Narratives of Criminal Procedure from Doyle to Chandler to Burke

SIMON STERN*

Despite the considerable body of work by various legal scholars aimed at showing that law is a form of narrative, these efforts have not found many adherents for the view that legal briefs and judicial opinions make better bedtime reading than mystery novels or courtroom dramas. This well-attested preference for fictional narrative suggests that the kind of satisfaction it offers is very different from the pleasures to be had from the genres of professional writing that we associate with forensic advocacy and decision-making. In the latter case, narrative serves the purpose of persuasion: a lawyer seeks to persuade a judge (and possibly a jury) by framing the client's story in a certain way; a judge seeks to persuade a wide array of readers by framing both the events and their doctrinal management in a certain way. Fiction may also seek to persuade, but more fundamentally it seeks to engage readers in the characters and the events, encouraging a kind of immersion in the story.

*Associate Professor & Co-Director, Centre for Innovation Law & Policy at University of Toronto Faculty of Law. B.A. (Yale); Ph.D., English (UC Berkeley); J.D. (Yale); member of the Washington, D.C. Bar. While in law school, Professor Stern was Editor-in-Chief of the Yale journal of Law & the Humanities. Professor Stern clerked for Ronald M. Gould on the U.S. Court of Appeals for the Ninth Circuit, practiced litigation at Shea & Gardner (now Goodwin Procter) in Washington, D.C., and then served as a Climenko Fellow and Lecturer on Law at Harvard Law School.

1 The scholarship on law and narrative is vast. For a recent discussion that surveys much of this work, see PHILIP N. MEYER, STORYTELLING FOR LAWYERS (2015). For a fuller discussion of the relations and discontinuities between forensic and fictional narrative, see Simon Stern, Narrative in the Legal Text: Judicial Decisions and Their Narratives, in NARRATIVE AND METAPHOR IN LAW (Michael Hanne & Robert Weisberg eds., 2017).


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that is hardly necessary, and is rarely attainable, in legal writing. No one would assume that the skills of a successful novelist translate directly into effective legal prose, and the occasional efforts, by judges, to add self-consciously “literary” touches to their opinions have generally proved disastrous.

Writers who have been successful in both areas are rare, because they have had to master a variety of skills that are often breezily assumed to be complementary or even cognate, but that turn out to have little in common once we look under the overarching label of “narrative” and try to specify them more concretely. Consider, for example, the roles of dialogue, characterization, and perspective (not to mention the orchestration of events so as to pique the reader’s curiosity, rather than simply to make the details readily comprehensible). The usual forms of legal writing offer no opportunity for cultivating these skills, whereas the novelist can hardly do without them. The list of writers who have excelled in both fields is not lengthy, but their prominence has perhaps made the achievement seem deceptively easy. Alafair Burke is among the few who have pursued a truly successful literary career while also producing a significant amount of work in the legal arena. In what follows, I consider the place of the

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3 Fiction may, of course, persuade by engaging readers in this fashion; that is the contention of a significant part of the philosophical work on “truth in fiction.” See, e.g., Mitch Green, Narrative Fiction as a Source of Knowledge, in NARRATION AS ARGUMENT (Paula Olmos ed., forthcoming), available at https://perma.cc/V6NJ-4YN6. By contrast, persuasion is usually the overt and nearly exclusive purpose of any legal argument, which therefore has little reason to enlist the kinds of imaginative capacities that fiction depends on.

4 See, e.g., Pennsylvania v. Dunlap, 555 U.S. 964, 964 (2008) (Roberts, C.J., dissenting from denial of cert.) (failing to recognize that in hardboiled detective fiction, police corruption is pervasive, and thereby undermining the ostensible point that the officer’s “experience in the neighborhood” helped to justify a finding of probable cause); R. v. Simon, 2010 ONCA 754, para. 1 (Can.) (similarly ill-advised invocation of hard-boiled idiom). As Raymond Chandler once observed, readers “will accept style, provided you do not call it style either in words or by, as it were, standing off and admiring it.” RAYMOND CHANDLER ET AL., RAYMOND CHANDLER SPEAKING 61 (Dorothy Gardiner & Kathrine Sorley Walker eds., 1962).

