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### Why Fiction?

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# Why Fiction?

ALAFAIR S. BURKE\*

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## INTRODUCTION

I sold my first novel the summer after I taught my first year of law school as a tenure-track law professor.<sup>1</sup> After allowing myself a moment of celebration, panic set in. I would need to tell my dean and colleagues. They would wonder why the newest member of the tenure track faculty was writing a mystery novel. When I broke the news to my dean, I made sure to mention the recent placement of my first post-hire law review article in a top-tier journal. I emphasized that I had written most of the manuscript while I was in practice. I assured him that any work I did as a crime writer was for “fun,”<sup>2</sup> completely “separate” from my academic work, no different than a colleague whose hobby was training for a marathon.<sup>3</sup>

Almost fifteen years and fourteen novels later, this symposium asks its participants—four of us published novelists, one of us a judge, all of us trained lawyers—to reflect on the depiction of the criminal justice system

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<sup>1</sup> See ALAFAIR BURKE, JUDGMENT CALLS (2003) [hereinafter JUDGMENT CALLS].

<sup>2</sup> To be certain, many scholars have emphasized the importance of having “fun” as a legal academic. See, e.g., Bryan Adamson et al., *Can the Professor Come Out and Play?—Scholarship, Teaching, and Theories of Play*, 58 J. LEGAL EDUC. 481, 517 (2008); Andre Hampton, *Legal Obstacles to Bringing the Twenty-First Century into the Law Classroom: Stop Being Creative, You May Already be in Trouble*, 28 OKLA. CITY U. L. REV. 223, 227 (2003); Kenney Hegland, *Fun and Games in the First Year: Contracts by Roleplay*, 31 J. LEGAL EDUC. 534, 534–35 (1981); Richard H. Seamon & Stephen A. Spitz, *Joint Teaching with a Colleague, For Just a Week or Two*, 52 J. LEGAL EDUC. 258, 266–67 (2002).

<sup>3</sup> In retrospect, I should have explained that my fiction falls squarely within the “law in literature” component, as opposed to the law as literature component, of the law and literature “enterprise.” See Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1 (1988).

in fiction. To quote the fictional character George Costanza: “Worlds are colliding.”<sup>4</sup> The contributions to this symposium make clear that the promise I made to my dean was itself a type of fiction: the work of a novelist depicting our criminal justice system in fiction is not wholly separate from the work of studying the criminal justice system in actuality. Whether an author realizes it or not, it is impossible to create an interesting, albeit fictional, depiction of the criminal justice system, without having something interesting to say about its real-world counterpart. My use of the word “interesting” in the previous sentence is intentional. Of course, an author can place police, lawyers, judges, and courtrooms on the page without having a “take” on the system in which they work. However, the criminal justice system in such a book would simply provide a procedural construct. It does not come to life, as if it were a living, breathing character.

Consider the following comparison to the role a geographic setting plays in a work of fiction. An author might situate his novel in Florida by telling the reader that the book is set in Florida, throwing in a few street names found in a search of Google Maps, and mentioning some beaches and the humidity. To treat location as character requires more. In *Their Eyes Were Watching God*, Zora Neale Hurston uses Florida as a way, in part, to compare rural and urban life for African-American southerners at the turn of the 20<sup>th</sup> Century.<sup>5</sup> Carl Hiaasen uses a “wacky”<sup>6</sup> depiction of modern Florida as a way to explore in his novels the same themes of corruption and environmental destruction raised in his columns as a journalist. Without a reason to connect a geographic setting to character or plot, it is merely a location. It serves no narrative purpose, and it certainly does not come alive as an independent character.

Similarly, if a law office or courtroom is simply a place for characters to appear, the legal system is merely a backdrop to the story. In contrast, successful legal fiction uses the legal system as a defining component of the narrative that feels entirely realistic, even if the plot that unfolds there is wholly fictional. A first-year associate, for example, is unlikely to find himself in the middle of a complex criminal conspiracy, as does Mitchell McDeere, the main character in John Grisham’s breakout novel, *The Firm*,<sup>7</sup> when he joins Bendini, Lambert & Locke. However, a reader will learn

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<sup>4</sup> *Seinfeld: The Pool Guy* (NBC television broadcast Nov. 16, 1995) (sitcom episode in which character George Costanza worries about the consequences if the two separate parts of his life should meet).

<sup>5</sup> ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (1937).

<sup>6</sup> See Colette Bancroft, *Before Coming to Tampa, Carl Hiaasen Talks Writing Satire in the Age of Trump*, TAMPA BAY TIMES, (Feb. 24, 2017), <https://perma.cc/2664-7BYJ>.

