

# Licensed To Kill: Spy Fiction and the Demise of Law

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“There’s a man who leads a life of danger  
To everyone he meets he stays a stranger  
With every move he makes another chance he takes  
Odds are he won’t live to see tomorrow  
Secret agent man, secret agent man  
They’ve given you a number and taken away your name”<sup>1</sup>

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1. JOHNNY RIVERS, *Secret Agent Man*, on GOLDEN HITS (Imperial Records 1966) (Lyrics by P.F. Sloan and S. Barri). The song was the theme for the television show *Secret Agent* and was released as a single in 1966. See *Secret Agent Man by Johnny Rivers*, SONGFACTS, <http://www.songfacts.com/detail.php?id=4352> (last visited July 21, 2010); *The Hits*, JOHNNY RIVERS, <http://www.johnnyrivers.com/jr/hits.html> (last visited July 21, 2010).

## I. INTRODUCTION

Fiction, particularly fiction whose subject is crime and its detection, can be a rich source of insight into cultural attitudes toward law.<sup>2</sup> Detective fiction, genred though it is,<sup>3</sup> while always taking as its narrative subject the detection and punishment of crime, continually reinvents itself as cultural norms evolve. A comparison of the nineteenth century tales of Edgar Allan Poe<sup>4</sup> and Sir Arthur Conan Doyle<sup>5</sup> with those of midcentury Raymond Chandler<sup>6</sup> and late century García

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2. See generally DENNIS PORTER, *THE PURSUIT OF CRIME: ART AND IDEOLOGY IN DETECTIVE FICTION* 1 (1981) (“The importance of popular works resides in their status as meaning-systems that embody implicit world views.”).

3. Much has been written about whether detective fiction deserves to be considered critically, or whether it is, by nature of its popular appeal, unworthy of scholarly attention. See, e.g., *id.* at 5 (“[T]here is an art of the detective novel that is not necessarily synonymous with literary art in Edmund Wilson’s sense.”); JULIAN SYMONS, *BLOODY MURDER: FROM THE DETECTIVE STORY TO THE CRIME NOVEL: A HISTORY* 25 (Viking 1985) (1972) (noting that critics of the detective novel “are so delighted by puzzles and problems that they confuse the undoubted interest such things possess with that of literature,” but also acknowledging that “the best crime stories are novels of quality”); EDMUND WILSON, *CLASSICS AND COMMERCIALS: A LITERARY CHRONICLE OF THE FORTIES* 263 (1950) (“[T]he reading of detective stories is simply a kind of vice that, for silliness and minor harmfulness, ranks somewhere between smoking and crossword puzzles.”), quoted in DAVID LEHMAN, *THE PERFECT MURDER: A STUDY IN DETECTION* 181 (1989).

4. See, e.g., EDGAR ALLAN POE, *The Murders in the Rue Morgue*, in *TALES OF EDGAR ALLAN POE* 50 (1944) (introducing his detective, C. Auguste Dupin, who deduces through pure reason the extraordinary nature of the crime and criminal involved in a brutal murder in Paris); see also SYMONS, *supra* note 3, at 39 (noting that “Dupin is able to interpret the thoughts of his companion by the way in which he reacts to exterior events like being pushed aside by a fruiterer carrying a basket on his head,” and that “[h]e solves the problems presented to him by pure analytic deduction”).

5. See, e.g., SIR ARTHUR CONAN DOYLE, *THE SIGN OF FOUR* (1890), reprinted in 1 *THE COMPLETE SHERLOCK HOLMES* 97, 126 (Barnes & Noble, Inc. 2003) (quoting Conan Doyle’s detective, Sherlock Holmes, as explaining, “[W]hen you have eliminated the impossible, whatever remains, however improbable, must be the truth”); see also SYMONS, *supra* note 3, at 21 (noting that crime literature in the era of Conan Doyle offered to readers “a reassuring world in which those who tried to disturb the established order were always discovered and punished,” and that “[b]ehind the conscious Victorian and Edwardian adherence to a firmly fixed hierarchical society there lay a deep vein of unease about the possible violent overturn of that society”).

6. See, e.g., RAYMOND CHANDLER, *THE BIG SLEEP* (Vintage Books 1992) (1939) [hereinafter CHANDLER, *THE BIG SLEEP*] (following a detective, Philip Marlowe, who punches and shoots his way through an investigation involving the psychopathic daughter of his client); see also RAYMOND CHANDLER, *The Simple Art of Murder*, in *THE SIMPLE ART OF MURDER* 1, 18 (Vintage Books 1988) (1950) [hereinafter CHANDLER, *The Simple Art*] (describing the hard-boiled or *noir* aesthetic: “down these mean streets a man must go who is not himself mean, who is neither tarnished nor afraid”); SYMONS, *supra* note 3, at 22 (“[By 1939] [t]he social and religious structure of society had changed so much that its assumptions seemed preposterous.”).

Márquez<sup>7</sup> makes this plain. Everything from the nature and causes of crime,<sup>8</sup> to the role of public and private police in its detection and punishment,<sup>9</sup> to the possibility or likelihood of determining the truth of a

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7. See GABRIEL GARCÍA MÁRQUEZ, *CHRONICLE OF A DEATH FORETOLD* (Gregory Rabassa trans., Alfred A. Knopf, Inc. 1983) (1981) (following a nameless detective-narrator who describes a killing and its perpetrators on the first pages, only to conclude by the narrative's end that the facts surrounding the murder are uncertain); see also Rosanna Cavallaro, *Solution to Dissolution: Detective Fiction from Wilkie Collins to Gabriel García Márquez*, 15 *TEX. J. WOMEN & L.* 1, 27 (2005) (contending that García Márquez's novella "challenges each of a series of aspects of the legal process through its systematic deconstruction of the paradigmatic detective story").

8. In the detective fiction of Conan Doyle, and later Agatha Christie, crime is the product of individual vice. See, e.g., LEHMAN, *supra* note 3, at 110 (noting that in the classic detective novel, "[c]rime is to chaos as detection is to order," and that with the "unmasking of the villain . . . the violation of decorum . . . has been isolated, and now the little community can pick up where it left off"). But the fiction of the so-called hard-boiled era later depicts crime as a byproduct of larger social forces. See, e.g., PORTER, *supra* note 2, at 40 (noting that in the fiction of Dashiell Hammett, "[t]he initial crime often turns out to be a relatively superficial symptom of an evil whose magnitude and ubiquity are only progressively disclosed during the course of the investigation"); CHESTER HIMES, *COTTON COMES TO HARLEM* 14 (Buccaneer Books 1993) (1965) ("[Detective Grave Digger Jones explains to his partner,] 'We got the highest crime rate on earth among the colored people in Harlem. And there ain't but three things to do about it: Make the criminals pay for it—you don't want to do that; pay the people enough to live decently—you ain't going to do that; so all that's left is let 'em eat one another up'"); MÁRQUEZ, *supra* note 7 (describing a community in which gender roles and social expectations associated with those roles force an "honor killing" of a bride's supposed lover by her brothers); Cavallaro, *supra* note 7, at 37 ("García Márquez challenges the paradigm of the *whodunnit* by distributing moral, if not legal, responsibility for the murders across a broad class of persons—nearly the entire town.").

9. Some of the earliest detective fiction arose in an era when larger communities like Paris and London were first employing and professionalizing a police force. See STEPHEN KNIGHT, *CRIME FICTION 1800–2000: DETECTION, DEATH, DIVERSITY* 30–32 (2004) (discussing the rise of the "New Police" in England); see also *Crawford v. Washington*, 541 U.S. 36, 53 (2004) ("England did not have a professional police force until the 19th century . . ."). The private detectives who are the protagonists of those narratives often appear as idiosyncratic geniuses, able to extract meaning from artifacts and clues that leave these new professionals befuddled, or worse, misled to erroneous conclusions. See, e.g., AGATHA CHRISTIE, *THE MYSTERIOUS AFFAIR AT STYLES* 366–71 (1975) (portraying Detective Poirot as able to extract meaning from minor clues, as evidenced by his articulate explanation of the mystery); AGATHA CHRISTIE, *SLEEPING MURDER* 202–03, 205–06, 214, 232, 236 (1976) (portraying Miss Marple as an idiosyncratic genius through her resolution of the crime); ARTHUR CONAN DOYLE, *The Beryl Coronet*, in *THE ADVENTURES OF SHERLOCK HOLMES* 244, 264–69 (Oxford University Press 1993) (1892) (portraying Sherlock Holmes as capable of deducing the meaning of things from minor clues). Detectives of the hard-boiled era are often at odds with official investigators, sometimes due to the public official's outright corruption and, at other times, due to frustration with professional neglect. See, e.g., LEHMAN, *supra* note 3, at 144 ("The contract between the reader and writer of a Chandler novel calls for

past event,<sup>10</sup> gradually transforming to track the zeitgeist of the author and the author's age.<sup>11</sup>

Spy fiction emerged in the early part of the last century as a recognizable genre unto itself,<sup>12</sup> and although it has much in common with detective fiction, it also departs from that style in important ways.<sup>13</sup>

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a shared view of our social world as universally corrupt. . . . Everyone is implicated; no one is safe.”); SEAN MCCANN, *GUMSHOE AMERICA: HARD-BOILED CRIME FICTION AND THE RISE AND FALL OF NEW DEAL LIBERALISM* 39–40 (2000).