5 More commonly, writers have traded one sphere for the other. John Sutherland, in a statistical survey of 878 Victorian novelists (566 men and 312 women), finds that one in five of the men was a lawyer at some point, “and in the vast majority of cases a failed barrister.” ‘Called to the Bar but never practised’ is thus the commonest prelude to a career in writing novels. And if one adds lawyer fathers (or, for women, lawyer husbands) the coincidence of training in law with the Victorian novel is even more pronounced.” John Sutherland, The Victorian Novelists: Who Were They?, in SUTHERLAND, VICTORIAN FICTION: WRITERS, PUBLISHERS, READERS 159, 170 (2d ed. 2006). Sutherland offers various practical reasons for the linkage, and concludes by speculating that “there is probably an affinity between the mentalities of jurisprudence and Victorian fiction, shaped as both were by the study of individual cases and the canons of (poetic) justice.” Id. at 171. Robert Ferguson has argued that a similar web of relations was pervasive in American literary culture, up to around the time of the Civil War.
criminal justice system in her most recent novel, The Ex. To provide some context for that discussion, I first show how legal mechanisms for investigating and prosecuting crime have figured into British and American literature over the last three hundred years.

Although crime has not been the only topic to occupy the attention of novelists and playwrights who weave legal themes into their work, it has been an enduring object of fascination for all the obvious reasons: crime lends itself to the sort of dramatic conflict that makes for a vivid and suspenseful plot, while also highlighting moral questions about greed, passion, and responsibility. The most notable examples from other areas of law often take on criminal dimensions: property and labor disputes that escalate into violence, corporate torts and inheritance fights that derive from fraudulent concealment or forgery, and slavery (which is now regarded as a criminal institution, and was seen as criminal in the nineteenth century by its opponents). While crime and punishment have long been constant factors in the literary imagination, the criminal law system has flickered intermittently, coming in and out of visibility. In the eighteenth century, the criminal law system (such as it was) figured prominently in popular forms of writing about criminality, such as those that appeared in the Old Bailey Sessions Papers (1674–1913) and the “dying confessions” published in broadside form by the Ordinary of Newgate, as well as the “based on fact” stories that they spawned. In England, at that

See Robert A. Ferguson, Law and Letters in American Culture passim (1984). Legal writing and argumentation were among the many practices that changed with the increasing professionalization of lawyers in England and America, towards the end of the nineteenth century, and these changes may help to explain why the conjunctions that Sutherland and Ferguson discuss are much rarer today.

6 Alafair Burke, The Ex (2016).

7 For some discussions elaborating these points, see Jeannine Marie DeLombard, Law and Literature, in A COMPANION TO AMERICAN LEGAL HISTORY 463 (Sally E. Hadden & Alfred L. Brophy eds., 2013); Simon Stern, Law and Literature, in THE OXFORD HANDBOOK OF CRIMINAL LAW 111 (Markus D. Dubber & Tatjana Hörnle eds., 2014); David Alan Sklansky, Dick Wolf Goes to Law School: Integrating the Humanities into Courses on Criminal Law, Criminal Procedure, and Evidence, 3 CAL. L. REV. Cir. 55 (2012).

time, there was neither an organized system for the investigation and prosecution of crime by agents of the state, nor a highly developed set of rules that allocated rights and evidentiary burdens in the legal process for determining criminal liability. Popular representations of criminal trials generally referred to the all-seeing eye of an omnipresent deity, in describing how criminal behavior came to be detected and punished. Indeed, the lack of procedural protections for criminal defendants—including the lack of counsel—was consistent with the view that an innocent person had nothing to fear.

A trial requiring that "the accused speaks" is a perfectly legitimate forum when criminality itself is largely manifest and its detection is the work of a reliable deity, capable of affording all the protections that an adequate criminal law system requires. "Manifest criminality," in this context, refers to the view that until the late eighteenth century, English criminal law concerned itself with offenses for which malice could readily be inferred from the act itself. Thus, for example, liability for theft applied to "conduct conforming to [an] image of acting like a thief and only to such conduct." Housebreaking and highway robbery fit that description.