<sup>7</sup> JOHN GRISHAM, *THE FIRM* 2 (1991).

more from that novel about the daily pressures of life as a junior associate at an elite law firm than from any lecture from a law school's career service advisor. *Supreme Ambitions*,<sup>8</sup> authored by Above the Law founder David Lat, exposes readers to the cut-throat world of appellate clerks competing for the ultimate prize of a Supreme Court clerkship. *In the Shadow of the Law*,<sup>9</sup> by University of Pennsylvania Law Professor Kermit Roosevelt, uses the backdrop of an elite law firm to demonstrate "the cynicism, careerism and opportunism of the zero-sum pyramid scheme called 'making partner.'"<sup>10</sup> *The Emperor of Ocean Park*,<sup>11</sup> by Yale Law Professor Stephen Carter, provides a searing portrayal of both academic and judicial politicking. Scott Turow's masterpiece, *Presumed Innocent*,<sup>12</sup> portrays the grind of daily life in a politicized big-city prosecutor's office.

In short, to be of interest, a novel's legal setting must serve a purpose. Much of crime fiction, unfortunately, fails this test. To avoid criticizing any other author, I will use my own debut as an example in which the author sometimes included legal detail solely for the purpose of proving the author's knowledge of it:

The Constitution affords arrestees the right to a prompt determination of probable cause. The Supreme Court seems to think forty-eight hours is prompt enough, meaning an innocent person might have to sit in jail for a couple of days until a judge gets around to checking whether there's any evidence against him. In Oregon, we only get a day, so we have to review the custodies and prepare probable cause showings before the 2 P.M. JC-2 docket. If we don't get them arraigned by the afternoon docket, they get cut loose.<sup>13</sup>

The whole paragraph makes me wish I had a time machine to go back and hit delete. To be sure, the paragraph is an accurate statement of the law. *Gerstein v. Pugh*<sup>14</sup> entitles arrestees to a "prompt" probable cause

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<sup>8</sup> See DAVID LAT, *SUPREME AMBITIONS* (2014); see also Alexandria Alter, *Pleasing the Court with Intrigue, David Lat's 'Supreme Ambitions' Is a Thriller for Lawyers*, N.Y. TIMES, Dec. 8, 2014, at C1 (reviewing *Supreme Ambitions* and noting its "elite niche" audience and "highly realistic" setting).

<sup>9</sup> See generally KERMIT ROOSEVELT, *IN THE SHADOW OF THE LAW* (2005).

<sup>10</sup> Alan M. Dershowitz, Sunday Book Review, *'In the Shadow of the Law': Their Finest Billable Hour*, N.Y. TIMES (June 12, 2005), <https://perma.cc/6KHU-VDPK>; see also Book Note, 120 HARV. L. REV. 1367, 1368 (2007) (noting that readers, with *In the Shadow of the Law*, "finally receive a contemporary depiction of the numerous monolithic law firms that ingest so many law school graduates each year").

<sup>11</sup> See generally STEPHEN CARTER, *THE EMPEROR OF OCEAN PARK* (2002).

<sup>12</sup> See generally SCOTT TUROW, *PRESUMED INNOCENT* (1987).

<sup>13</sup> JUDGMENT CALLS, *supra* note 1, at 98.

<sup>14</sup> *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

hearing, and *Riverside v. McLaughlin*<sup>15</sup> defines a hearing held within forty-eight hours as presumptively reasonable. But this explanation does nothing to advance character, plot, or even setting. In retrospect, I read my debut and realize that I was an insecure novelist, trying to mark my territory by proving that I knew enough about the ins and outs of the legal system to deserve a spot on the bookstore shelf. Much as legal scholars feel less pressure to write hundreds of footnotes over time, I now question any inclusion of legal information that extends beyond a few sentences in a novel. I ask myself whether the legal detail advances the development of character, plot, or atmosphere. If it does not, I skip it, knowing in my head that a legal explanation exists for whatever is happening on the page, but the reader does not need to have it.

The above answers the question of why a novelist might choose to write about law, but it does not answer the question of why a law professor might choose to write fiction. After fifteen years of pursuing two theoretically “separate” missions of crime fiction and legal scholarship, this symposium finally presses me to answer the question, “Why Fiction?” Fortunately, the five thoughtful and diverse essays contributed to this collection have helped clarify a decade and a half of my own thoughts. I appreciate the opportunity to comment on three themes that I hope I have developed at least as well through fiction as through traditional legal scholarship: (1) individual actors in the criminal justice system matter; (2) legal rules are only a starting point; (3) justice is not inevitable. Comparing these three points to narrative, one could say that they provide lessons about character, structure, and surprise endings.

## I. Character: Individual Actors Matter

One collective theme that emerges from this symposium is that the criminal justice system is not self-operating. The discretionary decision-making and professional judgment of the individual actors who operate within the system make a substantive difference. As Professor Wesson notes, law’s power is unpredictable because it “is burdened and distorted by the acts of humans.”<sup>16</sup> Professor Manus observes “that a system is only as infallible as those who engage in it.”<sup>17</sup>

From the perspective of studying the craft of writing, one could label this the art of creating a depth of character in novels that collide with the legal system. Instead of portraying lawyers solely through their job responsibilities, successful novels create three-dimensional protagonists

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<sup>15</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

<sup>16</sup> Marianne Wesson, *The Chow: Depictions of the Criminal Justice System as a Character in Crime Fiction*, 51 *NEW ENG. L. REV.* 263, 289.

