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META-STORIES AND MISSING FACTS

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In this short essay, I connect the study of law and literature to the craft of the fact statement. I reference the pattern of high-profile cases at the intersection of race and law enforcement to argue that the strategic description of setting in literary works can provide a model for “creating context” in legal writing. I hope my essay possesses pedagogic insight and topical resonance.

INTRODUCTION

The role of story in the law is contested. Humans are wired to digest information in narrative form,² but narration can also feign coherence and inevitability when there is none. “Chekov’s gun” is a familiar trope – the axiom that if a weapon is referenced in the first act of a play, then it must be discharged eventually. Literary devices like foreboding create a sense of irony or suspense in our fiction. But selective fact presentation in brief writing or courtroom presentation

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² Michael Neelsen, *Humans Interpret the World Through Narrative*, STORY FIRST MEDIA (July 20, 2013), <http://storyfirstmedia.com/humans-interpret-the-world-through-narrative>.

can craft a teleology of crime where there is mere correlation.³ Sometimes Chekov's gun is just a gun.⁴

There is also broader criticism of the law *as* literature movement. Scholars like James Boyd White and Robert Weisberg argue for legal texts to be interpreted using the same analytic techniques of literature.⁵ However, many jurists – including pantheon Judges Posner⁶ and Leval⁷ – are dismissive of any actual substantive connection between these two subjects. Posner cites the separate motivations that inspire legal versus creative writing.⁸ For example, lawyer-poet Wallace Stevens explicitly tried to keep his two identities discrete (whether he succeeded in this ambition remains a topic for debate⁹). Contemporary hermeneutics – deconstruction and its ilk – might instead bring terrible confusion to the law. Dialogic exegesis is interesting, but does it also tend to nihilism and a lack of judicial restraint in the very practical, consequential world of legal work?

³ The majority and dissenting opinions of *Wong Sun* are examples of how causality can be attenuated or strengthened depending on the legal conclusions of a judge. Justice Brennan's lead opinion denies the existence of probable cause in this case. He emphasizes the ambiguity and guesswork of the police seizure by unpacking the fog of arrest into a discrete sequence of isolated events, where the identities of law enforcement officers are obscured and those of witness-defendants are conflated. See *Wong Sun v. United States*, 83 S. Ct. 407 (1963).

⁴ See, e.g., Alan M. Dershowitz, *Life is Not a Dramatic Narrative*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99, 99–100 (Peter Brooks & Paul Gewirtz eds., 1996) (reminding the reader that sometimes a life insurance policy is just a life insurance policy, even if it is taken out a week before a mysterious death).

⁵ See generally Robert Weisberg, *The Law-Literature Enterprise*, 1 *YALE J.L. & HUMAN.* 1, 36–67 (1988).

⁶ E.g., Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 *VA. L. REV.* 1351 (1986).

⁷ Pierre N. Leval, *Judicial Opinions as Literature*, in *LAW'S STORIES*, *supra* note 3, at 206, 211 (arguing that while judges may benefit from the persuasive power of literary devices and rhetoric, they risk sacrificing clarity of thought and reasoning).

⁸ Posner, *supra* note 5, at 1367 (“[M]uch, apparently the greater part, of literary creation occurs unconsciously. Some literature is actually written in an unconscious blur.”).

⁹ See, e.g., Thomas Grey, *Steel Against Intimation: The Motive for Metaphor of Wallace Stevens*, *Esq.*, 2 *YALE J.L. & HUMAN.* 231, 234 (1990).

I. LAW IN LITERATURE: *THE TRIAL* AND *THE STRANGER*

My academic interest in legal writing encouraged me to explore this universe of law and literature, and in Fall 2013 I instructed a seminar on this topic at the Peking University School of Transnational Law. In the first section of the course we canvassed the less controversial heuristic of law *in* literature. We reviewed two fiction works where legal conflict is central to the plot, Kafka's *The Trial* and Camus's *The Stranger*.¹⁰

Both works are similar to Fact Statements in legal briefs with respect to the neutral, impartial tone of their narrators. Kafka especially has been compared to a literary Rorschach inkblot,¹¹ as the reader seems to impose her or his own subjectivities on the surrealist canvas of Kafka's stories. In *The Trial*, it is impossible to determine to what extent Joseph K., the narrator, is responsible for his own execution.¹² Robin West describes the intuitive, yet hypnagogic organization of the novel as both horrific and familiar.¹³ But perhaps we can substitute causality for a conjunctive here: it is horrific *because* it is familiar. The modern reader can relate to K.'s mundane world of bank clerks and provincial relatives. He makes sensible choices in the immediate, marginal compass of his work and trial. But when the micro-context of K.'s consent to authority is extended to the narrative arc of the story, his involvement in his own death can only be interpreted as absurd and grotesque.