11 Fletcher, Metamorphosis, supra note 10, at 473. English law did, of course, impose criminal liability for fraud, but that problem was governed by the same logic, albeit in a paradoxical form: if the deceit consisted only in words, unaccompanied by any props (false weights, forged papers), it was not manifestly criminal, precisely because the falsehood was said to be so easily discernible. Only a crafty swindle, discovered after the event, was so clearly malicious as to merit criminal sanction. See Simon Stern, R. v. Jones (1703): The Origins of the Reasonable Person, in LANDMARK CASES IN CRIMINAL LAW 59–79 (Phil Handler, Henry Mares, &
whereas “larceny by trick” did not, and could only become criminal through the development of a process that scrutinized intention more closely—a process that began to emerge near the end of the eighteenth century, in response to increasing concern about crimes of deception. Up to that time, felonious intent was required, to secure a conviction, but did not have to be proved separately: it was simply read off from the defendant’s thief-like conduct. One might assume that one of the benefits of relying on an all-seeing deity is that it reveals information that human observation would not disclose (details about a defendant’s motives, for example), but precisely because such details are not observable, they are also hard to prove in court. The deity’s role, in eighteenth-century narratives about crime, was not to expose secrets about the defendant's mental state, but rather to ensure that overtly malicious acts would inevitably be caught and punished by means of a witness, or on the basis of incriminating circumstantial evidence. In the absence of an organized police force, the criminal justice system found its literary manifestation in this providential pattern of ensuring that the criminal would not escape undetected.

The nineteenth century saw the establishment of organized police forces in England and the United States; accordingly, they began to play a significant role in literature about crime. However, if we take the criminal justice system to refer to an interlocking set of actors, rules, practices, and institutions, it has hardly any palpable literary presence in the imaginative literature of this era. Solving crimes, in nineteenth-century fiction, is a matter of courage and wit, with little attention to a legal or bureaucratic structure that facilitates or constrains the detective’s options. As a means of describing a genre of fiction, the term “detective” was first used, in the mid-nineteenth century, for stories of cops and robbers, not for a particular

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13 As Fletcher puts it, “[A]cting like a thief created a prima facie case of liability,” and conversely, “objectively unincriminating conduct was not subject to criminal sanctions,” Fletcher, Metamorphisis, supra note 10, at 473. Indeed, it is hardly clear that defendants enjoyed a presumption of innocence at this time. See Bruce P. Smith, The Presumption of Guilt and the English Law of Theft, 1750–1850, 23 L. & Hist. Rev. 133 (2005). See also NICOLA LACEY, IN SEARCH OF CRIMINAL RESPONSIBILITY: IDEAS, INTERESTS, AND INSTITUTIONS 137 (2016) (arguing that “mens rea, as we broadly understand it today,” was not a “feature of English criminal law [in] the eighteenth century,” and that the criminal trial in that era “was focused not on internal questions about the defendant’s state of mind but on external facts of conduct.”).

14 In addition, as Lacey observes, “the institutional mechanisms needed to render subjective responsibility an object of proof in the criminal trial were not yet in place in the eighteenth century.” LACEY, supra note 13, at 138.
narrative form that cagily doles out the details according to a formula designed to test the reader’s wits. In these tales, as in contemporaneous memoirs by “detective police,” the legal system for determining liability and assigning punishment appears only perfunctorily, if at all.

Over time, the meaning of “detective” fiction shifted, and was increasingly used to refer to stories that center around the interpretation of clues. Glimpses of certain procedural requirements come into visibility in these narratives, but they do not figure as part of a larger structure of criminal law enforcement that receives any significant amount of narrative attention. Thus, for instance, a careful reader of Sir Arthur Conan Doyle’s *Sherlock Holmes* stories, published around the turn of the nineteenth century, will find repeated references to a *Miranda*-like warning—as when an officer interrupts a criminal who is on the verge of confessing: “It is my duty to warn you that it will be used against you,’ cried the inspector, with the magnificent fair-play of the British criminal law.”

15 Martin A. Kayman, *From Bow Street to Baker Street* 105-06 (1992) (“The first literary application of the epithet ‘detective’ . . . occurs in 1850 with Dickens’ ‘Detective Anecdotes,’ one of a series of journalistic articles reporting the ‘real’ personalities and activities of the Detective Department. There is no suggestion here of using the detective and his activities to generate a new fictional hero or form.”). *See also id.* at 109-10, 129-31 (noting that terms such as “detective literature,” “detective novel,” and “detectivism” were used from the 1850s to the 1880s to describe action-based stories in which detectives unraveled secrets without specializing in any particular procedures for analyzing evidence).


