linguistics has defined the structuralist and poststructuralist views on how meaning is maintained and established in language. One of his fundamental concepts is that meanings given to words are arbitrary, maintained by convention only without any inherent connection between the signifier and the signified. See Ferdinand de Saussure, *Course in General Linguistics*, translated by Roy Harris (Fontana Collins, 1983) at 127. See also Roland Barthes, *The Semiotic Challenge*, translated by Richard Howard (Blackwell, 1988); Jonathan Culler, *Structuralist Poetics* (Routledge, 1975); Robert Scholes, *Structuralism in Literature: An Introduction* (Yale University Press, 1974); Seymour Chatman, *Story and Discourse: Narrative Structure in Fiction and Film* (Cornell University Press, 1978).

8. Bandes, *supra* note 4 at 384.

9. See Barbara Herrnstein Smith, "Narrative Versions, Narrative Theories" in WJT Mitchell, ed, *On Narrative* (University of Chicago Press, 1981) at 211.

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expected to read and write authoritative texts in ways that promote the objectively intelligible and accessible meanings of the laws.[10] Framed as such, the imperative of right judgment should not be reduced to legal historical debates about any one "canon of construction," such as that between strict and loose constructionists in constitutional law or over determining the will of the legislatures in statutory interpretation. Rather, the imperative arises more generally from readers' interest in comprehending and complying with rules described by constitutions, statutes, judicial opinions, scholarly articles, and other narratives, the meanings of which are assumed to be objectively intelligible and accessible by elements of the carceral and bureaucratic state in the common law system.

Issues of reader comprehension are fraught with theoretical conflict. Literary and legal hermeneutical scholars have vigorously debated the sources of textual meaning for decades.[11] On the one side are objective interpretivists, the principal supporter being E.D. Hirsch. He argues that meaning is determined by the author's psychic acts, or authorial intent, which readers may reproduce by reconstructing the historical assumptions that defined the author's intentions at the time of writing.[12] Hirsch explains that one of these historical assumptions is generic appropriateness, such that "if the text follows the conventions of a scientific essay … it is inappropriate to construe the kind of allusive meaning found in casual conversation."[13] This tracks an idea in genre theory that authors

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10. This theory of literary and legal jurisdiction is inspired by Dworkin's principled model of community that is comprised of associative obligations in which members agree on the interpretive practices they will jointly undertake. See Ronald Dworkin, *Law's Empire* (Harvard University Press, Belknap Press, 1986) at 195-202, 211. See also Kim L Scheppele, "Forward: Telling Stories" (1989) 87 Mich L Rev 2073 at 2090 (stating the "objectivist" assumption that "truth can be found by removing the self-serving accounts of those who stand to gain in the process of being partial.").

11. See, e.g., Sanford Levinson, "Law as Literature" (1981-1982) 60 Tex L Rev 373; Owen M Fiss, "Objectivity and Interpretation" (1982) 34 Stan L Rev 739; Stanley Fish, "Fish v. Fiss" (1984) 36 Stan L Rev 1325 [Fish, "Fish v. Fiss"]; Richard H Weisberg, "Text into Theory: A Literary Approach to the Constitution" (1985-1986) 20 Ga L Rev 939. These articles and others were reprinted (and in some cases, expanded or condensed) in Levinson and Mailloux's seminal volume in this field: Sanford Levinson & Steven Mailloux, eds, *Interpreting Law and Literature: A Hermeneutic Reader* (Northwestern University Press, 1988). See also Kenneth Abraham, "Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair" (1979) 32 Rutgers L Rev 678; Stephen A Edwards, "Interpretation of Legal Documents" (1979-1980) 20 Jurimetrics J 174; Steven Knapp & Walter Benn Michaels, "Against Theory", reprinted in WJT Mitchell, ed, *Against Theory* (University of Chicago Press, 1985) at 11-30; Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 1985) at 119-81 [Dworkin, *A Matter of Principle*]; Dworkin, *supra* note 10; Robin West, "Adjudication is Not Interpretation: Some Reservations about the Law-as-Literature Movement" (1986-1987) 54 Tenn L Rev 203; Brad Sherman, "Hermeneutics in Law" (1988) 51 Modern L Rev 386; Gregory Leyh, ed, *Legal Hermeneutics* (University of California Press, 1992) [*Legal Hermeneutics*]; Mark Kingwell, "Let's Ask Again: Is Law Like Literature?" (1994) 6:2 Yale JL & Human 317.

12. Eric Hirsch, "Objective Interpretation" in *Validity in Interpretation* (Yale University Press, 1967) at 209-44 [Hirsch, "Objective Interpretation"]. Accord Eric Hirsch, *The Aims of Interpretation* (University of Chicago Press, 1978). Another classic statement in support of objectivism founded in authorial intent is William K Wimsatt & Monroe Beardsley, "The Intentional Fallacy" in William K Wimsatt, *The Verbal Icon: Studies in the Meaning of Poetry* (Noonday Press, 1958) at 21.

13. Hirsch, "Objective Interpretation," *supra* note 12 at 236.

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can predetermine readers' engagement with literary texts by invoking formal and structural conventions which dictate the terms of the author-narrator-reader relation. For example, authors create characters or personae characterized by mood, tone, voice, and diction by means of narration. Texts define their readership based on the qualities their readers are expected to have, which should be reflected by the manner in which the texts' narrators address them.[14] By invoking these conventions, Hirsch argues that the authors' achievement of generic appropriateness gives rise to verifiable indicia of meaning, including the narrators' social, political, or legal suggestions, the authors' stated views on a relevant subject, the historical context of the texts' publication, as well as popular assessments of the texts' quality.

In the legal academy, one of the most prominent objective interpretivists is Owen Fiss. He describes adjudication as the "process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text."[15] As stated here, Fiss aspires for judges to find "the" meaning of an authoritative legal text (rather than "a" or multiple meanings) and "the" values "embodied" there. This meaning and these values are unitary, preexisting the interpretive act, and, if not immanent in the text itself or an external textual source, at least transcending the particular standpoints of individual readers. Fiss argues that it is possible to read legal texts and find objective meanings because the interpretive act is defined by a set of "disciplining rules" shared by a community committed to the rule of law. Specifically, "[the reader] is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence) as well as those that define the basic concepts and that established the procedural circumstances under which the interpretation must occur."[16]

On the other side of the debate are subjective interpretivists, many of whom are reader-response critics arguing that interpretations are dependent on the unique perspectives that readers bring to bear.[17] This theory is championed by

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14. See, e.g., Robert M Cover, "Nomos and Narrative" (1983-1984) 97 Harv L Rev 4 at 10 (arguing that the intelligibility of written forms is derived in the communal character of narratives, locating them in a "common script").

15. Fiss, *supra* note 11 at 739. See also Earl Maltz, "The Failure of Attacks on Constitutional Originalism" (1987) 4 Constitutional Commentary 43.

16. Fiss, *supra* note 11 at 744. Dennis Klinck describes the orthography of such an approach, stating that authoritative legal texts intend to adopt conventional language which should correspond to real classes of things in nature, such that it is possible to read these texts and settle on "valid" interpretations that are objectively intelligible and accessible to authors and readers. See Dennis R Klinck, *The Word of the Law: Approaches to Legal Discourse* (Carleton University Press, 1992) at 9 (explaining that while different languages may adopt different linguistic conventions, the assumption is that authors' intended meanings should be perfectly translatable and readings of texts are secure).

17. Christian Biet, "Judicial Fiction and Literary Fiction" (2008) 20 Law & Literature 403 at 419 ("The reader can decide to forgive, to acquit, to morally, religiously, legally condemn the hero and all the other characters in the eternal life, in the abstract literary world that reading constitutes, or in the fiction determined by the discourse. […] There are no limits to how the reader can judge.").

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Roland Barthes[18] and Jacques Derrida[19] who stand opposed to Hirsch's position that a text has only one meaning instead of multiple meanings depending on the readers' historical conventions. The subjectivists hold that comprehension is a politically determined process that is incapable of producing objectivity as if addressing some pure and pre-existing reality.[20] Theorizing in a similar vein about interpretive consciousness, Hans-Georg Gadamer suggests that all readers live within shifting cultural traditions that inculcate them with unique and individual "prejudices."[21] These limit what readers can perceive, as if on a horizon: "the range of vision that includes everything that can be seen from a particular vantage point."[22]

In writing about the law, the most influential subjective interpretivist is Stanley Fish. He argues that it is futile to search for one "true" or "verifiable" interpretation of the "values embodied" in a legal text, as Fiss claims. Comprehension is dependent on readers' constructed assumptions about what a text should mean, often derived from the reader's educational or professional training and membership in social, cultural, or political groups. These combine to create what Fish calls "interpretive communities."[23] Because different

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18. Barthes famously argues that objective intelligible and accessible authorial intent is an undesirable standard for interpreting a text's meaning, or at least interpreting a text written for intransitive ends. See Roland Barthes, "The Death of the Author" in Sallie Sears & Georgianna W Lord, eds, *The Discontinuous Universe: Selected Writings in Contemporary Consciousness*, translated by Richard Howard (Basic Books, 1972) at 10 [Barthes, "The Death of the Author"]. Barthes's essay was one of the first to explore the consequences of dissociating the interpretive process from author, origin, and identity. For this reason, it is significant for approximating the transition from structuralism to poststructuralism in literary theory. See also Roland Barthes, "From Work to Text" in *Image-Music-Text*, translated by Stephen Heath (Hill and Wang, 1977) (summarizing the poststructuralist theory of the "text").

19. Derrida's "logic of the supplements" is that an act of *writing* (a signifier) is a mediation for *speech* (also a signifier), filling in as its crude and unequal substitute when speech is absent. Speech, in turn, is a mediation for some unmediated thing—in this case, *objectively intelligible and accessible meaning* (the purported signified). His claim is that if this unmediated thing must be self-sufficient, it could not be accurately represented by a sign. Thus, we are left with a series of representations of representations *ad infinitum*, and the purported signified is actually a signifier in disguise that may be subjectively interpreted. Accordingly, readers should deconstruct a text because there is no objective meaning behind it to reconstruct, or *il n y'a pas de hors-text*, "there is nothing outside of the text." See Jacques Derrida, "The Exorbitant Question of Method" in *Of Grammatology*, translated by Gayatri Chakravorty Spivak (Johns Hopkins University Press, 1976) at 158. Two of the most concise and accessible summaries of the application of Derrida's theory to the law are JM Balkin, "Deconstructive Practice and Legal Theory" (1987) 96 Yale L J 743 and Stephen M Feldman, "How to Be Critical" (2000) 76:2 Chicago-Kent L Rev 893.