<sup>17</sup> Peter Manus, *Law and Noir*, 51 *NEW ENG. L. REV.* 297, 303.

who strike a chord for the reader. But from the perspective of those of us interested in law, the humanity of legal actors in fiction can inform our understanding of law's implementation in the real world.<sup>18</sup>

When I wrote my first novel, featuring Portland prosecutor Samantha Kincaid, my motive was, in part, to demonstrate the work that prosecutors do outside of the courtroom. As a fan of mystery novels, I noticed a tendency for fictional prosecutors to be portrayed as rigid, two-dimensional characters, whose only role was to take a case from the police and seek a conviction in court, barking "hearsay" and "relevance" along the way.<sup>19</sup> However, I knew from my experience as a Deputy District Attorney in Multnomah County, Oregon, that a prosecutor's most important decisions occur, as author Michael Connelly noted in a blurb on the book jacket, "in the shadows cast by politics and corruption and human desires."<sup>20</sup>

Viewed as "characters" within the criminal justice system, prosecutors shape the machinery of the criminal justice system at every phase of a criminal proceeding. They can decline prosecution with "an all but unreviewable power."<sup>21</sup> When they do initiate criminal charges, their decisions are evaluated only for the low standard of probable cause.<sup>22</sup> Once charges are issued, the rules that govern criminal discovery are malleable, at best.<sup>23</sup> Their power to plea bargain is nearly unlimited.<sup>24</sup> When a

<sup>18</sup> See generally Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1309–10 (2001) (noting that popular culture's portrayal of legal ethics provides an opportunity for lawyers to observe the consequences of their actions in a unique and unconventional way); David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725, 741–42 (2000) (discussing the lessons that fictional characters can teach regarding conflicts between legal ethics and personal conscience).

<sup>19</sup> A notable exception is Linda Fairstein's wonderful series featuring New York City prosecutor Alexandra Cooper. E.g., LINDA FAIRSTEIN, *FINAL JEOPARDY* (1994); LINDA FAIRSTEIN, *LIKELY TO DIE* (1997).

<sup>20</sup> JUDGMENT CALLS, *supra* note 1, at book jacket.

<sup>21</sup> Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 387 (2008).

<sup>22</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (noting that the grand jury's function is to determine "if there is probable cause to believe that a crime has been committed").

<sup>23</sup> A criminal defendant's entitlement to discovery is limited compared to the relatively expansive means of civil discovery; as a constitutional matter, prosecutors are required to disclose only material, exculpatory evidence, a standard that has proven elusive in practice. See generally Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 *passim* (2009); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. L. REV. 531 *passim* (2007); Bruce Green & Peter Joy, *Prosecutors' Disclosure Obligations in the U.S.*, 42 HITOTSUBASHI J. L. & POL. 51 *passim* (2014).

defendant whom they have convicted claims later to be innocent, the prosecutor enjoys discretion once again, this time in deciding how to respond to new evidence that might cast doubt upon the defendant's guilt.<sup>25</sup>

Formal law provides little guidance to prosecutors as they exercise broad discretion through each phase of a criminal case. The Supreme Court describes prosecutorial obligations only in broad strokes.<sup>26</sup> For example, in perhaps its most cited discussion of prosecutorial ethics, the Supreme Court described the prosecutor as "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."<sup>27</sup> What, precisely, this means will vary with individual prosecutors.<sup>28</sup> Bruce Green has noted that because of a "tradition of machismo," it is important to the prosecutorial culture to do justice in a "muscular," "unsentimental" way.<sup>29</sup> I have used the term "prosecutorial passion" to describe a prideful, warrior-like aspect of the culture.<sup>30</sup> In a fascinating study of prosecutorial culture, Ronald Wright and Kay Levine theorize that prosecutors tend to mellow—or become more "balanced" over time—and that with balance comes better professional judgment.<sup>31</sup>

I sought in my Samantha Kincaid series to show how significant criminal justice outcomes can sometimes turn on the randomness of which

<sup>24</sup> Courts are reluctant to interfere with plea bargaining, and factors such as sentencing guidelines, mandatory minimum sentences, and other risks of trial for a defendant can amplify a prosecutor's power during negotiations. See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 652 (1981); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004); Bruce Green, *The Right to Plea Bargain With Competent Counsel After Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?*, 51 DUQ. L. REV. 735, 737 (2013) ("In many cases, no real bargaining occurs because prosecutors have enough leverage to make a 'take it or leave it' plea offer."); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1982–83 (1992).

<sup>25</sup> See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 467 (2009).

<sup>26</sup> See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 622 (remarking on the "vagueness" of a prosecutor's ethical mandate to "seek justice") (1999).

<sup>27</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>28</sup> See generally DANIEL MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012).

<sup>29</sup> Green, *supra* note 26, at 609.

<sup>30</sup> Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 188 (2007).