17 *See* Kayman, *supra* note 16, at 133–35 (dating the shift in meaning to the 1880s); R.F. Stewart, *... And Always a Detective: Chapters on the History of Detective Fiction* 27–30 (1980) (dating the shift in meaning to the 1880s); *see also* Franco Moretti, *The Slaughterhouse of Literature*, 61 MOD. LANGUAGE Q. 207 (2000) (charting the development of the clue-based detective story).

18 *See, e.g.,* 2 Sir Arthur Conan Doyle, *The Adventure of the Dancing Men,* in *The New Annotated Sherlock Holmes* 864, 895 (Leslie S. Klinger ed., 2005) (1903). *See also* 3 Sir Arthur Conan Doyle, *A Study in Scarlet,* in *The New Annotated Sherlock Holmes* 3, 175 (Leslie S. Klinger ed., 2005) (1887) (“Have you anything that you wish to say? I must warn you that your words would be taken down, and may be used against you.”); 3 Sir Arthur Conan Doyle, *The Sign of the Four,* in *The New Annotated Sherlock Holmes* 209, 275 (Leslie S. Klinger ed., 2005) (1890) (“Mr. Sholto, it is my duty to inform you that anything which you may say will be used against you.”); 2 Sir Arthur Conan Doyle, *The Adventure of Wisteria Lodge,* in *The New Annotated Sherlock Holmes* 1231, 1236 (Leslie S. Klinger ed., 2005) (1908) (“[I]t is my duty to warn Mr. Scott Eccles that [his statement] may be used against him.”). Finally, in *The Adventure of the Retired Colourman,* when Holmes justifies his methods by telling an inspector, “You, for example, with your compulsory warning about whatever he
invocations of this requirement in several of the Holmes stories, and the occasional references to legal technicalities that allow wrongdoers to escape,\textsuperscript{19} Doyle shows little interest in the process that comes into play after a criminal’s arrest. The nearly universal absence of lawyers and courts in this literature reflects the same values that Doyle expresses in the example just quoted: once the criminal has been caught, the “magnificent fair play” of the legal actors and institutions will ensure that condign punishment is a foregone conclusion, so completely taken for granted as not to require any further expenditure of narrative resources.

Doyle’s formula required him to tread a fine line: on the one hand, Holmes must intervene because the official police are not intellectually equal to the challenges posed by the malefactors, but on the other hand, any criminal, once correctly identified, can expect to be treated in a just and impartial fashion. The authorities are not very skilled at analysis, but their good faith is never in doubt. There is no need to dwell on the trial process and its personnel, because they are perfectly reliable, once directed to the right culprit. The critical writing on this genre has shown how crime, in the “golden era” of mystery fiction, figures as merely a temporary aberration in a world otherwise built on fair and decent principles, defining a status quo that is always restored at the story’s close.\textsuperscript{20}

said being used against him, could never have bluffed this rascal into what is virtually a confession,” the response is a defense of the “fair play” that prompts the warning: “Perhaps not. But we get there all the same, Mr. Holmes.” 2 SIR ARTHUR CONAN DOYLE, The Adventure of the Retired Colourman, in THE NEW ANNOTATED SHERLOCK HOLMES 1730, 1745 (Leslie S. Klinger ed., 2005) (1926). Except in Doyle’s stories, fictional references to the warning from this period are extremely rare—a detail that is consistent with the generally scant attention given to criminal procedure in nineteenth-century fiction. For the earliest instance I have found, see G.P.R. JAMES, THE FORGERY: A TALE 138 (1850) (“Remember . . . that you are not obliged to make any statement, and that whatever you say will be taken down, and may be used against you at any other period.”). In another example, from an early detective “memoir” that scholars regard as a work of fiction, a wronged woman interrupts her accuser and completes the warning for him—implying that it would already have been familiar to the public. “WATERS” (pseudonym of William Russell), DIARY OF A DETECTIVE POLICE OFFICER 116 (1864) (“‘[L]et me warn you that all you say may be—’ ‘Used against me hereafter,’ broke in the infuriate woman.”). The origins of the warning date back to the mid-eighteenth century. See J.M. BEATTIE, POLICING AND PUNISHMENT IN LONDON, 1660-1750: URBAN CRIME AND THE LIMITS OF TERROR 221–22 (2001); Wesley MacNeil Oliver, Magistrates’ Examinations, Police Interrogations, and Miranda-Like Rules in the Nineteenth Century, 81 TULANE L. REV. 777, 786–87 (2007).