20. See Kingwell, *supra* note 11 at 351; Michael J. Shapiro, *Language and Political Understanding: The Politics of Discursive Practices* (Yale University Press, 1981) at 132 ("The hermeneutical approach to meaning involves elucidating not only the symbolic system that is the subject matter of analysis, but also the interpreter's frame of reference.").

21. Gadamer explains that these "prejudices" imbue readers with a first understanding of texts that initiate and order the remaining interpretive processes. See Hans-Georg Gadamer, *Truth and Method*, 2nd ed (Crossroad Publishing Corporation, 1997) at 202. For useful discussion of Gadamer's influence on the hermeneutical turn in jurisprudence, see Allan C Hutchinson, "Work-in-Progress: Gadamer, Tradition, and the Common Law" (2000-2001) 76 Chicago-Kent L Rev 1015.

22. Gadamer, *supra* note 21 at 301.

23. Stanley Fish, "Interpreting the Variorum" in *Is There a Text in This Class?: The Authority of Interpretive Communities* (Harvard University Press, 1980) [Fish, "Interpreting the Variorum"] at 171. Similarly, Culler argues that interpretive conventions must be seen as part

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interpretive communities will adopt different hermeneutical practices, readers will interpret texts as well as Fiss's own "disciplining rules" purporting to govern their interpretation in a manner ultimately generated by social, cultural, and political power.[24] As such, meanings in law are subjective, contextual, and conferred on texts from the outside.[25]

Subjective interpretivism has a practical problem that it cannot solve. How should readers reconcile the claim that texts have multiple meanings with the readers' lived reality, in many cases, that requires them to comprehend and comply with only one? Ronald Dworkin assessed such a task when engaged in the "special enterprise" of interpreting authoritative literary and legal texts, using Agatha Christie's crime novel *The Murder of Roger Ackroyd*[26] as an example.

> Suppose we distinguish between truth within a special game or enterprise and real or objective truth outside it. Taking fiction as a model, we might say that within the enterprise of a certain story someone killed Roger Ackroyd. But in the real world, outside that enterprise, Roger Ackroyd never existed, so that it cannot be true that anyone killed him. We might want to conceive the social practices of morality, art, law, and interpretation in some such way. Within the enterprise we make arguments and have beliefs of a certain sort—that slavery is unjust, for example, or that Christie novels display a certain view of evil. But when we stand outside the enterprise we know that no such proposition can be really or objectively true. …
>
> When people make interpretive or moral or legal judgments, [this picture] says, they are playing a certain game of make-believe, asking themselves which interpretation would be better if any really could be better, or what would be morally right if anything really could be morally right, and so forth. There is no reason why skeptical philosophers themselves should not "play the game," even though they know it is really, objectively speaking, all nonsense.[27]

This passage suggests a pragmatic compromise between objective and subjective interpretivist theories,[28] not endorsed by Dworkin but adopted hereinafter. Even

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of a boundless context: "Any given context is always open to further description. There is no limit in principle to what might be included in a given context, to what might be shown to be relevant to the interpretation of a particular speech act." See Jonathan Culler, "Convention and Meaning: Derrida and Austin" in EC Davis & R Schleifer, eds, *Contemporary Literary Criticism* (Longman, 1989) at 24.

24. Fish, "Fish v. Fiss", *supra* note 11 at 1332 (arguing that one cannot articulate and apply objectively intelligible and accessible disciplining rules because the act of doing so involves making subjective assumptions within a context where the rules are already intelligible and accessible). On this account, Fish claims that judges do not base their decisions on objective and abstracted legal principles, but they artificially assemble precedents to justify their decisions in a manner perceived to be consistent with their social, cultural, and political assumptions. See generally Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) [Fish, *Doing What Comes Naturally*] (asserting his provocative "anti-foundationalist" thesis).

25. See generally Fish, "Fish v. Fiss," *supra* note 11; Fish, "Interpreting the Variorum," *supra* note 23; Stanley Fish, "Anti-Professionalism" (1986) 7:3 Cardozo L Rev 645; Fish, *Doing What Comes Naturally*, *supra* note 24.

26. Agatha Christie, *The Murder of Roger Ackroyd* (Harper Collins, 1926).

27. Dworkin, *A Matter of Principle*, *supra* note 11 at 173.

28. The term "pragmatic" applies here in both its plain and jurisprudential sense. See Lief H Carter, "How Trial Judges Talk: Speculations about Foundationalism and Pragmatism in Legal Culture" in *Legal Hermeneutics*, *supra* note 11 at 219.

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if subjective interpretivists deconstruct the idea that one can access the objective meanings of authoritative texts, should readers then interpret these texts in wildly divergent ways, it would work against the readers' interests and the texts would work against their own purposes to promote comprehension and compliance.[29] Richard Weisberg explains that "few texts have a discernible meaning, and even then perhaps for only a few readers, but many texts display a discernible desire to be understood a certain way."[30] In other words, while the texts may not mean anything essentially true, they are clearly expected to mean something correct in literary and legal jurisdictions organized around their shared production and consumption.[31] This means that readers' effort to make the right judgment about authoritative texts—to "play the game" in Dworkin's words—may still provide the nominal structure for hermeneutical claims of this kind. Readers can make the right judgment by approaching texts initially according to the uses to which they are put by their enforcers, rather than by asking how the texts could or should be put due to a normative concern. It may be theoretically unsound in a subjectively deconstructed world, but the strategy promotes improved reading comprehension and compliance when authors, readers, and enforcement powers share its consequentialist outlook.

Further to this strategy, authors and readers should adopt specific interpretive methods for the meanings of literary and legal texts to be interpreted correctly. At a minimum, authors should write a complete and faithful account of events (or something aspiring to it) without any lies or significant omissions which detract from the right meanings. As Fish explains, authors and readers should belong to the same interpretive communities in which their constructed assumptions about the texts are shared.[32] To use Wayne Booth's seminal definition from narrative theory, authors, narrators, and readers should ascribe to the same intellectual, emotional, moral, and ethical norms affecting how they see the world, experience language, and relate to the texts.[33] Where these conditions are present, the narratives are said to be "reliable."[34]

Reliability may be easiest to achieve in fiction when first person or third person narrators are omniscient, when they occupy a non-locatable, indeterminate position exterior to and above their narrated universes, and when they represent their implied authors' views honestly and forthrightly.[35] Reliability can also be

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29. See Gerald Prince, *Narratology: The Form and Functioning of Narrative* (The Hague: Mouton, 1982) at 157 ("Narrative often displays itself in terms of an end which functions as its (partial) condition, its magnetizing force, its organizing principle.").

30. Weisberg, *supra* note 11 at 980.

31. Gadamer himself insists that "[w]hat [people] need is not just the persistent posing of ultimate questions, but the sense of what is feasible, what is correct, here and now." See Gadamer, *supra* note 21 at xxxviii.

32. *Supra* note 23 and accompanying text.

33. See Wayne Booth, *The Rhetoric of Fiction* (Chicago University Press, 1961) at 155-59 (explaining that the concept of reliability is linked to convergence between the implied author, narrator, and reader's norms).

34. *Ibid* at 158-59 ("I have called a narrator *reliable* when he speaks for and acts in accordance with the norms of the work (which is to say, the implied author's norms), *unreliable* when he has not.") [emphasis in original].

35. Gérard Genette calls this the "zero focalization" perspective: see Gérard Genette, *Narrative Discourse* (Basil Blackwell, 1972) at 189-94. Alternately, the omniscient narrator is called

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achieved in fiction and non-fiction when first person or third person narrators are fallible, but they freely perceive and admit the constraints of their perspectives and represent their implied authors' views honestly and forthrightly in light of those constraints.[36] Readers can then anticipate the threat of unreliability at the outset and remain alert for potential disconnections between authors and their narrated texts throughout.

Whether speaking in the first person or third person, in fiction or non-fiction, narrators' three main roles are interpreting, reporting, and evaluating.[37] Where narrators misread or fail to read part of a story, misreport or fail to report part of a story, or misjudge or fail to judge part of a story, they become "unreliable."[38] Theresa Heyd explains that unreliable narrators may be differentiated along the axis of intentionality or self-consciousness.[39] At one pole, there are narrators ignorant of the frailty of their thinking or language. They are unreliable despite themselves, telling a false or incomplete story because they lack the self-awareness or capacity to order events rightly. At the other pole, there are narrators who know their stories have the potential to deceive and write unreliably to further their own or their authors' private interests. They often exploit popular assumptions about what readers are thinking. They can obscure their true actions by making false utterances, omitting relevant and material information, or keeping

"covert," "effaced," "non-intrusive," or "non-dramatized" in literary criticism. David Lodge argues that the prospect of an "omniscient unreliable" narrator may be a contradiction in terms because it is difficult to conceive how a narrator could be all-knowing, and therefore incapable of observing, reporting, or evaluating badly, and consciously or unconsciously evasive at the same time. Lodge suggests that such a narrator could only figure in a very "deviant, experimental text." See David Lodge, *The Art of Fiction* (Penguin, 1994) at 154-55; Keen, *supra* note 3 at 43. As if responding to Lodge's invitation, several critics have challenged the automatic of the reliable omniscient narrator: see, e.g., Tamar Yacobi, "Interart Narrative: (Un)Reliability and Ekphrasis" (2000) 21:4 *Poetics Today* 711; Emily R Anderson, "Telling Stories: Unreliable Discourse, Fight Club, and the Cinematic Narrator" (2010) 40:1 Journal of Narrative Theory 80.

36. Correspondingly, the internal or external focalized narrator is called "overt," "intrusive," or "dramatized" in literary criticism. Such a narrator may be "heterodiegetic," meaning not a character in the story she narrates, or "homodiegetic," meaning a character in the story she narrates. See generally Genette, *supra* note 35 at 245; Gerald Prince, "Narratology" in *The Cambridge History of Literary Criticism*, vol 8 (Cambridge University Press, 1995) at 122-25; Keen, *supra* note 3 at 30-54.

37. James Phelan, *Living to Tell about It: A Rhetoric and Ethics of Character Narration* (Cornell University Press, 2004) at 50.