10. The work of Conan Doyle, Poe, and Christie never doubts the certainty of the crime's solution, whose clear and singular explication by the detective hero is the climax of each of those stories. LEHMAN, *supra* note 3, at 110 (“For the exonerated suspects, the feeling is one of relief; and the confident expectation of that relief—the certainty of a happy ending—is what makes the earlier tension not only bearable but desirable.”). Later, although ambiguity and uncertainty begin to infect the narrative of the hard-boiled writers, they, too, ultimately produce a singular “solution.” See CHANDLER, *THE BIG SLEEP*, *supra* note 6, at 223–24, 226–27. It was not until the postmodern experiments of Jorge Luis Borges, Alain Robbe-Grillet, and Gabriel García Márquez that the genre became a mode of illustrating the indeterminacy of fact and the unreliability of memory. See, e.g., JORGE LUIS BORGES, *Tlön, Uqbar, Orbis Tertius*, in *FICCIONES* (Alianza Editorial 1997) (1944); MÁRQUEZ, *supra* note 7; CHARLES J. RZEPKA, *DETECTIVE FICTION* 186, 234 (2005).

11. Some of the many excellent literary critiques of detective fiction, tracking this evolution in the genre, include Robin Winks, Julian Symons, and Charles Rzepka. See, e.g., RZEPKA, *supra* note 10; SYMONS, *supra* note 3; ROBIN W. WINKS, *MODUS OPERANDI: AN EXCURSION INTO DETECTIVE FICTION* (1982).

12. Critics usually mark the genre's birth with the works of Joseph Conrad and John Buchan. See generally JOHN BUCHAN, *GREENMANTLE* (1916); JOHN BUCHAN, *THE THIRTY-NINE STEPS* (1915); JOSEPH CONRAD, *THE SECRET AGENT: A SIMPLE TALE* (Bruce Harkness & S.W. Reid eds., Cambridge Univ. Press 1990) (1907). See also JOHN G. CAWELTI & BRUCE A. ROSENBERG, *THE SPY STORY* 34 (1987) (“The spy story gradually took shape in the nineteenth century and became a widely popular narrative formula around the time of World War I.”). Agatha Christie, perhaps the best known writer of detective fiction, wrote a small number of espionage tales that feature a somewhat naïve and nationalistic tone and have not received much critical attention. See, e.g., AGATHA CHRISTIE, *THE SECRET ADVERSARY* (1922) (featuring the characters Tommy and Tuppence, English upper-class friends who are accidentally drawn into a tale of international intrigue involving the sinking of the *Lusitania* and a secret treaty).

13. One important distinction between the two genres is that detective fiction centers on the solution of a particular crime of one individual against another—usually murder—but espionage fiction has at its narrative core international conflicts, which may include crimes against individuals that are merely ancillary to the political conflicts of nations enacted through their institutions and agencies. See WINKS, *supra* note 11, at 79 (observing that spy fiction “attempts to account for events already transpired and to control events yet to come;” that “[m]ost often evidence must be read backwards, inferred from events;” and that “[t]o this extent spy fiction is at the far end of the continuum from traditional mystery fiction, which begins by setting the scene, introducing the characters, usually killing one of them, and reconstructing what must have happened”); Glenn W. Most, *The Hippocratic Smile: John le Carré and the Traditions of the Detective Novel*, in *THE POETICS OF MURDER: DETECTIVE FICTION AND LITERARY THEORY* 341, 354–55 (Glenn W. Most & William W. Stowe eds., 1983) (observing that common features of

Like detective fiction, it supplies a source of insight into contemporaneous and evolving popular attitudes toward law. Its focus lies less on the procedural aspects of crime and punishment, and more on the nature of factfinding itself and the relation between the individual and the state, a relation that law claims to order. Indeed, one of the more startling aspects of law, as depicted in spy fiction, is that it appears to permit certain state actors—those “licensed to kill”<sup>14</sup>—to commit the most serious crimes; acts hailed as necessary and even heroic, rather than deserving of punishment. That the legal sanctioning of the most profound societal taboo is a centerpiece of the spy novel suggests that this genre of fiction may offer broader and deeper critiques of law in the modern era than its predecessors in the genre of detection.

This paper considers the work of two of spy fiction’s most prolific and popular authors: Ian Fleming, creator of James Bond,<sup>15</sup> and John le

murder and spy novels are deceit and violent death but that the mystery novel looks backward, whereas spy novels look forward toward the prevention of harm).

14. As James Bond muses:

It was part of his profession to kill people. He had never liked doing it and when he had to kill he did it as well as he knew how and forgot about it. As a secret agent who held the rare double-O prefix—the license to kill in the Secret Service—it was his duty to be as cool about death as a surgeon.

IAN FLEMING, *GOLDFINGER* 003 (Penguin Books 2002) (1959). See, e.g., CAWELTI & ROSENBERG, *supra* note 12, at 134 (“007, the number that gives an agent official sanction to kill.”); see also JOHN LE CARRÉ, *THE SPY WHO CAME IN FROM THE COLD* 15, 17 (Pocket Books 2001) (1963) (“[Control, head of the British Intelligence Service, to Leamas, an agent:] ‘I mean you can’t be less ruthless than the opposition simply because your government’s *policy* is benevolent, can you now?’ . . . ‘That is why,’ Control continued, ‘I think we ought to try and get rid of Mundt . . . .’ [Leamas responds to Control:] ‘If it’s a question of killing Mundt, I’m game.’”); LEROY L. PANEK, *THE SPECIAL BRANCH: THE BRITISH SPY NOVEL, 1890–1980*, at 215 (1981) (observing that Bond “act[s] as an assassin” and that “[i]n the books, we see him personally killing the antagonists in *Diamonds Are Forever*, *From Russia, With Love*, *Dr. No*, *Goldfinger*, *The Spy Who Loved Me*, *You Only Live Twice*, and *The Man with the Golden Gun*”).

15. A bibliography of Fleming’s Bond novels would include the following: *Casino Royale* (1953), *Live and Let Die* (1954), *Moonraker* (1955), *Diamonds Are Forever* (1956), *From Russia, With Love* (1957), *Doctor No* (1958), *Goldfinger* (1959), *Thunderball* (1961), *On Her Majesty’s Secret Service* (1963), *You Only Live Twice* (1964), and *The Man with the Golden Gun* (1965). See IAN FLEMING, *CASINO ROYALE* (1953); IAN FLEMING, *DIAMONDS ARE FOREVER* (1956); IAN FLEMING, *DOCTOR NO* (1958); IAN FLEMING, *FROM RUSSIA, WITH LOVE* (1957); FLEMING, *supra* note 14; IAN FLEMING, *LIVE AND LET DIE* (1954); IAN FLEMING, *THE MAN WITH THE GOLDEN GUN* (1965); IAN FLEMING, *MOONRAKER* (1955); IAN FLEMING, *ON HER MAJESTY’S SECRET SERVICE* (1963); IAN FLEMING, *THUNDERBALL* (1961) [hereinafter FLEMING, *THUNDERBALL*]; IAN FLEMING, *YOU ONLY LIVE TWICE* (1964); see also PANEK, *supra* note 14, at 202 (listing Fleming’s spy novels). Most of these titles became films, meeting with great popularity

Carré, creator of Alec Leamas, “the spy who came in from the cold,”<sup>16</sup> as well as of George Smiley and the British spy agency that le Carré dubs “the Circus.”<sup>17</sup> These works imagine legal orders that share many fundamental attributes, but their protagonists—Bond and Leamas—cannot be more different. Bond is a superhuman, two-dimensional hero who lives a life of adventure that can only exist in fantasy: extraordinarily handsome, sophisticated in his tastes, invincible, but not particularly reflective about the moral aspects of his work as spy and, at times, assassin.<sup>18</sup> Leamas is, by contrast, an unprepossessing everyman, beaten down by personal and professional failures, and troubled by the moral

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and financial success when originally released, as well as in their second life as contemporary remakes and spinoffs. See, e.g., PANEK, *supra* note 14, at 219 n.1 (listing Bond films with their years of theatrical release); *Casino Royale (2006)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0381061/> (last visited July 21, 2010); *Dr. No (1962)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0055928/> (last visited July 21, 2010); *Goldfinger (1964)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt0058150/> (last visited July 21, 2010); *Quantum of Solace (2008)*, THE INTERNET MOVIE DATABASE, <http://www.imdb.com/title/tt1139644/> (last visited July 21, 2010). In addition, a number of other authors wrote novels based on the characters created by Ian Fleming after Fleming’s death. See, e.g., RAYMOND BENSON, *DIE ANOTHER DAY* (2002) (a novelization based on the screenplay by Neal Purvis and Robert Wade); RAYMOND BENSON, *TOMORROW NEVER DIES* (1997) (a novelization based on the screenplay by Bruce Feirstein); JOHN GARDNER, *GOLDENEYE* (1995) (a novelization based on the screenplay by Michael France and Jeffrey Caine); JOHN GARDNER, *LICENSE RENEWED* (1981); JOHN GARDNER, *LICENSE TO KILL* (1989) (a novelization based on the screenplay by Michael G. Wilson and Richard Maibaum); JOHN GARDNER, *WIN, LOSE OR DIE* (1989).