\textsuperscript{19} See, e.g., 2 SIR ARTHUR CONAN DOYLE, The Illustrious Client, in THE NEW ANNOTATED SHERLOCK HOLMES 1449, 1452 (Leslie S. Klinger ed., 2005) (1924) (“Who could possibly . . . have any doubts as to the man’s guilt! It was a purely technical legal point and the suspicious death of a witness that saved him!”).

\textsuperscript{20} See, e.g., IAN OUSBY, BLOODHOUNDS OF HEAVEN: THE DETECTIVE IN ENGLISH FICTION FROM GODWIN TO DOYLE 21 (1976) (the detective is a “moral hero and a figure of power [who]
This pattern would change with the development of the hard-boiled detective story in the 1920s and '30s, and that change has given the criminal justice system a far more visible and enduring place in detective fiction. In the writings of Raymond Chandler, Dashiell Hammett, and many of their contemporaries, crime was not a temporary aberration but a pervasive condition that also reached into any number of state institutions, exemplified by crooked judges, politically motivated prosecutors, and ambitious (or avaricious) police officers. The administration of criminal law, from the practices of the officer on the beat and in the interrogation room, to the manipulation of evidence and witnesses at trial, to the “fixing” of appellate judges and prison officials, took on a newly distinctive cast. The criminal law system came into visibility precisely because its character could be impugned, and it came into visibility at a time when the law of criminal procedure was becoming more complex, in a way that rewards greater narrative attention to its intricacies. An area of law does not necessarily serve the writer’s needs simply by virtue of becoming increasingly technical, but the array of technicalities in criminal procedure, as well as their subject matter, have had precisely this effect, as so many procedural (both in fiction and on the screen) can attest. The exceptions to the probable-cause and warrant requirements, the differing uses of evidence depending on who collects it, the meaning of “search” in the Fourth Amendment—all of these continue to provide excellent material for mystery writers, not least when the authorities themselves test the limits of

establishes intellectual certainties and restores the order which has previously been threatened”); JAMES R. SMITH, DETECTIVE FICTION 26 (1996) (“the disturbance of the established order is only superficial,” because the detective’s “intellect allows him to reason through data to a solution of the crime and a restoration of order”); Cynthia S. Hamilton, U.S. Detective Fiction, in A COMPANION TO TWENTIETH-CENTURY UNITED STATES FICTION 122, 124 (David Seed ed., 2010) (observing that “radical critique of the status quo” is difficult in light of “the detective’s ostensible role in the restoration of law and order”).


these doctrines, or ignore them altogether.

Finally, there has been yet one more change in the character of criminal law since the early nineteenth century—a change in the role that character evidence is allowed to play in criminal law. As Nicola Lacey has shown in a series of publications, in the eighteenth century, it was considered perfectly appropriate to take the defendant’s character into account when determining guilt.23 In the course of the nineteenth century, as Anglo-American lawyers and judges became more concerned with a particular conception of objectivity, courts focused increasingly on requiring proof of both mens rea and actus reus; one signal of the law’s professionalization and systemization was a move “away from a system in which jury perceptions via common sense, local knowledge, and the statement of the defendant were the best source of proof,”24 and as Lacey shows, this also entailed a move away from the use of character evidence. She notes that this has not resulted in the complete disappearance of character evidence from criminal law and procedure; indeed, in recent years, character evidence has reemerged in conjunction with “developing technologies of risk assessment in medicine, psychiatry, geography, and demography, . . . particularly . . . in the areas of both terrorism and drug regulation,” as well as in the “expansion of inchoate, and . . . ‘pre-inchoate,’ offences,” aided by a “dramatic rise in the discretionary power of police and prosecutors.”25 The result has been that courts decline to entertain character evidence when it is introduced by lay witnesses, as part of the prosecution’s case, but character evidence has found its way into numerous aspects of the extra-judicial criminal law system, and may even be admissible when introduced by expert witnesses opining on statistical and demographic matters.