38. Booth, *supra* note 33. Booth's account of unreliable narration has inspired numerous case studies. See, e.g., Theresa Heyd, "Understanding and Handling Unreliable Narratives: A Pragmatic Model and Method" (2006) 162:1-4 Semiotica 217. Scholars have criticized Booth's account for placing too little significance on the role of the implied reader in "constructing" the unreliable narrator persona. See, e.g., Kathleen Wall, "*The Remains of the Day* and its Challenges to Theories of Unreliable Narration" (1994) 24:1 Journal of Narrative Technique 18; Monika Fludernik, "Defining (in)sanity: The Narrator of *The Yellow Wallpaper* and the Question of Unreliability" in Walter Grünzweig & Andreas Solbach, eds, *Transcending Boundaries* (Tübingen, Germany: Narr, 1999); Bruno Zerweck, "Historicizing Unreliable Narration: Unreliability and Cultural Discourse in Narrative Fiction" (2001) 35:1 Style 151.

39. Heyd, *supra* note 38 at 227. Suzanne Keen explains that along the axis of intentionality, there may be several reasons a narrator is unreliable. These include psychological states such as grief or denial; mental incapacities such as a low IQ; an incomplete grasp of language caused by senility or youth; limited access to information; and dishonesty or another deliberate motivation to tell the story in a misleading way. See Keen, *supra* note 3 at 43.

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vague about issues salient to the correct meanings. If their unreliability is only exposed after readers' have begun to understand their texts, the revelation of their exposure throws a wrench in readers' comprehension process, shifting the frames of reference that the narrators themselves helped to fix and forcing readers to reconsider what the correct meanings really are.

This raises crucial questions for debates about law. Could authoritative legal texts feature unreliable narration? Could poor narrative qualities defeat readers' ability to access the correct meanings of the texts? Given the threat that unreliability poses, how should authors and readers modulate their interpretive processes of writing and reading, as well as their respective roles in the common law system more broadly? These issues should concern anyone who writes, reads, or enforces legal prescriptions in the carceral or bureaucratic state.[40] In practice, unreliable could mean unusable in a litigation context, or at least useless to cite as objective authority. For most readers, comprehending and complying with the right meanings of legal texts is a practical imperative that carries serious penalties for non-compliance. For the legal system to function as it should and for these meanings to be intelligible and accessible to readers, the texts should feature reliable narration. Through a close reading of two texts in the following sections, this article shows that there are times when this is not the case.

Part II: Detecting Meaning in Crime Fictions

There may be no more closely examined work in the unreliability canon than Christie's *The Murder of Roger Ackroyd*, one of the most pure and accessible examples of unreliable narration in crime fiction.[41] Numerous studies in the humanities have used the novel to address the theoretical issues raised by its singular narrative construction.[42] As Dworkin's work illustrates, the novel is equally well-suited to legal analysis for its demonstrating the instructive analogy between crime fiction and legal non-fiction, including judicial opinions, given the conventions of both genres which define the reading of representative texts as special interpretive enterprises.[43] The novel is particularly useful for its demonstration of unreliability as a narrative technique, including formal and structural qualities

40. See Gadamer, *supra* note 21 ("for it is not [the] purpose [of legal hermeneutics] to understand given texts, but to be a practical measure to help fill a kind of gap in the system of legal dogmatics."); Dworkin, *Law's Empire*, *supra* note 10 at 94, 96, 109, 110 (arguing that judges advance their own interpretation of laws in order to justify the coercive power of the state); Cover, *supra* note 14 at 6.

41. Christie, *supra* note 26.

42. The novel's structure has been considered by authors as diverse as Raymond Chandler, Roland Barthes, Algirdas Julien Greimas, Gérard Genette, and Umberto Eco. Pierre Bayard's monograph *Who Killed Roger Ackroyd?*, translated by Carol Cosman (The New Press, 2000), is the most thorough exploration of the implications of unreliability in the narrative. For complementary analyses, see also Martin Priestman, "Writers and their Work" in *Crime Fiction from Poe to the Present* (Northcote, 1998); Carl R Lovitt, "Controlling Discourse in Detective Fiction, or Caring Very Much Who Killed Roger Ackroyd" in Ronald G Walker & June M Frazer, eds, *The Cunning Craft* (Western Illinois University Press, 1990); Stephen Knight, *Form and Ideology in Crime Fiction* (Indiana University Press, 1980); Peter Messent, *The Crime Fiction Handbook* (John Wiley & Sons, 2013).

43. *Supra* note 11 at 173.

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that may be operative in a wide range of social, political, and legal contexts.[44]

Readers enjoy a largely trusting relationship with crime fiction authors who are generally expected to operate within well-established narrative conventions. At the highest, the novels typically follow a linear plot trajectory through the discovery of the illegal act, investigation by the detective, and unmasking of the guilty party. Neil Sargent describes their constitution as the "history of a progressive unfolding of the meaning of a series of mysterious events, usually involving a limited number of protagonists in a confined temporal and spatial setting, in search of the underlying causal principles behind the mystery."[45] The circumstances of the crime must be explicable in terms of the solution provided.[46] More evocatively, Cecil Day-Lewis considers their stories to be as highly formalized as religious ritual, noting parallels between their denouement and the Christian Day of Judgment "when with a flourish of trumpets, the mystery is made plain and the goats are separated from the sheep."[47] In this way, crime fictions are distinct from other fictions that are intransitive or otherwise unconcerned with establishing the correctness of objective propositions through the collection of evidence and making of rational arguments.[48] The plots may twist and turn, chasing down false leads contrived by the perpetrators, but they should ultimately foreclose every possibility other than the right one in the end: whodunit. Inconsistent explanations can only be wrong.[49] As such, readers'

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44. It is a frequent criticism of law-and-literature scholarship that much of it lacks a principled methodology for selecting certain literary sources over others from which to draw insight about the legal process. See, e.g., Jane B Baron, "Law, Literature, and the Problems of Interdisciplinarity" (1999) 108:5 Yale L J 1059 at 1067; Daniel A Farber & Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives" (1993) 45:4 Stan L Rev 807 at 831.

45. Neil C Sargent, "Mys-Reading the Past in Detective Fiction and Law" (2010) 22:2 Law & Literature 288 at 291.

46. *Ibid*. For analyses of the generic conventions of crime fiction generally, see, e.g., Knight, *supra* note 42; Tzvetan Todorov, "The Typology of Detective Fiction" in Chris Greer, ed, *Crime and Media: A Reader* (Routledge, 2010); Patricia Merivale & Susan Elizabeth Sweeney, eds, *Detecting Texts: The Metaphysical Detective Story from Poe to Postmodernism* (University of Pennsylvania Press, 1999); Dennis Porter, *The Pursuit of Crime: Art and Ideology in Detective Fiction* (Yale University Press, 1981); Stephen Knight, *Crime Fiction 1800-2000* (Palgrave, 2004); John Clarke, "The Pleasures of Crime: Interrogating the Detective Story" in J Muncie & E McLaughlin, eds, *The Problem of Crime* (Sage, 2001); Lawrence M Friedman & Issachar Rozen-Zvi, "Illegal Fictions: Mystery Novels and the Popular Image of Crime" (2001) 48 UCLA L Rev 1411 at 1418-419.

47. Cecil Day-Lewis, "The Detective Story—Why" in Howard Haycraft, ed, *The Art of the Mystery Story* (Carroll & Graf, 1949) at 399. Rosanna Cavallaro has suggested that crime fiction's capacity for offering factual certainty is what makes the genre "both plausible and satisfying." See Rosanna Cavallaro, "Licensed to Kill: Spy Fiction and the Demise of Law" (2010) 47:3 San Diego L Rev 641 at 651, 667. See also DA Miller, *The Novel and the Police* (University of California Press, 1988) at 36-39, 45-46; Knight, *supra* note 42 at 117-18.

48. See Richard Posner, *Law and Literature: A Misunderstood Relation* (Harvard University Press, 1988) at 272.

49. Occasionally in crime fiction, after the detective has revealed the unambiguously correct solution to readers, he or she gives an alternative explanation to police on account of some higher imperative, usually to spare the surviving victim continued hardship or the murderer undeserved punishment. This explanation is usually accepted by the police because the detective has strategically withheld certain facts. In such cases, readers are almost always in on the deception which does not challenge the certainty of the correct solution—that is, the solution which the narrator intends the readers to perceive as the right one—unless the narrative is unreliable. One of the best known examples of such a story is Agatha Christie, *Murder on the Orient Express* (Harper Collins, 1934).

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engagement with the texts resembles an hermeneutical search for objectively intelligible and accessible meaning.[50] Readers expect crime fictions to avoid interpretive crises, deliver on their generic promise, and provide a remedy in the form of characters' confessions or convictions.

The subgenre of "Classical" crime fiction invokes specific narrative content that is characteristic of Christie's novels from the interwar period.[51] The setting is usually an idealized, remote, and hermetically-sealed English village, focusing on a country house. The brilliant amateur detective either resides in the area, vacations there, or arrives in response to an urgent summons. The murder victim is typically an undesirable patriarch, perhaps a member of the squirearchy, whose body should be relatively bloodless. There should be a finite cast of suspects representing a cross-section of village society. There is usually a young and plucky heroine, possibly the daughter of the squire, who is romantically involved with an athletic gentleman bachelor. There may be one or more gossipy spinsters able to parlay information told to them by an impressionable and well-connected maid. A professional man, often a lawyer or doctor, as well as a member of the military will figure frequently. The butler of the house must listen at doors. And a suspicious stranger, usually a "hot-blooded" Mediterranean foreigner, may be found lurking around the victim's estate. All suspects should have a motive for the killing, none should have a watertight alibi, and as many as possible should be hiding something, usually resentment, anger, or lust simmering beneath the surface of village gentility.[52] At novel's end, the detective should catch the killer and excise him from the community as an aberration from the norm so that the innocent are cleared and status quo is restored as something intrinsically worth preserving.[53]

Roger Ackroyd is prototypical for its fitting so neatly within this conventional milieu. It features a wealthy and undesirable patriarch, Ackroyd, who is

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50. See Bayard, *supra* note 42 at 83.

51. The subgenre of Classical crime fiction, first popularized and closely associated with the interwar period in Britain, is alternately termed the "Golden Age," "clue-puzzle," or "whodunit" subgenre in literary criticism. Agatha Christie, Dorothy Sayers, Margery Allingham, and Ngaio Marsh are the most representative and enduring authors.