<sup>31</sup> Ronald F. Wright & Kay L. Levine, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 41 LAW & SOC. INQUIRY 1, 1 (2016); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1065 (2014).

prosecutor happens to pick up a file. In *Judgment Calls*, a seasoned but cynical prosecutor gives short-shrift to the brutal assault of a fifteen-year-old girl, because the girl had been working as a prostitute at the time of the attack and then lied about that fact to the police and prosecutors. When Kincaid meets with the victim, she understands that the girl only lied because she was ashamed that she had been selling sex to support a drug habit. What would have been issued by one prosecutor as a mere felony assault is charged by Kincaid as attempted murder and a slew of other major felony charges.<sup>32</sup>

Crime fiction can also demonstrate the ways that a defense attorney's identity can determine criminal justice outcomes.<sup>33</sup> The very premise of *Gideon v. Wainwright*<sup>34</sup> is that a criminal trial without the appointment of defense counsel is fundamentally unfair, yet we know that wide disparities in performance exist among constitutionally competent attorneys.<sup>35</sup> In *Judgment Calls*, Samantha Kincaid opines about three different types of defense attorneys. The first camp are simply "bad attorneys" whose performance is "so pathetic. . . that most prosecutors will admit it takes the fun out of winning."<sup>36</sup> The second camp, Kincaid's favorite, are "the straight shooters,"<sup>37</sup> who know "the realities of the system,"<sup>38</sup> "negotiate the most favorable plea deal possible,"<sup>39</sup> and "if the client has a serious defense. . . , take the issue to court and do a good job."<sup>40</sup> The third camp are the "true believers," meaning they are "incapable of distrusting their clients."<sup>41</sup> It is clear that Samantha believes that the true believers do their clients a disservice, because such an attorney, like the boy who cried wolf, carries no sway when he vouches for a client.

But that, of course, is a prosecutor's view of a defense attorney. In my recent novel, *The Ex*, defense attorney Olivia Randall continuously goes to extraordinary lengths for her client (and ex-fiancé), Jack Harris, after he is arrested as a suspect in a triple homicide. Olivia's most impressive moments are not in-court uses of her lawyering skills. She is scrappy and

<sup>32</sup> JUDGMENT CALLS, *supra* note 1, at 16, 30.

<sup>33</sup> See generally John B. Owens, *Grisham's Legal Tales: A Moral Compass for the Young Lawyer*, 48 UCLA L. REV. 1431 (2001) (discussing various types of fictional lawyers created by author John Grisham).

<sup>34</sup> *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

<sup>35</sup> See generally *Strickland v. Washington*, 466 U.S. 668 (1984) (setting minimal standards for determining the adequacy of representation under the Sixth Amendment's right to counsel).

<sup>36</sup> JUDGMENT CALLS, *supra* note 1, at 32.

<sup>37</sup> JUDGMENT CALLS, *supra* note 1, at 32.

<sup>38</sup> JUDGMENT CALLS, *supra* note 1, at 33.

<sup>39</sup> JUDGMENT CALLS, *supra* note 1, at 33.

<sup>40</sup> JUDGMENT CALLS, *supra* note 1, at 32.

<sup>41</sup> JUDGMENT CALLS, *supra* note 1, at 32.



knows how to work people and relationships to benefit her client. It should be clear to the reader that Olivia is better than the typical defense lawyer: "I'm not good at everything. Or, to be more honest, I'm pretty bad on some fairly major metrics . . . . I am extremely good at one thing, though. I am good at tearing apart a prosecution."<sup>42</sup> But it is also clear that, in this particular case, Olivia is going above and beyond even her normal level of performance, not only because she believes she owes something to Jack because of their complicated past, but also because she deeply believes in his innocence: "Lawyers say it doesn't matter whether a client's innocent. It's not our job to know. We fight zealously no matter what. What a bunch of crap."<sup>43</sup>

Throughout the novel, Olivia works at "the edge" of zealous advocacy.<sup>44</sup> Even before he is charged, she breaks her own cardinal rule to try to help Jack:

I've pulled some questionable stunts in the name of zealous representation, but I had never—not once—looked an ADA in the eye to vouch for a client's innocence unless I knew to a certainty that the police had fucked up. So if ADA Scott Temple got a phone call from a homicide detective saying I insisted on speaking with him, the message would be clear. I was spending some hard-earned capital.<sup>45</sup>

Later in the book, she takes advantage of that same prosecutor's good will toward her by using a piece of information he discloses to her to embarrass him in open court.<sup>46</sup> She manages to evade a judge's gag order by notifying a friendly reporter when and where she might want to perch outside of a certain judge's courtroom.<sup>47</sup> Even Jack knows that his fate within the criminal justice system depends on Olivia: "You know I didn't do this, but some other lawyer won't. They'll just put me through the system."<sup>48</sup>

A tougher "character" to mine for material in the fictional criminal justice system is the elusive judge. As Judge Ponsor notes, judges are supposed to be "boring on purpose."<sup>49</sup> Their "Rhadamanthine opacity"

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<sup>42</sup> ALAFAIR BURKE, *THE EX* 55 (2016).

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

<sup>44</sup> See generally Symposium, *Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous Advocates*, 36 *HOFSTRA L. REV.* 261, 261–600 (2007).

<sup>45</sup> *THE EX*, *supra* note 42, at 38.