16. LE CARRÉ, *supra* note 14. Although George Smiley plays a relatively small role in this novel, it is nevertheless central to the analysis herein because it so clearly explicates le Carré’s attitudes toward law and the legal regime, as well as being chronologically close to the works of Fleming to which this paper makes comparisons.

17. Le Carré’s works depicting the world of British espionage include the following: *Tinker, Tailor, Soldier, Spy* (1974), *The Honourable Schoolboy* (1977), and *Smiley’s People* (1979). See JOHN LE CARRÉ, *THE HONOURABLE SCHOOLBOY* (1977) [hereinafter LE CARRÉ, *HONOURABLE SCHOOLBOY*]; JOHN LE CARRÉ, *TINKER, TAILOR, SOLDIER, SPY* (1974) [hereinafter LE CARRÉ, *TINKER*]; JOHN LE CARRÉ, *SMILEY’S PEOPLE* (1979). Other works for which he has received much critical and popular acclaim include *The Little Drummer Girl* (1983), *A Perfect Spy* (1986), *The Constant Gardener* (2001), *The Russia House* (1989), *The Night Manager* (1993), and *A Most Wanted Man* (2008). See JOHN LE CARRÉ, *A MOST WANTED MAN* (2008); JOHN LE CARRÉ, *A PERFECT SPY* (1986); JOHN LE CARRÉ, *THE CONSTANT GARDENER* (2001); JOHN LE CARRÉ, *THE LITTLE DRUMMER GIRL* (1983); JOHN LE CARRÉ, *THE NIGHT MANAGER* (1993); JOHN LE CARRÉ, *THE RUSSIA HOUSE* (1989). See generally DAVID MONAGHAN, *SMILEY’S CIRCUS: A GUIDE TO THE SECRET WORLD OF JOHN LE CARRÉ* (1986) (containing a taxonomy of the Smiley novel’s characters and plot).

18. See *supra* note 15; see also PANEK, *supra* note 14, at 215 (observing that Bond is seen “personally killing the antagonists in *Diamonds Are Forever*, *From Russia, With Love*, *Dr. No*, *Goldfinger*, *The Spy Who Loved Me*, *You Only Live Twice* and *The Man with the Golden Gun*”).

ambiguities of his espionage work.<sup>19</sup> Yet both represent a similar set of distinctly postwar attitudes toward the function of law, its growing indeterminacy, and the complex nature of its institutions.<sup>20</sup>

This paper explores the representation of law in espionage fiction as a variation on the larger representation of law in detective fiction, focusing in turn on each of several aspects: law as a tool of factfinding—Part II; law as the set of principles that order the relation of the individual to the state—Part III; and law as a positivist embodiment of the moral norms of a culture—Part IV. This paper suggests that espionage fiction expresses a cultural acknowledgment of the demise of law: that the representation of law in each of these modalities is as a system that enjoys very little public trust or respect and that fails to perform any of its essential functions in a satisfactory way.

## II. LAW AS FACTFINDING

One of the basic premises of law is that the state can task an individual or group of individuals—judge or jury—with determining the truth of a past event so that appropriate legal consequences can attach.<sup>21</sup> The

19. LE CARRÉ, *supra* note 14, at 10 (describing Leamas as “a short man with close, iron-grey hair, and the physique of a swimmer,” who is “very strong,” as revealed in “the stubby formation of his hands and fingers,” with a “utilitarian approach to clothes, as he did to most other things,” and noting that “[i]f he were to walk into a London club the porter would certainly not mistake him for a member” because “[h]e looked like a man who could make trouble, a man who looked after his money, a man who was not quite a gentleman”).

20. As Julian Symons explains:

It is right, I think, to see two traditions in the spy story . . . . The first is conservative, supporting authority, making the implicit assertion that agents are fighting to protect something valuable in society. The second is radical, critical of authority, claiming that agents perpetuate, and even create, false barriers between “Us” and “Them.” Fleming belongs to the first tradition, le Carré’s early work to the second.

SYMONS, *supra* note 3, at 225.

21. See Rosanna Cavallaro, *Pride and Prejudice and Proof: Quotidian Factfinding and the Rules of Evidence*, 55 HASTINGS L.J. 697, 697 & n.2 (2004) (noting that “the legal process is concerned with the accurate and orderly evaluation of disputed facts and past events,” but acknowledging that although “the traditional assumption has been that the primary purpose of adjudication is truthseeking, . . . this premise has been challenged by a variety of scholars proposing alternative purposes”) (citing FED. R. EVID. 102 (stating that evidence rules shall be construed “to the end that the truth may be ascertained and proceedings justly determined”)); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1500 (2001) (recognizing that although “Federal Rule 102 defines the ‘purpose’ of the rules as ‘that the truth may be ascertained,’ . . .

guilty can be punished; the tortfeasor can be made to pay damages. Underpinning the imposition of legal rules and sanctions is an institutional faith that the facts upon which the rules are predicated are determinable with a degree of certainty, which makes the imposition of those legal consequences legitimate. Thus, a significant, perhaps even central, function of the legal system is that it is a mechanism for determining facts conclusively, preempting the dissemination of alternative narratives with a singular “decision” about an event. The forms of law with which we are now so familiar—the allegations of fact in a complaint,<sup>22</sup> the denial or admission of those facts in the corresponding answer,<sup>23</sup> the complex rules of evidence by which disputed facts are proven and adjudicated, or “found,”<sup>24</sup> the array of procedural rules regarding burdens of proof,<sup>25</sup> the preclusive effect of prior findings,<sup>26</sup> and the unreviewability of issues of fact<sup>27</sup>—are all directed toward this central function of law.

In order to accept law’s legitimacy, the community within which law operates must necessarily accept the accuracy of those factual determinations upon which it is predicated. Public perceptions of factual inaccuracy, of which there have been a growing number, create a corresponding skepticism about the justness of legal outcomes, in turn creating social instability.<sup>28</sup> The unraveling of criminal convictions

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some of the rules themselves have no veritistic dimension, while others mix veritistic and non-veritistic concerns”); David P. Leonard, *The Use of Character To Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 38–43 (1986) (suggesting that the role of trial is to produce “catharsis”); Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1229 n.1, 1230 (2001) (suggesting that the “rules governing what happens *inside* the courtroom can be understood adequately only in the context of the state’s central project of regulating behavior *outside* the courtroom” through the provision of incentives for that behavior, citing, as an example of the truth seeking approach, inter alia, H. Richard Uviller, *Evidence of Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 845 (1982) (“The process of litigation is designed for the reconstruction of an event that occurred in the recent past.”), and citing, as an example of the nontruth seeking approach, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985) (contending that the purpose of adjudication is to produce “acceptable verdicts”)).

22. See FED. R. CIV. P. 8(a) (form of claim for relief).

23. See *id.* 8(b) (form of answer).

24. See FED. R. EVID. 102 (noting that the purpose of the rules is “to the end that the truth may be ascertained and proceedings justly determined”).

25. See, e.g., *id.* 301 (regarding presumptions and burdens of proof in civil actions).

26. See, e.g., FED. R. CIV. P. 8(c) (listing *res judicata* as an affirmative defense).

27. See *id.* 52(a)(6) (stating that questions of fact “must not be set aside unless clearly erroneous”).

28. See, e.g., Nesson, *supra* note 21 (contending that the purpose of adjudication is to produce “acceptable verdicts”).

using newly available DNA technology is one area in which the factual predicate for legal judgments has been called into question,<sup>29</sup> generating deep public concern about the legitimacy of criminal penalties, including but not limited to the death penalty.<sup>30</sup> Similarly, the accumulation of social science data that suggest we are often inaccurate and unreliable in our identifications of others, particularly when those identifications cross-racial categories, has had a similarly destabilizing effect in the criminal justice system.<sup>31</sup> Even fingerprinting, long a touchstone of scientific accuracy and reliability, is now in doubt.<sup>32</sup> Amid this growing

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29. See, e.g., Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14 (reporting that methods for determining the number of those falsely convicted of all crimes using confirmed exonerations in rape cases are analytically flawed); Solomon Moore, *Study Calls for Oversight of Forensics in Crime Labs*, N.Y. TIMES, Feb. 19, 2009, at A13 (reporting on a National Science Foundation study finding that “[c]rime laboratories around the country are grossly underfunded, lack a scientific foundation and are compromised by critical delays in analyzing physical evidence”). But see Adam Liptak, *Court Rejects Inmate Right to DNA Tests*, N.Y. TIMES, June 19, 2009, at A1 (reporting that the United States Supreme Court refused to hold that an inmate has a constitutional right to DNA testing that might prove an inmate’s innocence, although acknowledging the “unparalleled ability” of DNA testing “both to exonerate the wrongly convicted and to identify the guilty,” and that such testing has played a role in some 240 exonerations (quoting *Dist. Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2312 (2009))).