52. Day-Lewis connected the rise of Classical crime fiction with the rise of secularization at the end of the Victorian era in Britain. See Day-Lewis, *supra* note 47 at 399. This anticipates the arguments of modernist critics that the hermeneutical certainty of crime stories provided interwar readers an antidote to the increasing instability of Victorian modes of thinking, which had been shocked by the carnage of the First World War and sustained intellectual challenges by Freud, Darwin, and other writers. On this account, the role of law enforcement in Classical crime fiction is seen as a comforting presence which restores order to the chaos of murder in particular and modernity in general. For more on the links between Classical crime fiction and modernism, see, e.g., Alison Light, *Forever England: Femininity, Literature, and Conservatism Between the Wars* (Routledge, 1991); Michael Holquist, "Whodunit and Other Questions: Metaphysical Detective Stories in Postwar Fiction" in Glenn W Most & William W Stowe, eds, *The Poetics of Murder: Detective Fiction and Literary Theory* (Harcourt: 1983); Carolyn Durham, "Modernism and Mystery: The Curious Case of the Lost Generation" (2003) 49:1 Twentieth Century Literature 82; Gill Plain, *Twentieth Century Crime Fiction: Gender, Sexuality, and the Body* (Edinburgh University Press, 2001); Charles J Rzepka, *Detective Fiction* (Polity Press, 2005).

53. Numerous literary and legal studies have identified these and other conventional characteristics of the Classical crime fiction subgenre. For representative studies, see, e.g., George Grella, "Murder and Manners: The Formal Detective Novel" (1970) 4:1 NOVEL: A Forum on Fiction 30; Messent, *supra* note 42; Friedman & Rozen-Zvi, *supra* note 46.

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murdered. His body is found in the study of an isolated country house in the village of King's Abbot, where there is an interested amateur detective, Hercule Poirot, coincidentally retired from the Belgian police force to grow vegetable marrows. There is a young and plucky heroine, the patriarch's niece, and two gentlemen bachelors considered as her possible suitors. There are also at least three eavesdropping servants, two gossipy spinsters, one attending doctor, a major in the military, and a dark and mysterious stranger whose late night rendezvous at the crime scene cannot be explained. Events progress logically from the discovery of Ackroyd's body through Poirot's investigation of the crime, which generates several leads because so many people stand to benefit from Ackroyd's death. Eventually, Poirot identifies the culprit and convinces him to commit suicide in an act of atonement and, by so doing, the dangerous aberrational forces of selfishness, greed, paranoia, and violence that marked his impulsive nature and threatened to blight respectable society are diffused as well.

Unusually, the regular chronicler of Poirot's adventures, Captain Hastings, is visiting South America when Poirot is in King's Abbot, so the task falls upon someone unknown to Christie's readers, the local physician James Sheppard, to narrate the story. Facts are recounted chronologically through Sheppard's first person, imperfect, homodiegetic narration, such that readers' only insight on the fictional world is filtered through the language of his selective, subjective mental experience. However, readers are unwise to impute the general reliability of Hastings's narratives onto Sheppard's because readers discover at novel's end that Sheppard has deliberately omitted details along the way, including his whereabouts at certain times, his motivations for acting, and his role in Ackroyd's murder and subsequent cover-up. As Poirot puts it after Sheppard's unreliability is exposed, Sheppard's narration "is strictly truthful as far as it went, but it did not go very far."[54]

Pierre Bayard argues that one of the formal mechanisms creating an impression of reliability in the novel is "double-edged discourse," or narration replete with statements that offer two possible but contradictory meanings in the text.[55] This is exemplified by Sheppard's description of his meeting with Ackroyd on the night of the murder, also the most famous passage in the novel:

> The letter had been brought in at twenty minutes to nine. It was just on ten minutes to nine when I left him, the letter still unread. I hesitated with my hand on the door handle, looking back and wondering if there was anything I had left undone. I could think of nothing. With a shake of the head I passed out and closed the door behind me.[56]

Sheppard's story is not false, strictly speaking, but it obscures important facts that pertain to the correct interpretation. Offstage, in the ten minutes elapsing between the first and second sentences, Sheppard plunges a dagger into Ackroyd's neck. Later in the novel, he goads us to consider the passage in a new light:

54. Christie, *supra* note 26 at 292.
55. Bayard, *supra* note 42 at 34.
56. *Ibid* at 46.

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"Suppose I had put a row of stars after the first sentence! Would somebody then have wondered what exactly happened in that blank ten minutes?"[57] The lines which follow mislead in a similar way, as Sheppard's statement, "I hesitated with my hand on the door handle, looking back and wondering if there was anything I had left undone," is so vague as to signify multiply. Readers eventually interpret the right meaning that Sheppard is reflecting on whether he hid the evidence of his crime,[58] but not before most of them will have initially interpreted a wrong meaning, consistent with Sheppard's innocence, because they are taken in by his personality and appearance of genuine feeling.

Readers' views are cemented by Sheppard's tone and approach. He tells a dramatic story in an undramatic manner, recalling shocking facts of murder, illegitimacy, drug addiction, and suicide with a calm and mechanistic language that elides unpredictable expressive feeling. Stephen Knight suggests that in so narrating, "[e]motion is removed and takes incredulity with it." Sheppard's style further reflects a bourgeois sentimentality shared by a class of Christie's readers in the interwar period, generating a sense of closeness and immediacy between the narrator and his audience by creating a model of respectable confidence that is a valid means of interpreting events in the story.[59] Sheppard is also the only character with whom readers have continuous contact and to whom they believe they have unfiltered access, suggesting cooperation and shared humanity no matter how problematic Sheppard's character turns out to be.[60] In these ways, the murderer is disguised by the process of narration itself, in the form of a trustworthy voice that relates the story as if detached from events and existing in externally defined relation.[61] Situating Sheppard's identity behind the narrative "I" makes him at once invisible but still in plain view, seen from the outside through readers' interpretive consciousness and from the inside through the language of Sheppard's sympathetic perspective, such that most readers fail to appreciate they are seeing the world through the eyes of a killer.[62]

The primary structural mechanism creating an impression of reliability in the novel is the dual communicative framework between Christie and crime fiction

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57. *Ibid* at 310.

58. Another example of double-edged discourse occurs in Sheppard's account of his thought process during his final conversation with Ackroyd, narrated as follows: "Suddenly before my eyes there arose the picture of Ralph Paton and Mrs. Ferrars side by side. Their heads so close together. I felt a momentary throb of anxiety. Supposing—oh! but surely that was impossible. I remembered the frankness of Ralph's greeting that very afternoon. Absurd!" Christie, *supra* note 26 at 43. Really, Sheppard's "momentary throb of anxiety" and lessened command of language—"Supposing—oh! but surely that was impossible."—refers to the terrifying prospect that Dorothy Ferrars, who is being blackmailed by Sheppard, confided the facts of the blackmail to Sheppard's friend Ralph Paton before she died. For the reader who does not yet suspect Sheppard of having blackmailed Ferrars, Sheppard's anguish figures as an innocent reaction to the idea that Ferrars had privately accused Paton of the blackmail. See Bayard, *supra* note 42 at 34-35.

59. Knight, *supra* note 42 at 121-23 (arguing that the novel's plot was so disturbing because the murderer is a doctor, "the very man to be trusted with the individual's bodily secrets and hope of continuing life, the emerging figure of wise authority in an increasingly secular society.").

60. Kathy Mezei, "Spinsters, Surveillance, and Speech: The Case of Miss Marple, Miss Mole, and Miss Jekyll" (2007) 30:2 Journal of Modern Literature 103 at 107.

61. See Bayard, *supra* note 42 at 34.

62. *Ibid.*

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readers. This informs the generic conventions of novels that she wrote and the conventions of novels that her readers expect to read. Sheppard is situated in a place of ostensible authority as the narrator, a role which long carried with it a presumption of innocence in crime fiction. The presumption is rooted in what Sargent explains to be the operative principle behind the narrator-detective's method: "that the past is complete and exists in an already defined relation to the present."[63] This allows narrators to distance themselves from other characters in the story, attaining the privileged position of authoritative observers who are able to cognitively organize and communicate events accurately.[64] If not one step ahead of the criminals, narrators should at least be able to deduce the criminals' identities as readers are.[65] This translates into a tacit understanding between authors and readers that their engagement with the texts is really a game of wits, played fairly, to reach the right judgment from clues that are communicated honestly and forthrightly by narrators who are above suspicion. If narrators were to misinform readers along the way, the constitutive premise of the reading experience would be flawed. Readers assume that narrators are recounting events reliably because otherwise they could barely follow the stories, let alone make a sensible guess at the solutions.[66]

Roger Ackroyd caused a great furor when it was published. Many critics cried foul at the revelation of the narrator-murderer, calling the device "unfair," "unforgiveable," and most colourfully by S. S. Van Dine, "as insidious as offering someone a bright penny for a five dollar gold piece."[67] They were upset that Christie had changed the rules of the reading game, the conventional contract

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63. Sargent, *supra* note 45 at 289.

64. *Ibid*.

65. See Christine Corcos, "Presuming Innocence: Alan Pakula and Scott Turow Take on the Great American Legal Fiction" (1997) 22:1 Okla City UL Rev 129 at 146.

66. See Sargent, *supra* note 45 at 289. See also RA York, *Agatha Christie: Power and Illusion* (Palgrave MacMillan, 2007) at 26.

67. The novel resulted in a "prohibition" of narrator-murderers in crime fiction by the Detection Club, an association of crime fiction authors with which Christie was affiliated. One of the Detection Club's founding members, Ronald Knox, listed the prohibition as one of his "Ten Commandments of Detection" published in *Essays in Satire* (Sheed & Ward, 1928). Similar rules against narrator-murderers were added to other lists from the period, including one written by SS Van Dine who called Christie's device "insidious" as quoted. The newspaper *Daily Sketch* called Christie's gambit a "tasteless, unforgiveable let-down by a writer we had grown to admire." One irate reader, a doctor like Sheppard, wrote to *The Times*: "Until now I have always been a great admirer of Agatha Christie but in the latest book I feel she has let the whole of the medical profession down and therefore propose in the future not to buy any more of her books." Throughout her life, Christie defended the novel from critics who challenged her device of the narrator-murderer. As she explained to Francis Wyndham: "I have a certain amount of rules. No false words must be uttered by me. To write 'Mrs. Armstrong walked home wondering who had committed the murder' would be unfair if she had done it herself. But it's not unfair to leave things out. In *Roger Ackroyd* I made the narrator write: 'It was just on ten minutes to nine when I left him.' There's lack of explanation there, but no false statement. Whoever my villain is it has to be someone I feel *could* do the murder." Dorothy Sayers, a contemporary of Christie's and some-considered rival, defended her in public by saying, "Fair! And Fooled you … it's the reader's business to suspect everybody." For full accounts of these and other critics' responses to the novel at the time of its publication, see Gwen Robyns, *The Mystery of Agatha Christie* (Doubleday & Company, 1978) at 56-58; Robert Barnard, *A Talent to Deceive: An Appreciation of Agatha Christie* (Dodd, Mead, and Company, 1980) at 37-39.