<sup>46</sup> *THE EX*, *supra* note 42, at 202–03.

<sup>47</sup> *THE EX*, *supra* note 42, at 205.

<sup>48</sup> *THE EX*, *supra* note 42, at 33.

<sup>49</sup> Michael A. Ponsor, *Kooks, Crooks, Brutes, or Rhadamanthine Opacities: Some Thought on the Depiction of Judges in Popular Fiction*, 51 *NEW ENG. L. REV.* 227, 230.

comes from their “unbending integrity.”<sup>50</sup> They are “not exactly human . . . unburdened by an ambivalence about his job, or apparently any emotional life at all.”<sup>51</sup> But of course we know that judges are, in fact, human. They are not robotic decision-makers, merely calling balls and strikes.<sup>52</sup> If an individual judge’s temperament and judgment were irrelevant, Congress would not have created a commission to develop sentencing guidelines to remedy huge inter- and intra-jurisdiction disparities in sentencing.<sup>53</sup> Lawyers would not “judge shop,” manipulating legal processes in an attempt to land before judges inclined toward their position.<sup>54</sup> Judge Merrick Garland would have gotten a confirmation hearing to be considered for the United States Supreme Court, and the Senate would not have had to exercise the “nuclear option” of changing its own voting rules to overcome a filibuster of the Court’s newest member, Justice Neil Gorsuch.<sup>55</sup>

If there is any unifying legal lesson to be found in my work as a novelist, I hope it is that the criminal justice system does not operate independently of the individuals who carry out the work.

## II. Structure: Legal Rules Are Only a Starting Point

A second point that emerges from this symposium is, just as the legal system itself is not self-executing, neither are the legal rules that govern a defendant’s constitutional rights. Professor Stern, for example, notes that the rules of criminal procedure are not determinative of outcome. Writers

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<sup>50</sup> *Id.* at 231.

<sup>51</sup> *Id.*

<sup>52</sup> Supreme Court Chief Justice John Roberts, during his confirmation hearings before the United States Senate, infamously compared the job of a Supreme Court Justice to the role of an umpire. He stated during his introductory comments, “Judges are like umpires. . . . Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role.” Bruce Weber, *Umpires v. Judges*, N.Y. TIMES (July 11, 2009), <https://perma.cc/5V5C-5CKP>. He promised to “call balls and strikes, and not to pitch or bat.” Todd S. Purdum & Robin Toner, *Court in Transition: The Overview; Roberts Pledges He’ll Hear Cases with “Open Mind,”* N.Y. TIMES (Sept. 13, 2005), <https://perma.cc/8EHC-W265>.

<sup>53</sup> See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4–5 (1988) (reporting that a central purpose of the United States Sentencing Guidelines was to reduce “‘unjustifiably wide’ sentencing disparit[ies]”) (internal citations omitted).

<sup>54</sup> See, e.g., Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1009, 1037 (2010) (finding that, for many types of cases, judges’ political orientations affected which cases settled and on what terms).

<sup>55</sup> See, e.g., Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017), <https://perma.cc/7UF7-YX39>.

“continue to provide excellent material” when actors within the system “test the limits of these doctrines, or ignore them altogether.”<sup>56</sup> A fiction writer uses legal rules to his or her advantage, not by simply stating the rules, but in showing how characters “manipulate the rules, within certain limits,” treating “every procedure and constraint as a move in a game.”<sup>57</sup> Similarly, Professor Manus observes that crime fiction can depict “law as a massive machine . . . which may be operated, and successfully, by those with the right combination of training, savvy, creative energy, and luck.”<sup>58</sup> Professor Wesson asserts, “Much of the best crime fiction lives in the territory between the formal rules and the actors who evade, distort, reinterpret, ignore, or in spectacular fashion break them.”<sup>59</sup> Professor Capers, digging into doctrine,<sup>60</sup> notes the ways that a protagonist can avoid Miranda warnings,<sup>61</sup> the probable cause requirement,<sup>62</sup> and disclosure of exculpatory evidence under *Brady v. Maryland*.<sup>63</sup>

From this perspective, fiction can be viewed as a means of teaching criminal procedure beyond the traditional study of appellate decisions, “the bedrock of the classroom experience.”<sup>64</sup> As narrative, the tendency for actors within the criminal justice system to avoid, distort, and manipulate legal rules provides a type of structure within a crime novel, a cat-and-mouse game between competing actors, or between individuals and justice itself. One of my favorite examples of a cat-and-mouse game using legal rules is not from a novel, but from the television series, *Breaking Bad*.<sup>65</sup> Fans of the show refer to the scene, from the episode “Sunset,” as the “junkyard scene.”<sup>66</sup> In the scene, a dogged DEA Agent, Hank, has gone to a junkyard to pursue an RV that he suspects has been used as a mobile lab to cook methamphetamine by unknown (to him) dealers. He is about to enter the RV when the junkyard’s owner, Old Joe, asks Hank, “Got a warrant?”

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<sup>56</sup> Simon Stern, *Narratives of Criminal Procedure from Doyle to Chandler Burke*, 51 NEW ENG. L. REV. 249, 257.