30. See Cavallaro, *supra* note 7, at 39 n.144 (“In 2000, Governor George Ryan imposed a moratorium on executions in Illinois, citing concerns about fairness in a legal system that had convicted and imposed death sentences on 13 individuals who were subsequently exonerated.” (citing GOVERNOR’S COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 207 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html) (concluding, after an extensive study ordered by Illinois Governor George Ryan, that “no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death”)); Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1; Dirk Johnson, *No Executions in Illinois Until System Is Repaired*, N.Y. TIMES, May 21, 2000, at 20)); see also *House v. Bell*, 547 U.S. 518, 536–37 (2006) (“[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, ‘it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.’” (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))).

31. See John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207, 209 (2001) (noting that “[a] 1996 study found that twenty-eight convictions predicated upon eyewitness IDs have been overturned as a result of DNA evidence,” and that “[a]nother study implicated mistaken eyewitness IDs as the cause of more than 60% of the five hundred wrongful convictions studied” (citing, inter alia, Jennifer L. Devenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL’Y & L. 338, 338 (1997))).

32. See, e.g., Margaret A. Berger, *Laboratory Error Seen Through the Lens of Science and Policy*, 30 U.C. DAVIS L. REV. 1081, 1109 (1997); Tamara F. Lawson, *Can*

skepticism, it is no wonder that Crime Scene Investigation (CSI) dramas, in which the solution to grisly crimes of violence lies in the hands of the unerring forensic scientist, enjoy such public fascination and wide popularity: such shows operate in the realm of fiction, allaying public anxiety about the uncertainty of factual truth and offering the possibility of easy and consistent accuracy, even when the real crime labs are revealed as error ridden, overburdened, and at times even corrupt.<sup>33</sup>

In classic detective fiction, too, facts are central. As the sobriquet “whodunit?” implies,<sup>34</sup> facts are at the core of a mystery’s plot. The trajectory of the classic detective novel is, typically, from a place of very little knowledge of the facts, through a web of red herrings and distractions, to a complete and coherent explication of the crime, its perpetrator, and the perpetrator’s motives and methods.<sup>35</sup> This resolution, usually announced or explained by the detective who is the “hero” of the novel, is the capstone of the reader’s experience. Whether it is Sherlock Holmes explaining his reasoning to a befuddled Watson,<sup>36</sup> or Hercule Poirot gathering all the suspects for a detailed unraveling of his analysis,<sup>37</sup> the denouement is the payoff for the reader’s investment of time and interest in the plot’s twists and turns.

Significantly, in the detective novel, there is only one solution; competing explanations are depicted as errors—often made by official law enforcement—at some times contrived or promulgated by the

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*Fingerprints Lie?: Re-Weighing Fingerprint Evidence in Criminal Jury Trials*, 31 AM. J. CRIM. L. 1, 18 (2003) (applying *Daubert-Kumho* to fingerprint evidence and noting “the main sticking points regarding fingerprint identification evidence, which are: (1) the unquestioned reliability that has been artificially placed upon fingerprint evidence and (2) the question of whether, in fact, forensic science is science at all”).

33. See, e.g., Jason Felch & Maura Dolan, *DNA: Genes as Evidence: A Showdown in O.C.*, L.A. TIMES, Dec. 14, 2008, at A1 (describing how crime labs, often run by law enforcement agencies, have been affected by instances of fraud or undue influence).

34. See *Whodunit*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://merriam-webster.com/dictionary/whodunit> (last visited July, 26 2010) (defining *whodunit* as “a detective story or mystery story” and as an alteration of “who done it?” dating back to 1930).

35. See LEHMAN, *supra* note 3, at 110; RZEPKA, *supra* note 10, at 19 (describing the analeptic solution that ends classic detective stories in which “the detective (or sometimes the criminal himself) provides a summary narrative that connects and puts in proper order both the array of events leading up to the crime and the array of events by which the detective himself arrived at the correct sequence of the first array”).

36. See, e.g., SIR ARTHUR CONAN DOYLE, *The Adventure of the Dancing Men*, in *THE RETURN OF SHERLOCK HOLMES* (1903), *reprinted in* 1 *SHERLOCK HOLMES: THE COMPLETE NOVELS AND STORIES* 824 (Bantam Books 1986) (“Having once recognized, however, that the symbols stood for letters, and having applied the rules which guide us in all forms of secret writings, the solution was easy enough.”).

37. See, e.g., AGATHA CHRISTIE, *MURDER ON THE ORIENT EXPRESS* 200–12 (Bantam Books 1983) (1934) (detailing the solution to a murder on a train).

perpetrator in order to mislead or throw off suspicion, at other times accidental or coincidental. But there is no ambiguity by the novel's end, no suggestion that the fingerprints might be impossible to identify with certainty, or that the conversations or events to which others have testified might be confused, conflicting, or unreliable. The question instead is only how these "facts" add up.

Even in the detective fiction of the later twentieth century, often described as "hard boiled," the inquiry into the truth of an event remains central to the narrative.<sup>38</sup> Although the hard-boiled detectives of Raymond Chandler and Dashiell Hammett novels play a more active role in the events, witnessing and even participating in the violence that is the fallout of the initial crime, they, too, ultimately reach a place of understanding, in which a singular truth can be discerned amid the haze of subplots.<sup>39</sup> The Maltese Falcon is worthless, Brigid O'Shaughnessy murdered Sam Spade's partner, and her motive—greed—is ordinary.<sup>40</sup> No one is mistaken, no fact or memory susceptible to doubt. Although motives may be more obscure than those of the classic detective fiction of Agatha Christie or Dorothy L. Sayers, they are nonetheless discernible.<sup>41</sup>

This capacity for factual certainty, which makes the detective fiction genre both plausible and satisfying, mirrors a contemporaneous popular attitude toward factual truth: there is an objectivity to facts that permits legal institutions to seek and "find" them as a predicate to the imposition of legal consequences.<sup>42</sup> What Poirot and Holmes do in fiction is what

38. See Dashiell Hammett, *House Dick* (1923), reprinted in NIGHTMARE TOWN: STORIES 42, 46 (Kirby McCauley et al. eds., 1999) ("From any crime to its author there is a trail. It may be . . . obscure . . . since matter cannot move without disturbing other matter along its path, [but] there is—there must be—a trail of some sort. And finding and following such trails is what a detective is paid to do."); RZEPKA, *supra* note 10, at 187 (noting that "no Hammett story ends with uncertainty regarding the material facts of the case").

39. See RZEPKA, *supra* note 10, at 186 ("At the end of *The Maltese Falcon* we get a complete analeptic account of events, just as we do at the end of a story by Christie or Sayers. Recited at length by Spade to Brigid O'Shaughnessy, this recapitulation sets out the complete array of the novel, including both what has transpired in the course of the narrative and what has led up to the opening scene.")

40. See DASHIELL HAMMETT, *THE MALTESE FALCON* 209–10, 215–16 (Vintage Books 1992) (1929).

41. RZEPKA, *supra* note 10, at 192–93 (arguing that a central theme of Hammett's *The Maltese Falcon* is that "the truth of a story is immaterial as long as you can persuade others to believe it, or to behave as if they do").

42. See, e.g., NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 53–54 (1978) ("A rule of law is general in terms, stipulating that whenever a given set of operative facts occurs (*p*), a given legal consequence is to follow (*q*).").

juries do at trial: sort out the messiness of facts and wade through conflicting testimony, never doubting that there is one “correct” conclusion that can be reached by majority<sup>43</sup> or, in matters of liberty, unanimity.<sup>44</sup>

Moreover, although detective fiction is interested in “whodunit,” the “who” itself is never really in doubt. Individuals are essentially knowable, with a singular identity, although their motives may be hidden or disguised. Indeed, in the detective fiction of the classic or golden age, identity often operates at the level of stereotype, with characters that are fully comprehensible to the reader once identified by type: the retired army colonel, the spinster, the social climber.<sup>45</sup> The struggle is not to determine the personality and unique nature of each of these players, but rather to discover the web of events and relationships among those acting true to those natures that might have led to a homicide. Again,

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43. See FED. R. CIV. P. 48 (allowing parties in civil cases to stipulate to a majority verdict instead of a unanimous verdict).

44. In those matters in which accuracy in factfinding is deemed critical, such as those in which criminal sanctions are to be imposed, unanimous verdicts are required. See U.S. CONST. amend. VI (containing the constitutional right to a trial by jury); FED. R. CRIM. P. 31 (requiring unanimous verdicts in federal criminal trials); *Apodaca v. Oregon*, 406 U.S. 404, 406–11 (1972) (holding that a state rule allowing for a conviction by less than a unanimous jury does not violate the Sixth Amendment right to a trial by jury, but explaining the legislative history and precedent surrounding the unanimity requirement). This requirement presupposes that such unanimity is possible, and the remedy for failure to achieve it is not existential anxiety but a simple mistrial and “do-over” until that level of consensus can be reached. Admittedly, there are times when the facts are especially resistant to consensus, and there can be multiple mistrials and retrials, but that is the exception to a rule of accord. See, e.g., FED. R. CRIM. P. 31 (“If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The government may retry any defendant on any count on which the jury could not agree.”). There are also instances of compromise verdicts and even of logically inconsistent verdicts. See, e.g., *State v. Goblet*, 618 S.E.2d 257, 264 (N.C. Ct. App. 2005) (discussing logically inconsistent and legally contradictory verdicts), *overruled in part*, *State v. Tanner*, No. 474PA08, 2010 N.C. LEXIS 423 (N.C. June 17, 2010); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 772–76 (1998). But again, the norm is a binary inquiry in which the finder of fact agrees with either one side or the other as to the “truth” of an event. See, e.g., Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 828–31, 848–49 (1996) (noting that the instruction on mistake of fact in consent cases is often denied because the trial judge presumes that jurors will accept the “truth” of either the complainant’s or the defendant’s version of events, rather than selecting portions from each individual’s narrative).