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between herself and her audience, unilaterally and without notice. They discovered too late that readers' challenge in the novel is to find the solution from clues provided honestly but not forthrightly, in a narrative that is inconspicuous from a formal and structural perspective.[68] Christie's offense was not in publishing a story that had multiple meanings or no meaning at all, but constructing a narrative that unfairly impeded readers' access to the correct meaning in light of the traditional prohibition against narrator-murderers in crime fiction. This suggests that most readers accept the correctness of Sheppard's identification as the murderer within the terms of the narrative. It appears the combined regulatory forces of Christie's claims to generic appropriateness, the novel's conventional characteristics, and readers' investment in solving the crime are so powerful that they determine readers' legitimate belief that Sheppard's confession is reliable after the fact of his unreliability is exposed. The novel's final chapter is even entitled "Apologia," suggesting that Sheppard confesses to his narrative crimes that have been isolated to the unreliable "pre-revelation" text alone.

What if readers are undeservedly trusting to accept that Sheppard's pre-revelation statements are his only crimes against correctness and not his "post-revelation" statements as well? The powerful destabilizing effect of unreliable narration should cast doubt on the quality of the entire representation, leading readers to wonder whether Sheppard's apology, while appearing to foreclose meaning, may in fact be his most ingenious concealment. The fact that Sheppard is implicated in Ackroyd's murder effectively damages his credibility, laying the text threadbare and marking the whole story with a degree of uncertainty and taint of possible deception. His stating now appears fragile, his language inadequate to describe his true inner thoughts and feelings, let alone what really happened in King's Abbot.

To illustrate, Bayard argues that Sheppard's apology reads ambiguously enough to allow more than one credible interpretation.[69] Sheppard's comment, "I suppose I must have meant to murder him all along," relays his "supposed" intention to kill without admitting to the actual killing.[70] Another comment—"I'd brought a handy little weapon of my own, but when I saw the dagger lying in the silver table, it occurred to me at once how much better it would be to use a weapon that couldn't be traced to me"—considers the merits of various murder weapons without admitting to having used one.[71] Whatever these and other statements signify, they are part of a post-revelation narrative that cannot be read independently of other deliberate disarrangements in the text. Readers should assume that all Sheppard's signs have double edges, supplying the point of departure for more than one intelligible and accessible meaning.

Bayard theorizes on this basis and argues that the evidence Sheppard relies upon to incriminate himself in the post-revelation text may figure in any number of different solutions that are equally plausible as Sheppard's confession of guilt.

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68. See Heyd, *supra* note 38 at 240.
69. Bayard, *supra* note 42.
70. Christie, *supra* note 26 at 310.
71. *Ibid* at 309.

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Among them, he suggests that Caroline Sheppard murders Ackroyd in order to protect her brother from an accusation of blackmail and that Sheppard leaves behind a false confession in order to protect his sister.[72] This solution is appealing in its simplicity and uncontradicted by the pre-revelation facts. But the key significance is not the solution's superiority to Sheppard's confession, but the possibility of its credibly signifying from the narrative at all. Any pretension that there exists objectively intelligible and accessible meaning to be found in *Roger Ackroyd*, already destabilized by the fact of unreliable narration, is shattered if we accept the verisimilitude of alternative meanings. As Jonathan Culler explains in respect of unreliability, "[a]t the moment when we propose that a text means something other than what it appears to say, we introduce, as hermeneutic devices, which are supposed to lead us to the truth of the text, models which are based on our expectations about the text and the world."[73] Put another way, Sheppard's deviance breaks the boundaries of the narrative wide open. There is nothing to prevent other readers from inserting Sheppard's rows of stars on its pages, between sentences or even within words, to interpret the text through their own frames of reference. Knowingly or not, Christie was an early progenitor of subjective interpretivism and her critics were unprepared. This was not supposed to happen in this genre, in this way, and it raises important questions about the stability of analogous texts in other genres, including law.

Part III: Deciding Meaning in Judicial Opinions

As explained above, a common view about fiction is that its reliability flows from the narrators' omniscience or exteriority to the narrated world.[74] It follows that, with the benefit of such an unlimited perspective, it is easier to narrate a complete and accurate account of events free of lies or significant omissions detracting from the right meaning. A common view about non-fiction, with a few notable exceptions,[75] is its reliability also flows from exteriority to the narrated world. Of course, omniscience cannot be achieved in reality, but may be compensated for in non-fiction by the narrators' honest intentions, diligent research, or at least some benefit of critical hindsight. Again it follows that, with the benefit of such measures, it is easier to narrate a complete and accurate account of events without lies or significant omissions detracting from the right meaning.[76]

Generic labels such as "non-fiction," not unlike "crime fiction," may depend on narrators attempting to report the facts in a reliable way. Otherwise, the

72. *Ibid* at 128.
73. Culler, *supra* note 7 at 157.
74. *Supra* note 35 and accompanying text.
75. For example, the presumption of reliability would not attach, at least not in the same way, to autobiographies, memoirs, or other personal histories which are properly classified as "non-fiction," but which are understood to represent one individual or group's limited perspective on real life events. See generally Sidonie Smith & Julia Watson, "The Trouble with Autobiography: Cautionary Notes for Narrative Theorists" in James Phelan & Peter J Rabinowitz, eds, *A Companion to Narrative Theory* (Blackwell, 2008).
76. *Supra* note 35 and accompanying text.

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constitutive premise of many readers' engagement with the texts—instruction, enlightenment, reflection, or some other—would be flawed. Yet defined with that aim, reliability in non-fiction cannot be definitively assured. Authors of non-fiction cognitively organize events and communicate them into stories in the same way that authors of fiction do, which means that both fiction and non-fiction can be the province of unreliability. This will happen when authors and readers interpret works in accordance with different interpretive community affiliations or intellectual, emotional, moral, and ethical norms.[77] This observation applies equally to the special enterprise of interpreting the meanings of certain legal non-fictions, including constitutions, statutes, judicial opinions, and scholarly articles, the meanings of which are assumed to be objectively intelligible and accessible by elements of the carceral and bureaucratic state.

If one takes a narratological approach to legal non-fiction, similar to crime fiction, one takes up the structuralist ambition to understand the constitutive components that underlie and comprise authoritative texts, including the ways that storytelling gives shape to interpreted events.[78] More specifically, the approach reveals how authorial processes are inevitably informed by the narrators' unique perspectives on what information is pertinent and how best to construct the resulting narratives that describe laws.[79] Given the risk that readers will interpret legal non-fictions in the wrong way, their authors face immense pressures to convey meanings as clearly and unambiguously as possible. This is achieved in the subgenre of judicial opinions by means of an institutionally-imposed consensus about how opinions should be composed.[80]

With respect to narrative form, Robert Ferguson explains that judicial speech

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77. *Supra* note 33 and accompanying text.

78. On the narratological approach to legal discourse, see generally David R Papke, ed, *Narrative and the Legal Discourse: A Reader in Storytelling and the Law* (Liverpool: Deborah Charles Publications, 1991); Peter Brooks & Paul Gerwitz, eds, *Law's Stories: Narrative and Rhetoric in Law* (Yale University Press, 1996); Peter Brooks, "Narrativity of the Law" (2002) 14:1 Law & Literature 1 [Brooks, "Narrativity"]; Peter Brooks, "Narrative Transactions—Does the Law Need a Narratology?" (2006) 18:1 Yale J L & Humanities 1.

79. See Brooks, "Narrativity," *supra* note 78 at 1. Brooks explains that these arguments are uncontroversial to narratologists but remain heretical to legal scholars who fail to recognize the role of narrative in the adjudicative process. Brooks observes that the best-known book in the law-and-literature field remains Posner's *Law and Literature: A Misunderstood Relation*, which argues at bottom that literary theory has little to offer the law in practice. See Posner, *supra* note 48.

80. While there are few similar analyses of crime fictions and judicial opinions, this article is not the first to analyze judgments using methodologies borrowed from literary studies. See, e.g., Walker Gibson, "Literary Minds and Judicial Style" (1961) 36 NYU L Rev 915 at 928-30; Richard Weisberg, "How Judges Speak: Some Lessons on Adjudication in *Billy Budd, Sailor* with an Application to Justice Rehnquist" (1982) 57:1 NYU L Rev at 42-58; Robin West, "Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory" (1985) 60 NYU L Rev 145; Judith H Resnick, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges" (1988) 61 S Cal L Rev 1877 at 1882; Deborah S Gordon, "'"'Jug Jug' to Dirty Ears": *Maryland v. Craig* Through a Literary Lens" (1991) 66 NYU L Rev 1404; David R Papke, "Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions" in Papke, *supra* note 78 at 210; Shulamit Almog, "As I Read, I Weep—In Praise of Judicial Narrative" (2001) 26:2 Okla City U L Rev 471; Arthur Glass, "James Boyd White and the Character of Judgments" in *The Happy Couple*, *supra* note 2 at 290; Posner, *supra* note 48 at 281-89; Klinck, *supra* note 16 at 304-23.

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should be monologic, telling a story without awaiting a response.[81] Judicial methodology should be interrogative, guided by the "question that judges decide to accept as the basis of their deliberations."[82] Judicial tone should be declarative, "reaching down from above in a way that can be accepted from below."[83] Judicial rhetoric should impress what Booth and other rhetoricians call "ethical appeal," that is, cement the impression that judges are the kind of people who ought to be believed.[84] These conventions require writing in a manner that suppresses any recognizable identity suggesting freedom of choice in the moment of decision, "as if forced to an inevitable conclusion by the logic of the situation and the duties of office, which together eliminate all thought of an unfettered hand."[85] The overall effect should be that judges make decisions collectively and impersonally, as if it is the rule of law speaking rather than one person speaking, with a line of sight that approaches omniscience.[86] The impositions may be greatest on judges deciding cases that reverberate loudest in the law and media, for which the Supreme Court of Canada and other courts have reserved the option of issuing reasons *per curiam*, or "By the Court," literally dissolving the judges' unique and individual identities into one unanimous, anonymous, authoritative voice.[87]

With respect to narrative structure, legal readers expect judicial opinions to follow a highly formalized, linear plot trajectory, proceeding through the statement

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81. Robert Ferguson, "The Judicial Opinion as Literary Genre" (1990) 2:1 Yale JL & Human 201 at 205 (arguing that judicial speech works to appropriate other voices into its own monologue). See also David Ray Papke & Kathleen McManus, "Narrative and the Appellate Opinion" (1999) 23:4 Legal Studies Forum 450 at 462.