<sup>57</sup> *Id.* at 258–59.

<sup>58</sup> Manus, *supra* note 17, at 303.

<sup>59</sup> Wesson, *supra* note 16, at 295.

<sup>60</sup> I. Bennet Capers, *Re-Reading Alafair Burke’s The Ex*, 51 NEW ENG. L. REV. 235.

<sup>61</sup> See *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

<sup>62</sup> See *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

<sup>63</sup> *Brady v. Maryland*, 373 U.S. 83, 90 (1963).

<sup>64</sup> See Rogelio Lasso, *From the Paper Chase to the Digital Chase: Technology and the Challenge of Teaching 21st Century Law Students*, 43 SANTA CLARA L. REV. 1, 14–15 (2002) (describing the appellate decision as the “bedrock of the classroom experience”). See also Stern, *supra* note 56, at 261 (noting that fiction can serve “as a means of describing the rules and norms of criminal procedure”).

<sup>65</sup> *Breaking Bad* (AMC television broadcast 2008–2013).

<sup>66</sup> *Breaking Bad: Sunset* (AMC television broadcast Apr. 25, 2010).

What follows is an elaborate dance between Hank, on the one hand, and Old Joe and the meth cooks, named Walt and Jesse, on the other. Within a few minutes, Hank has attempted to manipulate the automobile exception<sup>67</sup> and plain view exceptions<sup>68</sup> to the warrant requirement to gain entry into the recreational vehicle. Quick on their feet, Old Joe, Walt, and Jesse mine legal doctrine for exceptions to Hank's favored exceptions. They argue that the RV is a domicile, not a vehicle, and that Hank, because he never saw the RV in transit, cannot know for certain that it even runs.<sup>69</sup> They argue that probable cause is not "readily apparent." In the end, Hank "loses" the game, and says that he will apply for a warrant. The scene can be used to teach a number of criminal procedure doctrines,<sup>70</sup> but more importantly, the viewer sees how easily actors within the legal system can unmoor legal rules from the standards that motivate them.<sup>71</sup> After teaching a criminal procedure doctrine, I often ask my students, "Now what might a wily police officer do with these rules?"<sup>72</sup> A rule should be viewed not as a norm, but as a starting point for strategic actors who will manipulate the rules to serve their desired outcomes.

In *The Ex*, both Olivia and members of law enforcement are constantly using the scope of legal rules to their respective advantage.<sup>73</sup> The book opens with a transcript of a detective's recorded interview with Jack Harris. The detective's initial questions confirm that Jack is at the precinct "voluntarily" and that he is speaking to the detective of his "own accord."<sup>74</sup> Olivia observes later that the police had "played him,"<sup>75</sup> because she

<sup>67</sup> *California v. Acevedo*, 500 U.S. 565, 573 (1991); *California v. Carney*, 471 U.S. 386, 392–94 (1985); *Chambers v. Maroney*, 399 U.S. 42, 48 (1970); *Carroll v. United States*, 267 U.S. 132, 156–57 (1925).

<sup>68</sup> See *Arizona v. Hicks*, 480 U.S. 321, 326–27 (1987).

<sup>69</sup> See *Carney*, 471 U.S. at 399 (grounding the automobile exception to the warrant requirement in a vehicle's mobility and distinguishing vehicles used as domiciles from vehicles used for transportation).

<sup>70</sup> See generally Alafair S. Burke, *Got a Warrant?: Breaking Bad and the Fourth Amendment*, 192 OHIO ST. J. OF CRIM. L. 191 (2015); Max Minzner, *Breaking Bad in the Classroom*, 45 N.M. L. REV. 398, 400 (2015).

<sup>71</sup> For a general discussion of the distinction between bright-line rules and case-by-case standards, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992).

<sup>72</sup> For a general discussion of the use of pop culture in the classroom, see Burke, *supra* note 70; Brian R. Gallini, *HBO's The Wire and Criminal Procedure: A Match Made in Heaven*, 64 J. LEGAL EDUC. 114, 115 (2014); Minzner, *supra* note 70; Victoria S. Salzmann, *Here's Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 MCGEORGE L. REV. 297, 299 (2011).

<sup>73</sup> See generally Capers, *supra* note 60.

<sup>74</sup> THE EX, *supra* note 42, at 1.