45. See, e.g., LEHMAN, *supra* note 3, at 111 (“Each suspect wears his tag on his lapel like an identity card.”). Lehman gives the example of Agatha Christie’s *Death on the Nile*, “whose cast includes such murder-mystery stalwarts as the mustachioed British colonel . . . , the excitable romantic novelist . . . , the hardnosed greedy American attorney . . . , and the armchair revolutionary.” *Id.* at 106–07.

the premise is that individuals are essentially knowable to others and that once known, their conduct in particular circumstances is fairly predictable.<sup>46</sup>

In spy novels, however, the issue is often not “whodunit” but “who is it?” The central narrative tension, the puzzle that drives the plot, concerns identity itself, and the facts and circumstances—actions, appearance, relationships, memory—that comprise one’s understanding of the identity of another.<sup>47</sup> This metaphoric uncertainty about identity generates all the consequential indeterminacy and accompanying anxiety that are the stuff of the best-loved spy stories.<sup>48</sup> The conduct of an individual, viewed through the lenses of various possible identities—loyal or traitorous—takes on entirely different meanings depending on which of those lenses accurately reveals the “truth.”<sup>49</sup>

In Le Carré’s *The Spy Who Came in from the Cold*, the game of multiple identities is played until the very end of the novel, with chilling results. Alec Leamas begins the novel as the head of a ring of British agents working in East Germany, watching as the last of his team is shot trying to cross to freedom at the newly erected Berlin Wall.<sup>50</sup> Believing

46. See Cavallaro, *supra* note 21, at 725 n.99 (discussing “trait theorists,” a school of social scientists who “‘came to believe that traits “are relatively stable and enduring predispositions,” which exert sufficient influence to produce generally consistent behavior across widely divergent situations” (quoting Miguel A. Méndez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 227 (1996) (quoting WALTER MISCHEL, PERSONALITY AND ASSESSMENT 6 (Lawrence Erlbaum Assocs. 1996) (1968))). But see Miguel A. Méndez, *Character Evidence Reconsidered: “People Do Not Seem To Be Predictable Characters.”*, 49 HASTINGS L.J. 871, 878 (1998) (“[R]esearch conducted for much of this century showed that behavior is largely shaped by specific situational determinants that do not lend themselves easily to predictions about individual behavior.”).

47. See, e.g., LE CARRÉ, *TINKER*, *supra* note 17 (focusing the novel on four career British intelligence agents, one of whom is actually a “mole,” or spy for the enemy).

48. See, e.g., GRAHAM GREENE, *THE QUIET AMERICAN* (Viking Press 1965) (1955) (telling the story of a seemingly amoral civil servant who becomes aware of the clandestine activities of an American agent in Vietnam); ROBERT LUDLUM, *THE BOURNE IDENTITY* (Bantam Books 1988) (1980) (telling the story of an American intelligence agent who has systematically had his own identity erased by his controllers so that he can be an efficiently amoral killing machine). See also CAWELTI & ROSENBERG, *supra* note 12, at 29 (noting that Greene’s novels concern themselves with the phenomenon of ordinary people caught up in the tension and duplicity of espionage).

49. See CAWELTI & ROSENBERG, *supra* note 12, at 16–17 (describing the psychological tension inherent in the clandestine world, generated by the continual need for pretense and duplicity).

50. LE CARRÉ, *supra* note 14, at 7 (“The East German sentry fired, quite carefully, away from them, into his own sector. The first shot seemed to thrust Karl forward, the

that these agents have been “blown” through the counterintelligence of an East German agent named Karl Mundt,<sup>51</sup> he agrees to undertake Mundt’s murder at the behest of Control, the Chief of British Intelligence.<sup>52</sup> Pretending to be down-and-out after the collapse of his network,<sup>53</sup> Leamas appears to leave the Circus under a cloud of suspicion about missing monies,<sup>54</sup> takes a menial job in a library, picks a fight with a local grocer, and ends up serving several months in jail.<sup>55</sup> Upon his release, apparently now completely cut off from his past as a British intelligence agent, he allows himself to be recruited by East Germany as a spy, intentionally leaking information about clandestine British payments abroad, which allows his East German handler, Fiedler, to suspect Mundt of being in the pay of the British.<sup>56</sup> Leamas is given to understand throughout that the goal of his mission is to bring down Mundt by providing the evidence needed to accuse Mundt of treason.<sup>57</sup>

Even as this complex plot unfolds, however, the reader is made privy to another set of events by which Leamas himself is undermined and the nature of facts and knowledge is challenged. As one critic has put it, the object of the novel is for the reader “to discover that the search for truth and justice is not the real object but only a ruse to protect their opposites

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second to pull him back. . . . Then he sagged, rolled to the ground, and they heard quite clearly the clatter of the bike as it fell. Leamas hoped to God he was dead.”).

51. As Control puts it, “[Mundt is] a killer. . . . He tried to kill George Smiley. And of course he shot the woman’s husband [in an earlier novel, *A Call for the Dead*]. He is a very distasteful man. Ex Hitler-Youth and all that kind of thing. Not at all the intellectual kind of Communist. A practitioner of the cold war.” *Id.* at 16. *See also id.* at 13 (“[Control says to Leamas:] ‘I suppose that girl blew him—Elvira?’ [Leamas replies,] ‘I suppose so.’ . . . ‘And Mundt had him shot,’ Control added.”).

52. *See id.* at 15, 17 (“[Control said,] ‘I think we ought to try and get rid of Mundt.’ . . . [Leamas responds,] ‘If it’s a question of killing Mundt, I’m game.’”).

53. *See id.* at 19 (“In the full view of his colleagues he was transformed from a man honourably put aside to a resentful, drunken wreck—and all within a few months.”).

54. *See id.* at 20 (“It leaked out—no one, as usual, knew where from—that Leamas’ sudden departure was connected with irregularities in the accounts of Banking Section.”).

55. *See id.* at 24 (“Finally he took the job in the library.”); *id.* at 37 (describing the fight with the grocer); *id.* at 38–40 (describing Leamas’s time in jail).

56. *See id.* at 116–18 (“[Fiedler, Leamas’s interrogator, asks,] ‘Tell me: this money, these large sums in foreign banks—what did you think they were for?’ . . . [He suggests tracking the payments and says,] ‘[W]e shall know where the agent was on a certain day. That seems to be a useful thing to know.’”).

57. *See id.* at 121 (“Control had been phenomenally right. Fiedler was walking like a man led in his sleep, into the net which Control had spread for him. It was uncanny to observe the growing identity of interest between Fiedler and Control: it was as if they had agreed on the same plan, and Leamas had been despatched to fulfill it.”).

for reasons of national self-interest . . . .”<sup>58</sup> Control’s goal is not to bring Mundt down but quite the reverse—to shield him from suspicion as the double agent he actually is—and Control has determined to accomplish this by keeping his own agent, Leamas, in the dark.<sup>59</sup> Even while Leamas plays his part, allowing himself to be recruited as a disaffected defector, British agents, including George Smiley, have approached the woman with whom Leamas had an affair during his down-and-out period, and have offered to pay her housing expenses and otherwise provide for her.<sup>60</sup> They have also made a payment to the grocer whom Leamas struck.<sup>61</sup> This connection between Leamas and British Intelligence, wholly at odds with his apparent defection, becomes a weapon for Mundt to impeach Leamas, rebuff Fiedler’s accusation, and demonstrate to his critics that Mundt has been the victim of British spy craft.<sup>62</sup> Using Liz’s membership in the local branch of the Communist Party, Mundt

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58. Most, *supra* note 13, at 361. Most goes on to link this plot inversion to the hard-boiled genre of which it is a descendant:

Yet, by turning those who believe in the ideals of detection into naive pawns in the hands of the cynical practitioners of *Realpolitik*, *The Spy Who Came in from the Cold* pushes Chandler’s moral disillusionment an important step farther. Le Carré’s novel implicitly asks the question whether English society has not reached the point at which the truth must be suppressed and justice thwarted if the society is to be preserved.

*Id.* at 362.

59. As Leamas explains at the novel’s close,

“We are witnessing the lousy end to a filthy, lousy operation to save Mundt’s skin. To save him from a clever little Jew in his own department who had begun to suspect the truth. They made us kill him, d’you see, kill the Jew. Now you know, and God help us both.”

LE CARRÉ, *supra* note 14, at 199. See also MONAGHAN, *supra* note 17, at 16 (noting that Control allows Mundt to destroy Leamas’s East Berlin network to enhance his prestige within the East German security service, thereby giving Control access to more valuable information from that source).