82. Ferguson, *supra* note 81 at 208 ("Every court makes a fundamental decision about the question before it, and the wording in that first decision controls all others.").

83. *Ibid* at 213 (suggesting that hyperbole, certitude, assertion, simplification, and abstraction are the essential devices which contribute to the declarative tone of judgments).

84. See generally Wayne Booth, *Modern Dogma and the Rhetoric of Assent* (University of Notre Dame Press, 1974); Richard Weaver, *Language is Sermonic* (Louisiana State University Press, 1970). For example, George Rose Smith advises judges to write opinions in a "point-first" manner—that is, judges should state the court's conclusions near the beginning of their judgments—which practice "induces the reader to be on the court's side from the start; he is preconvinced that the decision is right." See George Rose Smith, "A Primer of Opinion Writing, For Four New Judges" (1967-1968) 21 Ark L Rev 197 at 204.

85. Ferguson, *supra* note 81 at 206-07. See also Erwin Chemerinsky, "The Rhetoric of Constitutional Law" (2002) 100:8 Mich L Rev 2008; Peter Brooks, "Inevitable Discovery—Law, Narrative, Retrospectivity" (2002) 15 Yale JL & Human 71; Rosanna Cavallaro, "Solution to Dissolution: Detective Fiction from Wilkie Collins to Gabriel Garcia Marquez" (2005) 15 Tex J Women & L 1.

86. Ferguson, *supra* note 81 at 206-07. See also Pierre Bourdieu, "The Force of Law: Towards a Sociology of the Juridical Field" (1987) 38:5 Hastings LR 814 at 819-20; Papke & McManus, *supra* note 81 at 461. Klinck remarks on the general reluctance of judges to use the personal pronoun "I" in their formal writing because they feel it is inappropriate that judges should manifest "personal" perspectives. He concludes that unlike an omniscient narrator in fiction, the judge has an interest in how the legal case unfolds and therefore becomes a character in the story herself. See Klinck, *supra* note 16 at 307.

87. *Per curiam* reasons by the Supreme Court of Canada are rare. They are typically reserved for cases with exceptional implications, a high public profile, or great potential for controversy. Notable recent examples are *Reference re Same Sex Marriage*, [2004] 3 SCR 698 on the constitutional validity of same-sex marriage legislation in Canada; *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44 on the *Charter* rights of Omar Khadr, a Canadian-born combatant in the War on Terror who was captured and held in Guantanamo Bay; and *Reference re Senate Reform*, [2014] 1 SCR 704 on certain constitutional and legislative issues arising from efforts to reform the Senate of Canada.

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of the facts, framing of the issues, statement of the law, and making of the decision.[88] Writing opinions resembles the near-mechanical act of reviewing evidence admitted only for relevance and materiality.[89] The facts must be determinable with some degree of certainty in order for opinions to appear legitimate to their normal audience of persons trained in law.[90] This culminates the hermeneutical search for meaning in the story, foreclosing interpretations other than the correct version of what really happened, how the law applies, and what must legally result from it.[91] Judicial resolutions are mapped and rigorously enforced because appellate opinions stand as precedents for the application of the same rules in analogous law cases.[92] Stories with similar beginnings should have similar endings, fulfilling the courts' primary obligation to maintain continuity without which the rule of law would not be rooted in durable principles.[93] Appeal courts exist to discipline errant courts below, having the power to reinterpret facts and law and to rewrite the endings of stories which deviate from generic conventions. Peter Brooks argues that U.S. Supreme Court decisions make this power most explicit, typically concluding "It is so ordered" as if to declare the Court has communicated a narrative of (law and) order and given contested events a single, reducible, unambiguous meaning.[94] In this way, judicial opinions imply more than the conclusion of individual disputes, but the existence of group values, the upholding of objectively intelligible and accessible meanings that are the fundamental and practice-based *desiderata* of the common law system.

These formal and structural conventions activate readers' impressions that judicial opinions are reliable, and the implications of unreliable narration in this context are grave. If trial judges were to misinform readers by imagining, confusing, or omitting relevant and material information and this was later exposed, readers would perceive there to be unfairness in the process, error in the reasoning, or injustice in the results. If widespread, this perception would create public

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88. See Smith, *supra* note 84 at 204 (prescribing a similar five-step formula that opinions should generally follow); Neil C Sargent, "Murder and Mayhem in Legal Method: or, the Strange Case of Sherlock Holmes v. Sam Spade" in Logan Atkinson & Diana Majury, eds, *Law, Mystery, and the Humanities* (University of Toronto Press, 2009) at 39 (finding a shared structure in crime fiction and legal analysis that promotes logical reasoning).

89. Rosanna Cavallaro, "Pride and Prejudice and Proof: Quotidian Factfinding and the Rules of Evidence" (2004) 55 Hastings LJ 697 at 697 (arguing that while "the traditional assumption has been that the primary purpose of adjudication is truthseeking," concerned with the accurate and orderly evaluation of disputed facts and past events, "this premise has been challenged by a variety of scholars proposing alternative purposes").

90. Cavallaro, *supra* note 47 at 648.

91. To appropriate Knight's description of crime fiction that is equally applicable in this context, judicial resolutions are "consistent, often highly artificial and deeply comforting." See Knight, *supra* note 42 at 125.

92. See Biet, *supra* note 17 at 416-17. Biet explores the functions and truth value of what he calls "legal fictions," meaning the value of an external rule that permits readers (or judges) to make a decision, and "judicial fictions," meaning the narrative which weaves legal fictions and literary elements into a persuasive document (e.g., a factum). Biet distinguishes legal fictions and judicial fictions from "real court judgments," which he does not expressly classify as "non-fictions" as this article does, but which he agrees function as authorities for the specific application of "legal fictions" to specific facts.

93. See Klinck, *supra* note 16 at 297.

94. Brooks, "Narrativity," *supra* note 78 at 8; Peter Brooks, "Law and Humanities: Two Attempts" (2013) 93:4 BUL Rev 1437 at 1462-63.

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skepticism about the legitimacy of other judicial outcomes.[95] Accordingly, it is exceedingly rare for judges to deviate from the traditional model while serving in their professional capacity by either revealing that they were unreliable by design in the most unusual and subversive case, or admitting that they made honest errors on account of their personal shortcomings rather than legal and institutional factors outside of their control.[96] Such revelations should be managed carefully or else they risk undermining the authority of the common law.

These issues are brought into focus by an extraordinary decision of the Ontario High Court, *R v. Lodge*,[97] in which the accused was charged and ultimately convicted of sexual assault under section 271(1) of the *Criminal Code*.[98] The text's narrative construction has been overlooked by legal scholars until now, as *Lodge* has never, by the date of writing, been cited in subsequent case law or secondary legal sources readily available in Canada or the United States. The author of the opinion, Justice Neele, narrates the facts of the case in the following manner:

> [1] The complainant ("D.D.") is an 18 year old female. Mr. Robert "Bob" Lodge ("Mr. Lodge") had met the complainant while she was working as a prostitute in the Silvertown neighbourhood of Niagara Falls, Ontario. Mr. Lodge testified at trial that he contacted the complainant on March 10, 1987 and that she had agreed to go to his home that evening to celebrate his finding a job. They agreed she would take a taxi and he would buy her a 26 ounce bottle of tequila.
>
> [2] D.D. arrived at his home on Marco Crescent at approximately 10:30 p.m.
>
> […]
>
> [4] D.D. found Mr. Lodge alone sitting on his deck in his backyard smoking marijuana. He asked D.D. to have sexual intercourse with him in his car. Mr. Lodge

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95. Alan Dershowitz argues that if we "import the narrative form of storytelling into our legal system, we confuse fiction with fact and endanger the truth-finding function of the adjudication process." See Alan M Dershowitz, "Life is Not a Dramatic Narrative" in Brooks & Gerwitz, *supra* note 78 at 99, 101. Similarly, the Canadian Judicial Council stresses in its ethical guidance to federally appointed judges that, given the independence accorded to judges, they share a collective responsibility to promote a certain standard of conduct: "The rule of law and the independence of the judiciary depend primarily upon public confidence. Lapses and questionable conduct by judges tend to erode that confidence." See Canadian Judicial Council, *Ethical Principles for Judges* (Canadian Judicial Council, 2004) at 10, online: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_ Principles_en.pdf. One judge of the Court of Appeal for Ontario, Justice David Watt, has recently come under fire in the media for his use of narrative embellishments in his decisions "reminiscent of crime novels" that may undermine their appearance of legitimacy. Speaking about Justice Watt's "literary panache," one law professor was quoted in *The Globe and Mail* stating "He is out of control" and "I am frankly surprised that no one on the court—including the Chief Justice—has said anything to him. I would not be surprised if there is not a judicial council complaint if he continues." See Kirk Makin, "The judge who writes like a paperback novelist," *The Globe and Mail* (5 April 2011), online: http://www.theglobeandmail.com/ news/national/ontario/the-judge-who-writes-like-a-paperback-novelist/article 1937791/.

96. In one case, Lord Denning showed remarkable candor by explaining why he should not be bound by a relevant precedent that he had himself drafted: "I am afraid that I am the cause of all the trouble: because of what I said in [*The Mandarin Star*]. I must confess now that I was wrong there". See *Shell Petroleum Ltd v Gibbs*, [1982] 1 QB 946 at 987. Lord Denning's reasons in *The Mandarin Star* can be found at [1969] 2 QB 449.

97. [1988] 6 WDB (2d) 112 (Ont HC) [*Lodge*].

98. RSC 1985, c C-46.

https://doi.org/10.1017/cjlj.2017.15 Published online by Cambridge University Press

claims that he had discussed the possibility of having sexual intercourse with D.D. earlier in the night. However, D.D. refused to have sexual intercourse with Mr. Lodge. D.D. admitted to consuming four or five drinks as well as smoking marijuana on the night of the sexual assault but maintains that she was quite aware of what was going on in the backyard.

[5] Mr. Lodge claims D.D. began to touch herself beneath her skirt in a sexual manner. Mr. Lodge grabbed D.D. around the waist and began pulling her skirt off.

[6] D.D. claims Mr. Lodge forced himself on top of her. She said she told him to stop but Mr. Lodge covered her mouth with his hands and forearm. She testified that during the intercourse she said "Stop, Bob. You're hurting me." and later screamed for someone to help, but no one intervened. Mr. Lodge claims that the sexual intercourse was consensual.