Meursault in *The Stranger* possesses the qualities of a "totally reliable narrator,"¹⁴ and therefore should meet the standards of integrity

¹⁰ These works were chosen because of their relatively lucid and spare prose, which might in part reflect the fact that we read them in translation. The prolixity of *Billy Budd* or *The Merchant of Venice* might interfere too much with ESL student comprehension. Moreover, Kafka and Camus are valuable to the law student not mainly for their diction, but as storytellers of how the machineries of law intersect with our understandings of justice.

¹¹ Posner, *supra* note 5, at 1369.

¹² See Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 420 (1985).

¹³ *Id.* at 386, 420.

¹⁴ David Carroll, *Guilt By "Race": Injustice in Camus's The Stranger*, 26 CARDOZO L. REV. 2331, 2335 (2005).

and trust applied to a court advocate. But perhaps pure transparency is not the most important ethic we seek in our legal cadre. Instead legal audiences prefer a sense of candidness that is filtered through a moral code. Meursault's existential worldview is encapsulated by his "benign indifference of the universe."¹⁵ He is no nihilist, but cherishes the immediate, hedonic pleasures of simply being alive. He is sensuous to the point of solipsism.¹⁶

Meursault's incapacity for empathy conflicts with that of the expert legal writer. Here "Chekov's gun" is Meursault's apathy to his mother's passing. Camus's preface to the 1955 American English translation included the quip that "[i]n our society any man who does not weep at his mother's funeral runs the risk of being sentenced to death."¹⁷ Meursault is described as indifferent to the very possibility of sentiment.¹⁸ Indeed, Camus might be too officious when Meursault concedes that "my physical condition at any given moment often influenced my feelings,"¹⁹ or that only "of recent years" did he lose his habit of noting his emotions.²⁰ These fourth-wall moments of self-reflection seem superfluous (at least in the translation).

One reading theory of *The Stranger* is that the prosecutor's Fact Statement in Part I provides evidence for the trial in Part II.²¹ To an American audience the case for murder is contestable. It's not that Meursault is immoral; he's simply *amoral*. He's not ferreting out trouble to involve himself in. It's just that everything *feels* the same.²² And so Meursault "has no objection" to befriending the nefarious pimp Raymond,²³ and agrees to protect Raymond should a fight erupt with

¹⁵ ALBERT CAMUS, *THE STRANGER* 76 (Stuart Gilbert trans., Vintage Books 1946).

¹⁶ Gale Rasin, *The Stranger: Condemned to Death by Character*, 41-AUG. MD. B.J. 50, 51, 54 (2008).

¹⁷ Carroll, *supra* note 13, at 2335.

¹⁸ Rasin, *supra* note 15, at 50–51.

¹⁹ CAMUS, *supra* note 14, at 41.

²⁰ *Id.*

²¹ Cf. Dwight Newman, *Existentialism and Law—Toward a Reinvigorated Law and Literature Analysis*, 63 SASKATCHEWAN L. REV. 87, 109 (2000) (discerning in Part I the "trial-like" character and in Part II the "novel and the literal trial").

²² CAMUS, *supra* note 14, at 16, 30.

²³ *Id.* at 20.

the “Arab” during their beach rendezvous.²⁴ So what is the question presented for this trial – that Meursault killed the Arab with bad intent (an action), or that he is guilty of having a “criminal heart” (a status)? If this murder is so important, then at least one character should bother to name the victim. Instead the Arab’s alterity is reified by his anonymity.²⁵ Remember the colonial context of this novella. Meursault had available an airtight self-defense argument. He is the privileged White French; an ethnic thug brandishing a knife had already torn into his friend’s skin. The data points are there for a successful defense. But instead Meursault blurts out that a torrid, blinding sun made him kill (Meursault refers to the sun or sunlight over twenty-five times in this text). This answer is ad hoc and maybe half-right. However, Meursault deliberately *chose* not to take the easy route to legal innocence. Does this make him a Hero? An Anti-Hero?²⁶

II. LAW AND LITERATURE: UNEXPECTED BENEFITS

Judge Rasin points out that this “moral monster” theory put forward by the prosecutor is entirely admissible in French law.²⁷ In American Evidence Law “prior bad acts” are of course disfavored. Only if a defendant “opens the door” by claiming she or he is honest or friendly or loyal, etc., can the prosecutor then respond with character evidence that suggests otherwise. I think one “legal” benefit of reading law in literature is that it helps the student identify the asymptotic limits of our doctrinal frameworks (where do we draw the line?).²⁸ Camus in his *Myth of Sisyphus* warned that it “is almost impossible to be logical to the bitter end.”²⁹ Perhaps another, more ethereal bene-

²⁴ *Id.* at 35.