This brings us to the role of the criminal justice system in Burke’s novel, The Ex. Ever since the era of the hard-boiled detective novel, the criminal justice system has been relatively prominent in mystery writing. Indeed, this newfound prominence helps to account for the emergence of the procedural as a genre.26 As noted above, readers find novels more entertaining than briefs and legal opinions because fiction can satisfy the desire to be immersed in the plot and engaged by the characters. One of the most compelling traits of recent mystery fiction, particularly Burke’s,

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23 See Lacey, supra note 13, at 112; Nicola Lacey, Character, Capacity, Outcome: Towards a Framework for Assessing the Shifting Pattern of Criminal Responsibility in Modern English Law, in Modern Histories of Crime and Punishment 14–15 (Markus D. Dubber & Lindsay Farmer eds., 2007); Nicola Lacey, Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility, 4 Crim. L. & Phil. 109, 117 (2010).
24 LACEY, supra note 13, at 119.
involves its ability to capitalize at once on this desire and on readers’ fascination with crime—and to develop the story in a way that intertwines these two features. The interactions among defense lawyers, police officers, prosecutors, judges, and prison officials—as well as the institutions they serve—are essential to the pleasures that Burke’s fiction offers.

In Burke’s hands, the criminal justice system emerges as a crucial presence in the world of the novel, an elaborate bureaucracy with a vast array of complex rules and practices, along with experts who specialize in each of them.27 Like many bureaucracies, this one seems concerned less with achieving any substantive goal than with perpetuating itself, keeping the machine humming. Jack Harris, the defendant in The Ex, is not one of these bureaucratic experts; he is the figure at whom all the system’s activity is directed, and his efforts show him to be relatively inept, as Burke demonstrates at the outset. In the novel’s first chapter, Harris responds to a request from the police for “help” from “‘folks’ who might have seen something” by making a voluntary statement that proves highly incriminating, describing a complicated story involving an online post about a “missed moment,” which led to a romantic date that just happened to place Harris at the scene of his enemy’s murder.28 The specialists—the personnel who are habituated to the system—know how to manipulate the rules, within certain limits, in order to achieve their ends; Harris quickly emerges as a character who lacks these talents. That his “missed moments” story sounds complicated and implausible does nothing to help matters, but ultimately the system appears relatively indifferent to his involvement—he can remain silent or speak up, and it may have little bearing on the final outcome.

In the world the novel describes, even those rules that were created with a particular aim in mind (oriented towards truth-finding, or protecting the defendant’s rights or the integrity of the legal system) are ultimately absorbed into a system that treats every procedure and constraint as a move in a game. Harris serves as a kind of foil to this

27 Jeannine DeLombard notes that as the modern procedural has given increasing attention to legal professionalism and bureaucracy, the use of fiction as a vehicle for effecting social change has diminished. Writing about John Grisham’s fiction, DeLombard observes that because law is portrayed as an insular profession rather than a political or social force, Grisham’s works, in contrast to nineteenth-century fiction and nonfiction, do not call upon their audiences to transform what is often portrayed as a corrupt, inefficient legal system, much less the larger society in which it operates. The procedural emphasis on logic does not prevent the genre from portraying the life of the law as experience, but it is an experience far removed from that of the lay reader. Jeannine Marie DeLombard, Law and Literature, in A COMPANION TO AMERICAN LEGAL HISTORY 463, 478 (Sally E. Hadden & Alfred L. Brophy eds., 2013).

28 BURKE, supra note 6, at 1–7, 21, 23.
system, because he appears by turns to be either sweet, naive, and (legally and factually) innocent, or dangerous, deceptive, and guilty. He appears as a foil because the criminal justice is, by itself, neither one nor the other: it continually enacts a kind of blunt-force drama that is neither sweet nor hostile, neither clever nor naive. The system simply remains a looming presence, capable of yielding nearly any result that the craftiest operator can wring from it. In that way, the criminal justice system differs significantly from the avatars we find in hard-boiled fiction, where the system’s character is decidedly malevolent, necessitating the introduction of a sleuth who, despite being wily and even jaded, nevertheless remains honest and optimistic enough to work around the system and to oppose it. As Chandler put it, “Down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid.”