60. LE CARRÉ, *supra* note 14, at 180 (“[Liz explains to the tribunal,] ‘I’ve got a lease. Someone bought the lease and sent it to me.’”). See also *id.* at 92–94 (describing the visit of George Smiley); *id.* at 173 (“[Mundt’s lawyer examines Leamas:] ‘[Y]ou cannot imagine that Smiley would have taken any interest in you after you left the Circus?’ [Leamas responds,] ‘God, no.’ [Mundt’s lawyer continues,] ‘Nor in your welfare after you went to prison, nor spent money on your dependents . . . ?’”).

61. See *id.* at 181 (“[Liz testified,] ‘I heard in the street that the grocer had got some money, a lot of money from somewhere after the trial. There was a lot of talk about it, and I knew it must be Alec’s friend . . .’”) (ellipsis in the original).

62. See *id.* at 184 (“[Mundt’s lawyer, at the end of Liz’s evidence, states,] ‘This is not the first time that a revanchist plot has been uncovered through the decadence of its architects.’”).

arranges for her to be “invited” to visit East Germany,<sup>63</sup> where she is then brought to appear as a witness against Leamas. Mundt describes Smiley’s visit to her,<sup>64</sup> as well as Leamas’s own words, in which Leamas told her that ““there was something he had to do; someone he had to get even with, whatever it cost”” and that he would be going away for a while.<sup>65</sup>

Significantly, le Carré uses the legal ritual of Mundt’s trial as the vehicle through which to reveal the plot inversion he has only, until then, foreshadowed.<sup>66</sup> Openly mocking the Anglo-American image of the trial as a search for truth, le Carré demonstrates the manipulations of evidence and witnesses that are possible within any trial and that British, not East German, intelligence has cynically masterminded.<sup>67</sup> It is not because the formal legal process of the Soviet bloc nation is wanting but because of the duplicitous and deliberate seeding of the factual record by Smiley and Control that the trial unravels in a direction Leamas and the reader cannot expect. Exploitation of Liz’s genuine concern for Leamas becomes the tool that backfires against Leamas and Fiedler, and “saves” Mundt.<sup>68</sup> Indeed, Liz’s intrusion into the trial is an externalization of the clash of identities that has been a source of strain throughout the novel, a representation in the world of the uneasy integration of Leamas’s spy identity with his authentic self.<sup>69</sup> In this way, le Carré invites the reader to see the trial process—the mechanism by which a civilized and sophisticated legal system determines the truth of a matter—as a sham. The novel’s denouement, then, powerfully denounces law and its accompanying institutions and their promises.<sup>70</sup>

Although the reader is permitted inside knowledge of Control’s counterplot to save Mundt and sacrifice Fiedler, our sympathies throughout

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63. See *id.* at 132–33 (letter of invitation).

64. See *id.* at 181–82.

65. *Id.* at 184.

66. See *id.* at 155–91.

67. See SYMONS, *supra* note 3, at 226 (“The whole apparatus of the trial in the *Spy* is a game . . . . And the purpose of such party games is betrayal . . .”).

68. See LE CARRÉ, *supra* note 14, at 182 (“[Mundt’s lawyer argues,] ‘Leamas had done the one thing British Intelligence had never expected him to do: he had taken a girl and wept on her shoulder.’”).

69. Leamas is, throughout the novel, cast as a man utterly alone, “out in the cold.” *Id.* at 14; see also *id.* at 10 (“Somewhere long ago there had been a divorce; somewhere there were children, now in their teens, who received their allowance from a rather odd private bank in the City.”). The reader is told that “[o]nly very rarely . . . did he allow himself the dangerous luxury of admitting the great lie he lived.” *Id.* at 121. See *infra* text accompanying notes 88–90 (discussing the title metaphor).

70. See LE CARRÉ, *supra* note 14, at 191 (“And suddenly, with the terrible clarity of a man too long deceived, Leamas understood the whole ghastly trick.”).

are with Leamas, whose experience of the shifting and unreliable nature of the facts provides the novel's emotional core. On the eve of trial, Leamas falls asleep "content in the knowledge that Fiedler was his ally and that they would shortly send Mundt to his death."<sup>71</sup> But as the facts emerge at trial about the payments to Liz, Leamas becomes less sure, thinking:

How the hell did they know so much? He was sure, he was absolutely sure, he hadn't been followed to Smiley's house that afternoon. And the money—how did they pick up the story about him stealing money from the Circus? That was designed for internal consumption only . . . then how? For God's sake, how?

Bewildered, angry and bitterly ashamed he walked slowly up the gangway, stiffly, like a man going to the scaffold.<sup>72</sup>

The reader is made to feel the anxiety that accompanies Leamas's gradual recognition as he learns of Smiley's visits to Liz and, finally, sees Liz in the East German courtroom, a place in which he never expected her to appear.<sup>73</sup> The reader watches as Leamas struggles to grasp the significance of each new bit of evidence—to make it fit with the facts as he has understood them—and as Fiedler poses questions that Leamas cannot answer:

"Mundt knew what to look for—he even knew the girl would provide the proof—very clever of Mundt I must say. He even knew about that lease—amazing really. I mean how *could* he have found out; she didn't tell anyone. I know that girl, I understand her . . . she wouldn't tell anyone at all."<sup>74</sup>

In this way, each fact and event to which Leamas has assigned meaning is upended and must be reintegrated into a new narrative. As le Carré tells it, "And suddenly, with the terrible clarity of a man too long deceived, Leamas understood the whole ghastly trick."<sup>75</sup> Unlike the satisfying closure we expect of the traditional detective novel, here le Carré invites the reader to experience facts and truth as essentially

71. *Id.* at 150.

72. *Id.* at 185 (ellipsis in the original).

73. *See id.* at 175–76 ("[As Liz entered the courtroom and began her testimony,] [s]he was interrupted by the sound of movement; the screech of furniture forced aside, and Leamas' voice, hoarse, high-pitched, ugly, filling the room. 'You bastards! Leave her alone!' Liz turned in terror and saw him standing, his white face bleeding and his clothes awry, saw a guard hit him with his fist, so that he half fell; then they were both upon him . . ."); *id.* at 190 ("He fell silent for a moment, then continued. 'And I never thought you'd bring the girl. I've been a bloody fool.'").

74. *Id.* at 190 (ellipsis in the original).

75. *Id.* at 191.

unknowable, and the anxiety that this indeterminacy produces as terrifying.<sup>76</sup> The resolution is deeply unsettling rather than cathartic.

Even though there is an analeptic resolution of the plot—a “truth” to be discovered—the fact of its being so thoroughly and cynically concealed by those in whom he has placed his greatest trust, is profoundly disconcerting even to a savvy player like Leamas. There is little pleasure in the revelation of the truth—instead it propels the protagonist to suicide. Thus, one critical difference between spy and detective fiction is that the emotional resolution is neither the triumph of law against criminality nor of order over chaos, but is instead one of despair and moral ambiguity.

It is easy to see the well from which this fictional fascination with identity as the ultimate unknowable fact is drawn: the spy story explores through fiction the metaphysical question that has dominated the later half of the twentieth century—can we ever really know anyone outside of ourselves?<sup>77</sup> As le Carré’s George Smiley ponders to himself in an earlier novel, *Call for the Dead*:

What did Hesse write? “Strange to wander in the mist, each is alone. No tree knows his neighbour. Each is alone.” We know nothing of one another, nothing, Smiley mused. However closely we live together, at whatever time of day or night we sound the deepest thoughts in one another, we know nothing.<sup>78</sup>

This sensibility is at the core of postmodern inquiry.<sup>79</sup> The dislocation and anxiety that accompany the realization of our metaphysical isolation are among the central themes of twentieth century philosophy, literature, psychology, and the arts. Robin West describes it this way:

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76. See Most, *supra* note 13, at 361 (“The conventions of the mystery story are used as a red herring to deceive the reader as well as the characters and they are exploded by the ending, in which the murderer is saved while the East German detective [Fiedler] and the English avenger are killed.”). Because the reader has been persuaded by the narrative to be disgusted by Mundt and to see Leamas as the hero, such an ending cannot be called a resolution because it is so profoundly unsettling. See *id.*

77. See generally Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992) (noting the conceptual difficulty in knowing that which is external to us).

78. JOHN LE CARRÉ, *CALL FOR THE DEAD* 30–31 (Walker & Co. 1962) (1961).

79. See, e.g., KNIGHT, *supra* note 9, at 197 (noting the key attributes of “[p]ostmodern crime fiction” as “tonal complexity[,] . . . rejection of ancient traditions of certain knowledge, assured identity and detective-centered moral authority”); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 5 (1988) (observing that “[l]iberal legalists . . . describe an inner life enlivened by freedom and autonomy from the separate other, and threatened by the danger of annihilation by him,” but that “[c]ritical legal theorists, by contrast, tell a story of inner lives dominated by feelings of alienation and isolation from the separate other, and enlivened by the possibility of association and community with him”).

[A]ccording to the critical theorist, what [the] material state of separation existentially entails is not a perpetual celebration of autonomy, but rather, a perpetual longing for community, or attachment, or unification, or *connection*. The separate individual strives to connect with the “other” from whom he is separate. The separate individual lives in a state of perpetual dread not of annihilation by the other, but of the alienation, loneliness, and existential isolation that his material separation from the other imposes upon him. The individual strives through love, work, and government to achieve a unification with the other, the natural world, and the society from which he was originally and continues to be existentially separated.<sup>80</sup>

So, then exists the metaphorical struggle with identity in the espionage novel.