[7] After the intercourse finished Mr. Lodge said he would drive D.D. home. She refused the ride and ran off toward the main road. She then just went knocking on doors until someone answered. A resident on Moretta Drive testified that D.D. was crying and looked distraught. D.D. then asked the neighbour to call the police. It was now sometime between 1:00 a.m. and 3:00 a.m. on the morning of March 11, 1987. D.D. was taken by police to Greater Niagara General Hospital where she was assessed for sexual assault.

[8] Those are the facts of this case. The sole issue is whether the Crown has proven, beyond a reasonable doubt, that the complainant D.D. did not consent to having sexual intercourse with the accused Bob Lodge.

[9] In assessing the reliability of the accused's evidence, the Court has considered Mr. Lodge's version of events as they occurred March 10, 1987 in the context of the whole of the evidence. The facts as stated above are just that—Mr. Lodge's *version* of them. They are what he would have this Court believe on their face because in the absence of other evidence they may give rise to a reasonable doubt that the sexual assault occurred. But I am not taken in. There are additional important facts which in my opinion corroborate the complainant's testimony. I state them now.

[10] When they were in the backyard, D.D. claims that Mr. Lodge forced her skirt off her, ripping it in the process. Two missing teeth from the zipper of D.D.'s skirt were later found in Mr. Lodge's backyard.

[11] D.D. claims that while he was entering her, Mr. Lodge held her wrists above her head. D.D. identified bruises on her wrists from photographs adduced at trial.

[12] D.D. claims that after she began screaming, Mr. Lodge grabbed her by the throat in a choking manner, causing her to temporarily lose consciousness. D.D. also identified bruises on her neck from photographs adduced at trial.

[13] Upon being processed at Greater Niagara General Hospital for sexual assault, traces of Mr. Lodge's DNA were found inside the complainant D.D.

[14] And yet Mr. Lodge claims their exchange was consensual.[99]

99. *Ibid* at paras 1-14.

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Justice Neele makes an interesting hermeneutical study for the implications of her choice to narrate the facts in two distinct movements: paragraphs one to seven, and paragraphs ten to thirteen. In paragraphs one to seven, she provides an incomplete version of the facts. Like Sheppard's pre-revelation text in *Roger Ackroyd*, these paragraphs are highly inconspicuous from a stylistic perspective, telling a dramatic story in an undramatic manner with neutral language and few unnecessary details. This conforms to readers' expectations about how such factual summaries should read. In paragraph eight, Justice Neele writes "Those are the facts of this case," with the backward-looking adjective "those" cementing readers' impressions that her factual summary was completed in paragraphs one to seven. This bridges to her next statement, "The sole issue is whether or not…," using conventional syntax to frame the legal question as typically follows the completed factual summary in a judicial opinion. This sets up Justice Neele's stunning revelation in paragraph nine that she withheld relevant and material evidence in the preceding summary, which she explains is "Mr. Lodge's *version*" of the facts offered in his own defence. Like Sheppard's own version, Justice Neele's recounting of it "is strictly truthful as far as it went, but it did not go very far."[100] Paragraph nine functions in the same way as Sheppard's apology: Justice Neele admits to her omitting "additional important facts" in the pre-revelation text and attempts to reassert her authority in the post-revelation text, emphatically letting readers know that she "was not taken in" by Mr. Lodge's attempt at deception. She then cites the "additional important facts" in paragraphs ten to thirteen that bear on the legal question and support her subsequent finding—one of the correct meanings of the text—that Mr. Lodge is guilty of sexual assault for the reasons provided.

How will the *Lodge* opinion be interpreted by its normal audience of lawyers, judges, legislators, constituents, and commentators who are more or less distant from Justice Neele, or more or less distant from one another, because they have different interpretive community affiliations or ascribe to different intellectual, emotional, moral, or ethical norms? *Lodge*'s mispositioned narrative sequence reveals that which the conventional edifice of judicial opinions is intended to conceal: their vulnerability to subjective interpretation.

While Justice Neele occupies the privileged position of an authoritative observer, she is still an unreliable narrator. If her language signifies ambiguously, incompletely, or incorrectly in paragraphs one to nine, it may do so elsewhere. That Justice Neele deliberately misleads readers by her placement of paragraphs ten to thirteen may be improbable, to be fair. After she cites the additional facts, her narration proceeds in the ordinary course through her statement of the law and making of the decision. She never mentions "Mr. Lodge's version" of the facts again or gives any reason for her prior mispositioning, which may not have been done with any specific political or ulterior motive. Regardless, Justice Neele's opinion, as Angela Fernandez describes about another unconventional case, "subverts any attempt to establish an authoritative meaning or to turn a

100. Christie, *supra* note 26 at 292.

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necessarily fluid and multi-faceted artifact into a hard object."[101] The opinion does so by exposing the potential that unreliability can feature in her judgments for whatever reason—self-conscious design, unconscious error, or factors outside her control—casting doubt, for legal readers, on the objectively intelligible and accessible quality of her interpretive processes generally.[102] This means readers who believe *Lodge* to be a straightforward statement of the criminal law have been "taken in" by Justice Neele's concealment of misdirection: they would have interpreted as law what should really have been interpreted as an unreliable work of crime fiction. No wonder the case has been overlooked until now.

The narrative form and structure of judicial writing, like crime fiction writing, imitate objects that can be verifiably cited about happenings in the past. They may impress "mere appearances" of reliability, but they cannot undermine the kind of facts to which the subjective interpretivist critique appeals. At bottom, judges are story-tellers who must invariably focalize events through the social, cultural, and political lens of their narrative ordering processes.[103] When judges hear conflicting testimony or legal submissions at trial, their reactions are a composite of unique and individual prejudices shared by members of their interpretive communities, rarely known in advance or admitted in their reasons, which may or may not accord with the most widely-accepted or prescribed version of events that occurred. And the reasons themselves will always provide the intellectual, emotional, moral, or ethical basis for multiple, divergent interpretations of their form and content. This is true so long as there remain interpretive community outsiders who bring different constructed assumptions about what judicial opinions should mean or interpretive community insiders who bring different narrative ordering purposes, perspectives, and practices to bear than what readers traditionally expect of them. This means that judicial opinions can be read as saying something fundamentally at variance with, and possibly subversive of, the way they were intended by their

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101. Angela Fernandez, *Pierson v. Post, the Hunt for the Fox: Law and Professionalism in American Legal Culture* (forthcoming, Cambridge University Press) (copy on file with the author) at 37. Beyond these, the law books are replete with examples of judicial opinions that defy generic conventions. See, e.g., John B McClay & Wendy L Matthews, eds, *Corpus Juris Humorous in Brief: A Compilation of Humorous, Extraordinary, Outrageous, Unusual, Infamous, and Witty Opinions from 1256 A.D. to the Present* (Barnes and Noble, 1994).

102. See *LaTouraine Coffee Co v Lorraine Coffee Co*, 157 F.2d 115 at 123-24 (C. C. A. 2d 1946), per Frank J.A. (dissenting opinion), cited in Jerome Frank, "Say It With Music" (1948) 61:6 Harv L Rev 921 at 928 ("Fact-finding, when a judge sits without a jury and the record consists of oral testimony, is his responsibility, not that of the upper courts. Only when it is clear beyond doubt that he has closed his eyes to the evidence, may an upper court properly ignore his version of the facts. Since his 'finding' of 'facts,' responsive to the testimony, is inherently subjective (i.e., what he actually believes to be the facts is hidden from scrutiny by others), his concealed disregard of evidence is always a possibility. An upper court must accept that possibility, and must recognize, too, that such hidden misconduct by a trial judge lies beyond its control. Only, perhaps, by psycho-analyzing the trial judge could his secret mental operations be ascertained by us; and we are not skilled in that art, which, at the least, would require many hours of intensive personal interviews with the judge.").

103. This "indeterminacy thesis" of judicial reasoning has been articulated before, but without analogy to crime fiction or detailed reference to contemporary advances in narratology. See generally Frank, *ibid*; JAG Griffith, *The Politics of the Judiciary* (Manchester University Press, 1977); Joseph Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94:1 Yale LJ 1; Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36:4 J Legal Educ 518; Mark V Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles" (1983) 96:4 Harv L Rev 781.

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authors or the way they are interpreted by their enforcers.

There is no objective meaning of the facts in *Lodge*. There can be no objective meaning of the facts in other cases narrated by judges who wield the same limited power as Justice Neele.[104] There are only social, cultural, and political effects, felt in a multitude of ways, plotted and perpetuated in disparate judicial decisions, in potentially conflicting readings and reinventions of legal history.

Robin West and other scholars have argued against a similar conclusion, stating that analogies of literature to law can be reckless and misplaced because legal adjudication is not an interpretive act, but in its exercise of social, cultural, and political will, an imperative one. West would concede subjective interpretivists the power to make meaning in fictional worlds, but not at the expense of critical complacency about the power of judges to make commands in reality: "We must recognize power when we see it, and we cannot afford to trivialize the discovery by insisting that we see it everywhere."[105]

These scholars are correct that analogies of literature to law may diminish the severity of the power issue if one equates the casual author or reader of open-ended fictions with judges who interpret meanings that have more serious or immediate consequences in real life. But crime fictions and judicial opinions, unlike other fictions and non-fictions, are organized around the same regulatory principles. Conventions of both genres found their authority on claims of objective intelligibility and accessibility, on claims of clear and unambiguous meanings about *what really happened* and *what justice demands*. Perhaps because of the varied consequences of their production and consumption, these scholars overlook how the two genres, crime fictions and judicial opinions, function analogously and thus merit comparative analysis. Through such an analysis, readers can identify and expose the narrative mechanics that prevent them from making the right judgment when it matters most.

Judicial excellence is defined, in large part, by judges' performance in their writing. Professional standards should expand to include the attempted reliability of judicial opinions independently of concerns about the internal consistency, rhetorical persuasiveness, and generic conformity of legal reasoning. Judges should appreciate how the form and structure of unreliable narration can work against the opinions' own purposes by preventing readers from making the right judgment. If

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104. To the contrary, Michael Hancher and other scholars have argued that literary interpretation can be distinguished from legal interpretation because appellate judges are able conclusively solve the meaning of a subject text. See Michael Hancher, "Dead Letters: Wills and Poems" (1982) 60:3 Tex LR 507; Michael Hancher, "What Kind of Speech Act is Interpretation?" (1981) 10 Poetics 263. However, while appellate judges can order meaning with practical certainty for a time, it is unclear that they can order meaning with hermeneutical certainty for any time or at all. Appellate courts often contradict and even explicitly overrule themselves, which suggests that a plurality of meanings or at least an evolution or malleability of meaning can derive from a text over time.