<sup>75</sup> THE EX, *supra* note 42, at 1.

knows that a voluntary appearance at the police station to give a voluntary statement means that the police need neither probable cause nor Miranda rights. Olivia, flipping the power dynamics, then invokes the Sixth Amendment to persuade the detective to provide an unmonitored room to meet with her client. She says to the detective, “When your hard work and savvy investigative skills lead you to some nugget that could have been gleaned from the conversation I’m about to have with my client, do you really want me claiming that you got it through a Sixth Amendment violation?”<sup>76</sup>

After Jack is charged, Olivia pushes the prosecution to provide discovery earlier than technically required. In response, the prosecution delivers seventeen boxes of discovery, filled with duplicates and hundreds of seemingly irrelevant documents. Olivia’s “gut” tells her that the prosecutor has hidden exculpatory evidence, “evidence that would help our case, which he was required to turn over—but he’d buried it among several boxes of paper to make me work for it.”<sup>77</sup> The prosecutor was technically complying with *Brady v. Maryland*,<sup>78</sup> but was playing the game of hide the ball.<sup>79</sup>

### III. Surprise Endings: Justice Is Not Inevitable

A third theme that emerges from this symposium could be viewed as a lesson in surprise endings. It is often said that a defining component of crime fiction is that, despite the violence and chaos that may throw a reader off guard throughout a novel, there is an inherent promise between author and reader that, by the end of the book, order will be restored and something resembling justice will be found.<sup>80</sup> Author P.D. James, for example, wrote that crime fiction “confirms our hope that, despite some evidence to the contrary, we live in a beneficent and moral universe in which problems can be solved by rational means and peace and order restored from communal or personal disruption and chaos.”<sup>81</sup> Shortly after September 11, 2001, author Lee Child speculated that the demand for crime fiction had increased because “it gratifies [readers’] desires for safety and security and the rule of law, because at the end of crime novels, order is

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<sup>76</sup> THE EX, *supra* note 42, at 18.

<sup>77</sup> THE EX, *supra* note 42, at 195.

<sup>78</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>79</sup> Gershman, *supra* note 23.

<sup>80</sup> See, e.g., Stern, *supra* note 56, at 255–56 (“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.”).

<sup>81</sup> P.D. JAMES, TALKING ABOUT DETECTIVE FICTION 174 (2009).

restored.”<sup>82</sup> Author Michael Connelly has explained his decision in his novel, *The Narrows*, to revisit an antagonist from a previous book by saying, “it began to bother me that I had created a fictional world where a killer like [him] could walk free. I started to long for order to be restored in that world.”<sup>83</sup>

However, this symposium’s contributions challenge the assumption that crime fiction necessarily serves up an ending that roughly approximates justice. Professor Stern notes a shift away from the pattern of returning to the status quo, attributing the change to the emergence of the hard-boiled detective story.<sup>84</sup> Professor Wesson goes even further, raising the disturbing question of whether we are entering an era in which violations of rules will no longer be met with consequences, undermining a fundamental assumption of the crime fiction genre.<sup>85</sup>

P.D. James, often cited for the proposition that mysteries traditionally require a return to order, has said that modern crime stories “seldom have a complete restoration of order as you used to in the days of Agatha Christie.”<sup>86</sup> The list of contemporary bestsellers in which order is not wholly restored is long.<sup>87</sup> This seeming trend in the genre comes during a period when the public appears fascinated by real-world stories that ask whether justice was served or not. We live in the era of exonerations, where well more than 300 convictions have been set aside on the basis of exculpatory DNA evidence, a reality that has crept into contemporary pop culture.<sup>88</sup> The first break-out podcast was *Serial*, from the producers of *This American Life*, which re-examined the 1999 murder of a Maryland teenager and explored both the possibility that an innocent man was convicted and the adequacy of the processes used to convict him.<sup>89</sup> Netflix found an unlikely hit series in *Making a Murderer*, which re-visited the murder

<sup>82</sup> Richard Alleyne, *Bleak Times Means Crime Takes Over from Romance When It Comes to Library Book Lending*, THE TELEGRAPH (Feb. 3, 2012, 6:30 AM), <https://perma.cc/D6DC-RGEN>.

<sup>83</sup> MICHAEL CONNELLY, THE NARROWS, *Afterword* (2004), <https://perma.cc/9QCS-WU2H>.

<sup>84</sup> Stern, *supra* note 56, at 255–56.

<sup>85</sup> Wesson, *supra* note 16, at 295.

<sup>86</sup> P.D. James *Believed Mysteries Were Made Of Clues, Not Coincidences*, FRESH AIR (Dec. 1, 2014, 2:27 PM), <https://perma.cc/CNP9-ZTKP>.

<sup>87</sup> I am listing some examples in this footnote, which one should not read if trying to avoid spoilers. Some endings that come to mind that do not necessarily restore order are William Landay’s *Defending Jacob*, Gillian Flynn’s *Gone Girl*, Dennis Lehane’s *Gone Baby Gone*, and yes, my novel, *The Ex*.

<sup>88</sup> *Exonerated by DNA*, INNOCENCE PROJECT, <https://perma.cc/PU2S-FXKN> (last visited Mar. 11, 2018) (listing 350 exonerations since 1989).

<sup>89</sup> Sarah Koenig, *Serial, Season One* (This American Life Podcast 2014), <https://perma.cc/2Z4U-MWXS>.

conviction of Steven Avery, who had previously been wrongly convicted of yet a different crime.<sup>90</sup> HBO's hit documentary, *The Jinx: The Life and Death of Robert Durst*, left viewers wondering as they fell asleep just how many people Durst had killed.<sup>91</sup> The O.J. Simpson case provided material for both a ten-episode FX drama<sup>92</sup> and a five-part documentary for ESPN.<sup>93</sup> Less viral, but still captivating and popular, are the true-crime mini-series *The Staircase*,<sup>94</sup> documenting the trial of a novelist accused of killing his wife, and Robert Kolker's book, *Lost Girls*,<sup>95</sup> about the crimes of a still unidentified serial killer. In sum, we live in a world in which we not only openly acknowledge that guilty people get away with murder, while innocent ones are convicted, but we are also willing to be both informed about and *entertained by* the factors that lead to those injustices, and contemporary crime fiction is bending its usual mores accordingly.