The same cannot be said for Burke’s professionals, who would sooner insist on their savoir-faire and shrewdness than their decency. If Doyle’s detective was a gifted unofficial professional with more talent than the official ones (and with an adjudicatory system of his own), and if the hard-boiled sleuths were clever private professionals who occasionally cooperated with the police but more often regarded them as adversaries, Burke’s are skilled professionals whose own talents for working within the system often rival those of the state officials, and who are necessary supplements, even more than they are foils, to the state officials.

Thus, for example, the defense counsel, the police, and the prosecution constantly score off each other in a kind of epigrammatic competition that combines the thrust-and-parry of verbal wit and a game of one-upmanship over the procedural rules. When Harris’s lawyer, Olivia Randall, attempts unsuccessfully to extract some information about the prosecution’s case from a desk sergeant (“a glorified receptionist”) at the precinct, and he reaches for the phone in a gesture seemingly intended to show her that he has more important business to attend to, she tries to put him in his place by remarking portentously, “I’m sure you know, Sergeant, that under New York’s right to counsel laws, you must immediately inform Jack Harris that a lawyer is here for him,” to which the sergeant replies, “Who d’ya think I’m calling? Ghostbusters?” Shortly afterwards, Randall insists on conferring with Harris in a “private room,” reminding the detective in charge that after his “hard work and savvy investigative skills lead . . . to some nugget that could have been gleaned from the conversation I’m about to have with my client,” the last thing he wants is for a judge (“these days a lot of them aren’t big fans of the NYPD”) to hear her claiming that it was obtained

29 Raymond Chandler, The Simple Art of Murder (1944), in Later Novels and Other Writings 977, 992 (Frank MacShane ed., 1995).
30 Burke, supra note 6, at 14–15.
through a violation of his right to counsel under the Sixth Amendment.\textsuperscript{31} The detective responds by handcuffing Harris in preparation for moving him, and when Randall balks, he responds, "You're the one who wants him moved from this comfy room with the big sturdy lock. Can't have it both ways, Ms. Randall."\textsuperscript{32}

These scenes typify a pattern repeated throughout the novel, in which every procedural argument is couched in an idiom also calculated to produce a certain effect on the audience. At the bail hearing, the Associate District Attorney observes that Harris "had a long-standing vendetta against [the] victim," and although it is a bench hearing, with no jury, Randall nevertheless objects to this characterization because of the presence of the press: "I'd made the objection only for the sake of the considerable number of reporters in the courtroom. I did not want to leave the impression that we were accepting the prevailing narrative about the reasons for this shooting."\textsuperscript{33} Always attuned to the possible consequences of their statements, the professionals in this world invariably choose their words with care, hoping to startle, intimidate, confuse, or get a rise out of the interlocutor, or simply imply that they know more than they are telling. Randall's opening dialogue with Harris makes this clear:

"Listen to this question carefully: what would make the police think you did this?"

I had learned the careful phrasing from Don [Ellison, Randall's law partner]. As worded, the question allowed for distance. It gave the client a chance to tell me what evidence the police might have, but still allowed me ethically to let the client take the stand and offer an entirely divergent story.\textsuperscript{34}

The strategy that goes into formulating these statements, and explaining their significance on occasion, also has an impact on the reader, for whom the battle of wits is always being played on several levels simultaneously—the sparring lawyers constantly score off each other inside court and outside, as they court the press, while at the level of plot, we remain uncertain about Harris's guilt and the lengths to which the prosecution will go to incriminate him, and we also remain uncertain about whether his factual guilt or innocence will match the result achieved by the lawyers.

It is precisely because of this combination of skills that Burke's novels are categorically different, as a means of describing the rules and norms of

\textsuperscript{31} \textit{Burke}, supra note 6, at 18.

\textsuperscript{32} \textit{Burke}, supra note 6, at 18–19.

\textsuperscript{33} \textit{Burke}, supra note 6, at 120.

\textsuperscript{34} \textit{Burke}, supra note 6, at 20.
criminal procedure, from the legal decisions that scholars are often at pains to present as narratively cognate with fiction. This is not to deny the importance of the narrative aspects of legal opinions, which still have not been fully understood. It should be evident, however, that judicial writing never even has the opportunity, let alone the ability, to sustain a plot on several levels, as Burke does, while making the dialogue conspire with the lawyers' strategy to advance the action, and including the criminal law system itself among the characters.