By attaching grave consequences—in espionage novels, global political consequences—to the failure to correctly identify another, the spy story allows us to examine, in amplified volume, a question that is central to our daily lives. Errors about identity mean that we are acting without the guidance and comfort that knowledge affords; they are a source of anxiety because we are made to see that the risk of error is significant, and we are loath to err in matters of great importance.<sup>81</sup> Like with other artistic explorations of aspects of the human experience, there is a cathartic aspect to the fictional exaggeration of these stakes in the form of the spy and his double identity; surely, no ordinary individual can have as much to lose by being wrong as Leamas, Mundt, and Fiedler.<sup>82</sup> The ability to manage the anxiety associated with these fictional

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80. West, *supra* note 79, at 9–10; *see also* Patterson, *supra* note 77, at 271–77 (contending that “[l]anguage is the central preoccupation of contemporary philosophy,” and that “[t]he postmodern conception of individuality casts the individual not as the subject in control of discourse, but as an artifact produced by discourse,” so that “identities can come into being and dissolve depending on the concrete practices that constitute them”). For a literary expression of this theme, *see* E.M. FORSTER, *HOWARDS END* 167–73 (Alistair M. Duckworth ed., Bedford Books 1997) (1910) (depicting the character Margaret who invokes the metaphorical refrain “only connect,” saying, “That was the whole of her sermon. Only connect the prose and the passion, and both will be exalted, and human love will be seen at its highest. Live in fragments no longer. Only connect, and the beast and the monk, robbed of the isolation that is life to either, will die”).

81. *See* WINKS, *supra* note 11, at 103–04 (writing about Jorge Luis Borges’s *Tlön, Uqbar, Orbis Tertius*, Winks describes “the sense of mirror-menace so central to spy fiction, since it presupposes the existence of a secret organization that is spreading either true knowledge or, more likely, fictitious impressions, which when accepted will change the entirety of man’s recording of his activity on earth”).

82. The reader is assured that whoever is believed will live; whoever is disbelieved will be shot. *See* LE CARRÉ, *supra* note 14, at 194 (“‘Who will they shoot now?’ Liz asked quickly. ‘After the trial?’ ‘Leamas,’ [the prison guard] replied indifferently, ‘and the Jew, Fiedler.’ Liz thought for a moment she was going to fall but her hand found the back of a chair and she managed to sit down.”).

international political identity shifts makes daily uncertainties more bearable.

But if, as this paper claims, one of law's fundamental functions is to ascertain truth through mechanisms like trials, this representation of life's factual uncertainties deeply undermines confidence in that aspect of law. The consequences that attach to the determination of truth—guilt and innocence, compensation and punishment—cannot enjoy the kind of public trust and acceptance that they once did if their predicate is so uncertain.<sup>83</sup> Moreover, when good and evil actors can be mistaken for one another and the acts of one can be attributed to another, it is vastly more difficult to condemn or justify either.<sup>84</sup>

The inability to determine facts with certainty, then, necessarily raises fundamental questions about law's legitimacy because errors in the factual findings that underlie legal consequences thereby invalidate those consequences.<sup>85</sup> Accordingly, doubts about factual accuracy cannot be confined to the episodes themselves but instead spill over into the larger political arena of law's legitimacy. This becomes plainer still when one considers law's other important function: to embody the moral norms of the culture for which it speaks.<sup>86</sup>

The incapacity to know for certain the truth of an event or the identity of another also exposes its terrifying corollary: understanding that we are essentially alone. Without clear guidance about who is trustworthy and who is duplicitous, life is a solitary journey fraught with constant risk of betrayal.<sup>87</sup> The life of the spy is a fictional exaggeration of this state of

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83. See, e.g., Nesson, *supra* note 21, at 1359 (“The aim of the factfinding process is not to generate mathematically ‘probable’ verdicts, but rather to generate acceptable ones . . .”).

84. See *infra* Part IV (discussing *The Spy Who Came in from the Cold*: either he is targeting Mundt and law acts for good, or he is, in fact, targeting Fiedler, in which case law acts for evil and destroys the innocent).

85. One notorious example is the repeated exoneration, through DNA and other forensic tools, of those convicted of capital crimes, which resulted in the wholesale commutation of death sentences by a sitting governor. See *Governor Clears Illinois Death Row*, BBC NEWS (Jan. 11, 2003, 10:27 PM), <http://news.bbc.co.uk/2/hi/2649125.stm> (reporting that Governor George Ryan of Illinois had commuted the death sentences of all Illinois prisoners, three years after imposing a moratorium on capital sentences, because of the concern that “the Illinois death penalty system is arbitrary and capricious—and therefore immoral.”). More subtle ambiguities of fact are endemic to the trial process and result in corresponding concerns about the validity of the judgments upon which they rest. See, e.g., Cavallaro, *supra* note 44, at 850–51 (noting that contemporary scholarship recognizes that differences in perception may flow from differences in gender, race, and culture).

86. See *infra* Part IV.

87. In the novels of le Carré, the betrayals are both personal and professional, from the mole of *Tinker, Tailor, Soldier, Spy*, to the affairs of Smiley's high-born wife Ann:

isolation, and le Carré describes it powerfully in the enduring metaphor of his title, *The Spy Who Came in from the Cold*. As Control explains to Leamas early in the novel:

“We have to live without sympathy, don’t we? That’s impossible of course. We act it to one another, all this hardness; but we aren’t like that really, I mean . . . one can’t be out in the cold all the time; one has to come in from the cold . . . d’you see what I mean?”<sup>88</sup>

Control asks Leamas to participate in the mission to bring Mundt down, continuing the metaphor: “I want you to stay out in the cold a little longer,” Control says.<sup>89</sup> The implication is that, when the mission is completed, there will be an end to the alienation and isolation of the spy’s life; in fact, the narrative denies this relief to both Leamas and the reader, instead reinforcing the persistent anxiety and dread that accompanies it.<sup>90</sup>

The counterpoint to the isolation of the spy’s life<sup>91</sup> is the “warmth” of human connection and intimacy, which Leamas finds with Liz. Leamas comes to realize this during his prolonged debriefing in Holland:

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both are constructed on the premise that we can never really know one another or the truth. As Robin Winks puts it, “the spy, amateur or professional, must move alone, all society set against him, perhaps even his own control betraying him.” WINKS, *supra* note 11, at 51.

88. LE CARRÉ, *supra* note 14, at 14 (ellipses in original). Control explicates this idea further when Leamas agrees to kill Mundt, saying, “I mean in our world we pass so quickly out of the register of hate or love—like certain sounds a dog can’t hear. All that’s left in the end is a kind of nausea; you never want to cause suffering again.” *Id.* at 17. The irony is that Control conveys empathy for Leamas that his actions belie entirely: Control has no intention of allowing Leamas to act on his own hatred of Mundt because Mundt is too valuable an agent. Instead, Control uses Leamas to achieve an antithetical result at great human cost.

89. *Id.* at 14.

90. Leamas, “a man permanently isolated in his deceit,” explains:

In itself, the practice of deception is not particularly exacting; it is a matter of experience, of professional expertise, it is a facility most of us can acquire. But while a confidence trickster, a play-actor or a gambler can return from his performance to the ranks for his admirers, the secret agent enjoys no such relief. For him, deception is first a matter of self-defence. He must protect himself not only from without but from within, and against the most natural of impulses; . . . though he be an affectionate husband and father, he must under all circumstances withhold himself from those in whom he should naturally confide.

*Id.* at 120.

91. See *supra* note 1 and accompanying text (“To everyone he meets he stays a stranger . . . Secret agent man . . . They’ve given you a number and taken away your name.”).

There was a girl standing on the beach throwing bread to the seagulls. Her back was turned to him. The sea wind played with her long black hair and pulled at her coat, making an arc of her body, like a bow strung towards the sea. He knew what it was then that Liz had given him; the thing that he would have to go back and find if he ever got home to England: it was the caring about little things—the faith in ordinary life; the simplicity that made you break up a bit of bread into a paper bag, walk down to the beach and throw it to the gulls. It was this respect for triviality which he had never been allowed to possess; whether it was bread for the seagulls or love, whatever it was he would go back and find it; he would make Liz find it for him.<sup>92</sup>

In the final scene of the novel, after Leamas realizes the depth of betrayal he has experienced at the hands of Control and his other bosses, he chooses death over this degree of isolation.<sup>93</sup> For Leamas, it is not possible to “come in from the cold,” so complete is his alienation from a life of feeling and intimacy, and from his authentic self.<sup>94</sup> And the final cruelty of *The Spy Who Came in from the Cold* is that Control exploits Leamas’s human need for connection and love—his feelings for Liz—to guarantee the safety and continued utility of Mundt.<sup>95</sup> As Liz explains, “It’s far more terrible, what they are doing; to find the humanity in

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92. LE CARRÉ, *supra* note 14, at 85.

93. *Id.* at 212 (describing George Smiley who can be heard from the western side of the wall calling for Leamas to jump after shots ring out). Le Carré writes:

Shielding his eyes [Leamas] looked down at the foot of the wall and at last he managed to see her, lying still. For a moment he hesitated, then quite slowly he climbed back down the same rungs, until he was standing beside her. She was dead; her face was turned away, her black hair drawn across her cheek as if to protect her from the rain.