²⁵ See Carroll, *supra* note 13, at 2338.

²⁶ See generally Rasin, *supra* note 15.

²⁷ *Id.* at 53-55.

²⁸ For example, K.’s unusual trial is thought to be coherent with the contemporary legal process. See, e.g., Posner, *supra* note 5, at 1357 (noting that “many details in *The Trial* are faithful reproductions of Austro-Hungarian criminal procedure”).

²⁹ Daniel Stern, *The Fellowship of Men that Die: The Legacy of Albert Camus*, 10 CARDOZO STUD. L. & LITERATURE 183, 183-84 (1998).

fit of being well-read in law and literature is that it helps the student gain comfort in ambiguity. This facility with uncertainty is commonly equated with the actualization of “thinking like a lawyer.”³⁰ To me James Boyd White’s reading of *Antigone* seems more fruitful – that Creon and Antigone “are far more alike than different.”³¹ Judge Posner instead employs a binomial analysis and distinguishes these foils as the mature Creon to the juvenile Antigone.³²

Professors Balkin and Levinson present a related third benefit to an education in the humanities – that the study of letters inspires moral imagination.³³ A recent study concluded that exposure to high literature can improve one’s ability to relate to others.³⁴ In turn, at least one scholar has called for empathy to be a criterion for legal judgment.³⁵ It makes intuitive sense why an educated imagination aids interpersonal intelligence. A broad cultural knowledge provides context and familiarity with standpoint;³⁶ a rich sense of the character study helps one understand the full portrait of individual experience.

Related to empathy is the ability to predict how a legal rule might function as precedent (thinking as the other versus thinking in the future). The literary lawyer might have a more granular feel for the texture of our legal lexicon, and how its penumbras and workable interpretations might function in a future context. This binary of practical ethics against hyper-rational abstraction seems to be an animating motivation for Balkin and Levinson in “An Uneasy Relationship.” Indeed, Learned Hand argued that all judges should be familiar with the Great Books.³⁷ But today’s student cohorts are more likely to quote

³⁰ A relevant question is whether lawyers truly do think differently. See Donald J. Kochan, “Learning” *Research and Legal Education: A Brief Overview and Selected Bibliographical Survey*, 40 SW. L. REV. 449, 466–68 (2011) (providing overview and selected bibliography on the question).

³¹ James Boyd White, *Book Review: What Can a Lawyer Learn From Literature?*, 102 HARV. L. REV. 2014, 2043 (1989).

³² *Id.* at 2042–44.

³³ Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE. J.L. & HUMAN. 155, 184 (2006).

³⁴ Pam Belluck, *For Better Social Skills, Scientists Recommend a Little Chekov*, N.Y. TIMES (Oct. 3, 2013), http://well.blogs.nytimes.com/2013/10/03/i-know-how-youre-feeling-i-read-chekhov/?emc=edit_tnt_20131004&ntemail0=y&_r=2.

³⁵ See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

³⁶ *E.g.*, Elizabeth Borland, *Standpoint Theory*, ENCYCLOPAEDIA BRITANNICA (Mar. 27, 2015), <<http://www.britannica.com/EBchecked/topic/1983538/standpoint-theory>>.

³⁷ Balkin & Levinson, *supra* note 32, at 155–56.

Coase than Plato.³⁸ The Balkin/Levinson thesis might be overreaching—that the opportunity cost of favoring technocratic approaches to statutory construction is the instrumental blinders approach of the “Torture Memos.”³⁹ Still, we can speculate on how our world might differ if law was understood as a culture or humanity rather than as a science.⁴⁰ Perhaps our self-selection as lawyers intersects with common modalities of legal thinking in certain, intangible ways.⁴¹ For example, surveys suggest that economists are much more likely to take a self-interested position in the Prisoner’s Dilemma game theoretic as compared to non-economists.⁴² Their theories might thus overpredict how often humans are “rationally” selfish creatures. Similarly, Judge Posner appears tremendously syllogistic in his approach to literary analysis. In *A Misunderstood Relation*, he selects a few canonical texts out of the cultural catalog of front-rank poems or novels to create an IRAC to prove why literature is either X or Y or Z.⁴³ Is this how most humans think about Art? As something that can be reduced into a precedent as support for a linear argument? Instead many, including Posner who contends that ambiguity gives literature its “purchase,”⁴⁴ believe great literature possesses an irreducible, ineffable magic. So maybe lawyers are just pre-wired to ignore the relevance of a literary sensibility to legal thinking?