## CONCLUSION

As long as I have the opportunity to comment about my work as a fiction author, this seems like the place to confess that my largest discomfort with my dual roles as a law professor and the author of commercial fiction is the question of how to handle real-world inequities in race, class, gender, and sexual identity when creating a fictional world. Professor Capers notes that, even if an individual protagonist has the system work to his advantage, the system is unlikely to work equally for all.<sup>96</sup> Income, status, and the race of both defendant and offender tilt the balance of justice's scales<sup>97</sup>. Similarly, as Professor Wesson observes, the criminal justice system "is an admirable institution for the well-heeled who can afford the best criminal lawyer in town," but "[f]or everyone else, it is as indiscriminate a machine as the one Kramer describes in *The Bonfire of the Vanities*."<sup>98</sup> Even actors who work within the system run into discrimination based on identity.<sup>99</sup>

While I appreciate Professor Capers' discussion of the attempts I made in *The Ex* to highlight the criminal justice system's stubborn inequities, I

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<sup>90</sup> *Making a Murderer* (Netflix 2015).

<sup>91</sup> *The Jinx: The Life and Deaths of Robert Durst* (HBO TV Mini-Series 2015).

<sup>92</sup> *The People v. O. J. Simpson: American Crime Story* (FX television broadcast 2016).

<sup>93</sup> *O.J.: Made in America* (ESPN Films Broadcast 2016).

<sup>94</sup> *The Staircase* (Maha Productions 2014).

<sup>95</sup> ROBERT KOLKER, *LOST GIRLS: AN UNSOLVED AMERICAN MYSTERY* (2013).

<sup>96</sup> Capers, *supra* note 60, at 242–43.

<sup>97</sup> Capers, *supra* note 60, at 242–43.

<sup>98</sup> Wesson, *supra* note 16, at 283.

<sup>99</sup> Wesson, *supra* note 16, at 285–86.

wonder sometimes if my efforts are perhaps too subtle. My attempts to discuss equality issues in fiction tend to be almost subversive.<sup>100</sup> A publisher once said something to me along the lines of “women in Peoria don’t want to read about police shooting African-Americans.” I wrote the book I had in mind anyway, but the jacket for that novel buried the lede, positioning the plot as an investigation into the murder of a “hotshot journalist,” who just happened to be investigating some shady things going on in the police department.<sup>101</sup> Similarly, the jacket for my novel, *Never Tell*, describes the death of a sixteen-year-old girl who “appeared to have everything: a famous father, a luxurious Manhattan townhouse, a coveted spot at the elite Casden prep school.”<sup>102</sup> Only in the last paragraph does the summary mention the girl’s “inner circle—an eclectic mix of overly precocious teenagers from Manhattan’s most privileged families as well as street kids she met in Greenwich Village.”<sup>103</sup> Never named in the glamorous rundown is Casey Carter, a homeless teenager who emerges as a central character in the story, or the fact that Casey is transgender. I have five novels in what is known as the “Ellie Hatcher” series, featuring white, female detective Ellie Hatcher. A reader has to crack the spine to get to know Hatcher’s African-American partner, J.J. Rogan, or read their banter about being perceived as “affirmative-action hires” or “diversity detectives.”<sup>104</sup> Even so, I have had readers email me to ask, in all apparent earnestness, “Why is J.J. Rogan black?,” leading me to believe that my former publisher was not so wrong with his comment about the discomfort of potential readers.

Could I do more? Certainly. But, if I did, would I have a smaller audience? Is it possible that my current approach of “dicta,” as Professor Capers described it, is more effective than “harping on it”?<sup>105</sup> I tell myself that it is better to expose a larger number of readers to world views that are potentially challenging, rather than trying to change hearts and minds through fiction. But this symposium reminds me that I have an ongoing responsibility as a writer to keep asking myself these questions.

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<sup>100</sup> See Marlyn Robinson, *Collins to Grisham: A Brief History of the Legal Thriller*, 22 LEGAL STUD. F. 21, 33 (1998) (noting the ways that authors of legal thrillers “have all been authors of their times, almost subversively arguing important contemporary legal issues in a popular culture format.”).

<sup>101</sup> ALAFAIR BURKE, *CLOSE CASE* (2005).

<sup>102</sup> ALAFAIR BURKE, *NEVER TELL* (2009).

<sup>103</sup> ALAFAIR BURKE, *NEVER TELL* (2009).

<sup>104</sup> ALAFAIR BURKE, *ANGEL’S TIP* (2008).

<sup>105</sup> Capers, *supra* note 60, at 241–42.



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