105. West, *supra* note 11 at 150-51. See also Papke, *supra* note 80 at 208. ("[D]espite their literary features, appellate opinions, because they are backed by state power, have more in common with legislation and government decrees than with great poems or novels."). Others have made similar arguments that subjective interpretivist theory is contrary or counterproductive to the task of legal interpretation in contexts where making the right judgment is a practical necessity. See generally Daniella Murynka, "Some Problems with Killing the Legislator" (2015) 73 UT Fac L Rev 11 at 24-26.

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they do so, judges should find that their opinions will be more acceptable to readers and that readers' understanding of their opinions will be more acceptable or credible to enforcing powers than before. This argument calls for greater openness, honesty, and transparency in judicial writing—a new, self-referential language that embraces the subjective and contextual nature of legal adjudication—to mitigate the risks of interpretive disconnect between authors, readers, and their enforcers.

In practice, this means that judges should not feign omniscience or pretend to the form and structure of objectivity, but simply write their personal best. Judges might aspire to something greater than the sum total of their experiences, but in doing so they should critically reflect on what is external to the self, disclose their preconceptions at the outset, and try to tell stories that make best sense of their worlds.[106] If judges acknowledged their limitations and admitted the ways that they could have impacted their narrative ordering processes, readers could remain alert for deviations before and while they read their reasons, identify and resolve these deviations before interpreting them, and reach a better understanding of the correct meanings that enforcing powers are likely to apply. This would also reveal other meanings (and issues and interests and voices) that could not be expressed using the standard linguistic and semiotic forms, narrative qualities, or common law structures as they are currently constituted, providing the basis for further and more principled critique.

For instance, could conventional judicial discourse, being a form of narrative, favour certain aspects of human experience over others? Whose perspectives are included and whose perspectives are left out?[107] What kinds of wordless knowledge, cognitively organized through narrative but rarely communicated as such, do judges rely on in determining a witness's credibility or in making discretionary decisions? Whose perspectives determine the content of this wordless knowledge and how should they be accounted for in legal writing?[108] What

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106. This recommendation should not be controversial. See Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowansville, Quebec: Êditions Yvon Blais, 1991) at 12-13 ("There is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet … [T]he wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of bad attitudes and sympathies that fellow sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."). Several judges have been more forthright about accepting the limitations of their interpretive processes. See, e.g., John W Morden, "The 'Good' Judge" Ontario Justice Education Network (5 March 2004) at 6, online: http://www.lsuc.on.ca/media/ hon_john_morden_the_good_judge_mar0504.pdf.

107. See, e.g., Allan Hutchinson, "Part of an Essay on Power and Interpretation (with Suggestions on How to Make Bouillabaisse)" (1985) 60 NYU L Rev 850 at 861 (arguing that legal discourse, being a form of narrative, favours some aspects of human experience over others and therefore contributes to power imbalances); Milner S Ball, "Stories of Origin and Constitutional Possibilities" (1989) 87:8 Mich L Rev 2280 (providing an account of how outsider stories can challenge insider privilege); Debora L Threedy, "The Madness of a Seduced Woman: Gender, Law, and Literature" (1996) 6 Tex J Women & L 1 at 17 (suggesting the study of narrative as a means of exposing the ways that traditional legal discourse tends to silence the voices of historically marginalized groups).

108. See, e.g., Frank, *supra* note 102 at 932 (describing how trial judges cannot formulate his instinctive and intuitive responses to conflicting oral testimony in traditional linguistic forms, which "wordless knowledge" is integral to the judges' decision-making process).

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are the effects of standpoint biases and other subjective influences on the judicial decision-making process? How are these influences leveraged for and against the goals of increased procedural fairness, substantive equality, cultural diversity, and distributional justice?[109] Considered in the broadest terms, how might the use of narrative, and the interdisciplinary study of narratology, be creatively and productively mobilized in law toward socially progressive ends?[110]

Apologia

Crime fictions and judicial opinions show how easily readers may be deceived by narrators acting the part of propriety. Clinging to the promise of secure communication ignores how individual influences can shape readers' interpretations in meaningful ways. These narratives further illustrate the diversity and dynamism of unreliability as a technique, operative through various interactive disguises with the consequence that there may be no essential textual quality that marks a story's meaning as objectively intelligible and accessible.

Perhaps the most subversive implication of this kind of analysis is the extent to which unreliable narration may inhabit not only representative works in the crime fiction and judicial opinion genres, but other authoritative texts across a variety of disciplines claiming sacrosanctity, including religious writings.[111] Consider this article's epigraph. Questions abound in the theological sciences as to the proper ordering of the Gospels, such that not even their meanings are without serious uncertainty. That one should turn briefly now to focus on scholarly articles, including this one, seems a natural step.

When reading a scholarly article, readers make value judgments that are based on their assumptions about various aspects of the text, including the credentials of the author, prestige of the journal, structure of the argument, and clarity and complexity of the language. These are indicia of reliability in academic circles.[112] What if an author in this context sets out to imitate history, to mimic the forms of footnote reference to cases and other legal authorities that can be cited about

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109. See, e.g., Martha Minow, "The Supreme Court, 1986 Term—Foreword: Justice Engendered" (1987) 101 Harv L Rev 10 at 45-50 (explaining that judges fail to appreciate the role of standpoint bias in decision-making).

110. For one example of how narratology can be mobilized in law toward socially progressive ends, see Kathryn C Swiss, "Confined to a Narrative: Approaching Rape Shield Laws through Legal Narratology" (2013-2014) 6 Wash U Jurisprudence Rev 397.

111. The study of narratology has been critically applied in fields as diverse as musicology, art criticism, philosophy, and psychology. See, e.g., Anthony Newcomb, "Schumann and Late Eighteenth Century Narrative Strategies" (1987) 11:2 19th-Century Music 164 at 164-74; Wendy Steiner, *Pictures of Romance: Form against Context in Painting and Literature* (University of Chicago Press, 1988); Christian Metz, *Film Language: A Semiotics of Cinema*, translated by Michael Taylor (University of Chicago Press, 1991); Christine G Glenn, "The Role of Episodic Structure and Story Length in Children's Recall of Simple Stories" (1978) 17 Journal of Verbal Learning and Verbal Behaviour 229 Nancy L Stein, "The Definition of a Story" (1982) 6 Journal of Pragmatics 487.

112. See generally Farber & Sherry, *supra* note 44 (on both the use of storytelling in legal scholarship as well as widely-accepted indicia of quality legal scholarship in the Anglo-American tradition).

https://doi.org/10.1017/cjlj.2017.15 Published online by Cambridge University Press

happenings in the past, to perpetrate a narrative illusion on his readers?[113]

Consider, for example, an author who embellishes, mischaracterizes, or invents details in an article to achieve a desired effect; who changes a judge's name to match the pseudonym Christie adopted during the eleven days she mysteriously disappeared in the year *Roger Ackroyd* was published;[114] who gives the accused in *Lodge* the same address as his childhood home; who makes the alleged crime occur on his date of birth; who gives the accused, "Bob Lodge," an anagram of his last name; who gives the complainant, "D.D.," his initials; whose cites the *Lodge* case to a law reporter which does not exist; who holds back the real reason for the judgment's historical obscurity; and who completely imagines the *Lodge* case which has no basis in reality at all.

If the author intends that his readers will make the right judgment about the value of the article, he should confess his unreliability at the outset. Readers could then take him at his word that, the references to *Lodge* aside, the author has done everything that he could, honestly and forthrightly despite the constraints of his perspective, to convince them of his argument about attempting reliability. Or perhaps the uncertainty will be too great. His narrative will signify things in ways the author could not have expected, suggesting meanings in addition to or instead of his own, as if Sheppard's rows of stars cluttered the pages, and may lead readers to question the objective quality of texts operating within similar generic conventions as scholarly writing. Readers may be left with nothing but a call to read the article critically and reflexively, as they would a potentially unreliable work of crime fiction, in their attempts to solve the mystery of legal interpretation.[115]

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113. See generally Keen, *supra* note 3 at 128-40 (explaining the narrative mechanics of fiction taking the form of non-fiction). One of the most spectacular examples of revealed-to-be fictional academic "nonfiction" is Glenn Boyer's edited memoir of Josephine Earp, which was discovered nearly twenty years after its original publication by a respected university press to be "creative nonfiction" having a "fictional format." See Glenn G Boyer, *I Married Wyatt Earp: The Recollections of Josephine Sarah Marcus Earp* (University of Arizona Press, 1976).

114. *Roger Ackroyd* was published in spring of 1926. The year was a tumultuous one for Christie, as it had become plain that her marriage to Archie Christie so badly deteriorated that he was publicly carrying on an affair with another woman, Ms. Nancy Neele. On December 3, 1926, after Archie had left to visit Ms. Neele for the weekend, Christie packed her bags and drove off. Her car was found the next morning abandoned on an embankment covered in frost. Inside the car, the police found a small case, women's clothing, and driving license bearing Christie's name. The newspapers were soon ablaze with speculation about the writer's disappearance. The *Daily News* even offered a sizable reward for information leading to Christie's discovery. By the following weekend, police officers from four counties and thousands of volunteers had become involved in the search. On the evening of December 14, 1926, Christie was recognized as a guest at the Hydropathic Hotel in Harrogate where she had checked in under the name of Ms. Teresa Neele, claiming to be a visitor from South Africa. When asked by a *Daily News* reporter how she had got to Harrogate, Christie said that she did not know and that she was suffering from amnesia. Archie Christie positively identified his wife, announcing in the press that she had suffered near complete memory loss, which statement was later corroborated by two doctors. However, this did not stop the press from accusing Christie of having planned her disappearance to obtain publicity. Christie makes no direct reference to her disappearance in her autobiography, stating merely that after illness came sorrow and heartbreak, and that there was no need to dwell on it. For a more detailed account of Christie's mysterious disappearance, see Charles Osborne, *The Life and Crimes of Agatha Christie* (Harper Collins, 2000) at 51-57.

115. For its onomatopoeic quality, this article owes a credit of inspiration to Part IV of Jerry Frug, "Argument as Character" (1988) 40:4 Stan L Rev 869.

https://doi.org/10.1017/cjlj.2017.15 Published online by Cambridge University Press