III. MISSING FACTS AND CREATING CONTEXT

I should qualify my earlier reference to the neutral tone of Fact Statements. Of course there are many examples of court briefs that make effective use of an effusive, passionate rhetoric. But the art of persuasion can also be thought to possess a core tension – how do you convince someone of something while not signaling that you are *trying* to convince them of that thing? Hyperbole

³⁸ *Id.* at 158.

³⁹ *Id.* at 185–86.

⁴⁰ *See, e.g.,* White, *supra* note 30, at 2045.

⁴¹ *See* Robin West, *Law, Literature, and the Celebration of Authority*, 83 Nw. U.L. REV. 977, 978 (1989) (“Posner’s book . . . tells us something important about the distinguishing commitments of liberal legalism and the type of personality which it attracts.”).

⁴² *See* Tom Stafford, *Does Studying Economics Make You More Selfish?*, BBC (Oct. 22, 2013), <http://www.bbc.com/future/story/20131022-are-economists-more-selfish>.

⁴³ White, *supra* note 30, at 2016–18; *see also* John Fischer, *Reading Literature/ Reading Law: Is There a Literary Jurisprudence?*, 72 TEX. L. REV. 135, 152–53 (1994) (referencing Judge Posner’s “timeless” criterion of surviving the trans-historical marketplace of literature).

⁴⁴ Posner, *supra* note 5, at 1369.

and self-validating adverbs like “obviously” or “absolutely” can trigger reader skepticism.

Julie Spanbauer uses the prism of the 1963 Birmingham Civil Rights Marches to show how subtle use of fact selection and emphasis can pull the reader to opposite legal conclusions.⁴⁵ Interestingly, in the pro-protest *Shuttlesworth* opinion Justice Stewart cites to missing facts that a reader might expect to surface in similarly situated kinds of marches. He notes that “no automobiles were obstructed, nor were traffic signals disobeyed,” and that although “the spectators at some points spilled out into the street ... the street was *not* blocked and vehicles were *not* obstructed.”⁴⁶ This kind of contextual approach to the Fact Statement encourages the reader to distinguish the peaceful nature of this protest from an unruly hypothetical protest, a control or foil that might not form in the reader’s mind if the author did not write in the negative.

Conversely, the student author might choose to leave out certain details from a Fact Statement. The insoluble problem for the instructor is that these student decisions are necessarily kept hidden – it goes to the oblique logic of proving a negative: *How do I know you didn’t mean to include that?* Therefore, in my teaching, I pair a “meta” writer-centric assignment with the Fact Statement so students can identify and explain the editorial choices they make in that reader-centric document.⁴⁷ Questions to consider in this clarifying assignment include: Did you choose to craft a compact, deliberate sentence to emphasize a detail? Or form an over-complex, labyrinthine sentence to defuse the impact of an inopportune detail? Did you exclude bad facts that don’t go to the core legal questions of your case? Or to make note of missing facts to distinguish your case from those that might turn on this distinction?

⁴⁵ Julie M. Spanbauer, *Teaching First-Semester Students that Objective Analysis Persuades*, 5 LEGAL WRITING J. LEGAL WRITING INST. 167 (1999).

⁴⁶ *Shuttlesworth v. City of Birmingham*, 89 S. Ct. 935, 937 (1969) (emphasis added).

⁴⁷ My inspiration for this assignment is Sasha Samberg-Champion, my own legal writing instructor while a student at Columbia Law. Essential to the dialogic quality of the paired submission is that the student is forced to think about the process of thinking. This kind of “metacognition” is fundamental to contemporary notions of constructivist learning. Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 376 (2001). For discussion of other constructivist assignments, see Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342, 350–52 (1996).

A reader in 2015 might also ask how expansive the “context” of a legal conflict might be. Camus uses the hostile Algiers environs to key into the existential condition of Meursault. The leitmotifs of an impersonal sun and an empty, diaphanous desert are prime movers in the story. These contextual facts are written into the Fact Statement of Part I to explain the fundamental loneliness and apartness of Meursault, his status as the outsider. In the same way, today’s legal audiences might seek a Fact Statement that includes the zeitgeist of suspicion that clouds interaction between police and black males. Perhaps these recent high-profile trials should detail missing facts that have been unable to surface. By expanding upon the *Shuttlesworth* ethic of a comparative context, the upheld “in the beat” decisions of law enforcement might begin to feel more “Kafkaesque” at a systemic level. Courts might not be best positioned to manage these social facts.⁴⁸ But a technocratic approach to the law is also unlikely to uncover them.

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⁴⁸ *E.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 53 (14th ed. 2002).