*Id.*; see also West, *supra* note 79, at 12 (“Subjectively, and in spite of the dominant culture’s insistence to the contrary, we long to establish some sort of human connection with the other in order to overcome the pain of isolation and alienation which our separateness engenders.”).

In this respect, Leamas is in the tradition of the hard-boiled detective, about whom Robin Winks writes, “[B]ehind the facade of toughness is someone sentimental enough to care about both truth and people, though truth comes first.” WINKS, *supra* note 11, at 99.

94. See CAWELTI & ROSENBERG, *supra* note 12, at 32 (describing the metaphor of “the cold” as twentieth century alienation of the individual); *id.* at 20–21 (discussing how the labile identity of the spy leads to extraordinary isolation and even paranoia, with no one to trust and no community of which to be a part); see also PANEK, *supra* note 14, at 238 (“For Le Carré, man is essentially an isolated, undefined entity, existing in a world which is terribly difficult but one in which identity is possible on a number of levels.”). Thus, Leamas’s estrangement from the nameless wife and children of his past. See LE CARRÉ, *supra* note 14, at 10.

95. In the final scene before the tribunal, Mundt’s lawyer, Karden, mocks Leamas’s human need for intimacy saying, “‘Leamas had done the one thing British Intelligence had never expected him to do: he had taken a girl and wept on her shoulder.’ Then Karden laughed quietly, as if it were all such a neat joke.” LE CARRÉ, *supra* note 14, at 182.

people, in me and whoever else they use, to turn it like a weapon in their hands, and use it to hurt and kill . . .”<sup>96</sup>

Additionally destabilizing is the perception, fueled by the work of le Carré, that although individuals cannot comprehend the truth of events or identities, the authoritarian state knows everything about us. Even as we are cut off from the comfort of knowledge and certainty, the novelist generates additional anxiety in the reader by imagining a regime—on both sides of the Iron Curtain—in which we cannot conceal even the most intimate emotional details of our lives from an all-knowing bureaucracy. As Leamas explains to Liz the plot by which Mundt destroyed Fiedler and saved himself, Liz asks, “But how could they know about me; how could they know we would come together? . . . Heavens above, Alec, can they even tell when people will fall in love?”<sup>97</sup> This image suggests a state in which intimacy is impossible because the privacy it requires is also impossible. And although the Cold War generated images of such a state on the Soviet side of The Wall,<sup>98</sup> le Carré’s purpose in *The Spy Who Came in from the Cold* is to demonstrate that intrusion into our intimate lives is a function of modern life and occurs with equal frequency in the West.<sup>99</sup>

Le Carré depicts the intelligence bureaucracy’s knowledge as detached, unemotional, perfect. He never tells us Control’s real, human name but instead allows it to evoke a generic and fearful authoritarianism.<sup>100</sup> He uses the term *London* for the collection of unnamed individuals who hatch the plot by which Leamas is deceived: “Fiedler was too powerful for Mundt to eliminate alone, so London decided to do it for him. I can see them working it out, they’re so damned academic; I can see them

96. *Id.* at 204 (ellipsis in the original). She continues, “[T]hey’re more wicked than all of us. . . . Because of their contempt, . . . contempt for what is real and good; contempt for love, contempt for . . .” *Id.* (final ellipsis in the original).

97. *Id.* at 201.

98. For example, Liz’s wardress tells Liz that the prisoners housed there are “[e]nemies of the state, . . . [s]pies, agitators,” and when asked how she knows they are spies, the wardress replies “The Party knows. The Party knows more about people than they know themselves. Haven’t you been told that?” *Id.* at 193.

99. Indeed, at an earlier point in the novel, Control mentions Liz, and Leamas responds: “I don’t want her brought into this.” *Id.* at 46. Control’s reply is disingenuous: “Why should she be?” Control asked sharply and for a moment, just for a moment, Leamas thought he had penetrated the veneer of academic detachment. “Who suggested she should be?” *Id.*

100. The choice of the sobriquet “Control,” of course, evokes oppressive domination.

sitting around a fire in one of their smart bloody clubs.”<sup>101</sup> This yin and yang depiction of “knowledge as elusive for individuals but comprehensive when collected against individuals” defines a state in which totalitarianism is inevitable.

For Ian Fleming’s James Bond, the game of identity generates not anxiety but amusement. Unlike le Carré, Fleming’s spy is not tormented by doubt and confusion; but neither is he real in the sense that Leamas appears real to the reader. Instead, Bond is an impossible cartoon,<sup>102</sup> an agglomeration of traits that no real individual possesses.<sup>103</sup> His adventures with identity do not create anxiety because the tone of the novels assures us there will be no unpleasant surprises.

Indeed, everything about Bond’s identity is transparent, even blatant: his expensive tastes in brand-name clothing, cars, and food; his superhuman strength; and his extraordinary appeal to the opposite sex

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101. LE CARRÉ, *supra* note 14, at 200. The “smart bloody clubs” reference is one of many by which le Carré associates powerful state actors with the class hierarchy of British society. Many of his novels are concerned with the link between the public school/Oxford/Cambridge educated elite and the British Intelligence Service. *See generally* LE CARRÉ, HONOURABLE SCHOOLBOY, *supra* note 17 (using a title metaphor that evokes a character defined by a moral from the bygone world of British public schools); LE CARRÉ, TINKER, *supra* note 17 (depicting relationships among the loyal and double agents that are formed at a boys’ boarding school). Leamas is, by contrast, very much *not* of that world: le Carré says that “[i]f he were to walk into a London club the porter would certainly not mistake him for a member . . . . He looked like a man who could make trouble, a man who looked after his money, a man who was not quite a gentleman.” LE CARRÉ, *supra* note 14, at 10. When Liz asks Leamas, “[W]hat do you believe in?,” he replies sarcastically, “I believe an eleven bus will take me to Hammersmith. I don’t believe it’s driven by Father Christmas.” [Liz presses,] ‘You must believe in something,’ [and Leamas replies,] ‘I don’t like Americans and public schools. I don’t like military parades and people who play soldiers.’” *Id.* at 30; *see also id.* at 12 (“[Leamas describes Control as] shorter than Leamas remembered him: otherwise, just the same. The same affected detachment, the same donnish conceits; the same horror of draughts; courteous according to a formula miles removed from Leamas’ experience. The same milk-and-water smile, the same elaborate diffidence, the same apologetic adherence to a code of behaviour which he pretended to find ridiculous. The same banality.”).

102. For some critics, this aspect of Fleming’s novels is an occasion for criticism. *See, e.g.,* PANEK, *supra* note 14, at 201 (“[Fleming] fails to render more than cartoon reality in his characters, either major or minor.”).

103. *See id.* at 207 (“Bond is the essential clubman, intent on comforting rituals of dress and consumption . . .”). These rituals of etiquette might be seen as filling the void left when moral standards of a more enduring kind seem to have crumbled.

At least one critic has suggested that “the growth of Bond as a mythical figure, with its accompaniments of brand-name shirts, shoes, drinks, cigarettes, games, came after the immense success of the first Bond film made in 1962, two years before Fleming’s death.” SYMONS, *supra* note 3, at 224.

are all unwavering aspects of his iconic character.<sup>104</sup> His identity is so fixed as to defy contemporary experience, providing a consoling antidote to the anxiety associated with shifting and ambiguous identity. The certitude of his character is a touchstone for and counterpoint to the existential doubt that has come to define late twentieth century fiction and philosophy. But this certitude must operate in the realm of fantasy.<sup>105</sup> As Julian Symons puts it, “He was a perfect pipe-dream figure for organization man, because he was an organization man too, but unlike the standard model, he was individually powerful. He could act, he could destroy, he appeared to be free.”<sup>106</sup> Bond’s unlikely clarity of self serves only to underscore the reality of our experience: that, unlike Bond, we can never really be sure about the identity of another.

When Bond is allowed, briefly, to doubt his role as a professional assassin, he is quickly reined in and assured that his is the side of unambiguous good against evil. As Umberto Eco writes:

The difference between good and evil—is it really something neat, recognizable, as the hagiography of counterespionage would like us to believe? At this point, Bond is ripe for the crisis, for the salutary recognition of universal ambiguity, and he sets off along the route traversed by the protagonist of *le Carré*. But at the very moment he questions himself about the appearance of the devil and, sympathizing with the Enemy, is inclined to recognize him as a “lost brother,” Bond is treated to a salve from Mathis [an American colleague]: “When you get back to London you will find there are other *Le Chiffres* [the villain of *Casino Royale*] seeking to destroy you and your friends and your country. . . . [A]nd you will go after them to destroy them in order to protect yourself and the people you love. . . . Surround yourself with human beings, my dear James. They are

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104. See CAWELTI & ROSENBERG, *supra* note 12, at 128 (“[Bond is] ‘an expression . . . of the prime myth of the British upperclass, the delusion that it is a genuine elite, distinguished by an “effortless superiority.” It does everything better, with no trouble, than the lower orders do with great effort.” (quoting Joan Rockwell, *Normative Attitudes of Spies in Fiction*, in MASS CULTURE REVISITED 325, 331 (Bernard Rosenberg & David Manning White eds., 1971))); PANEK, *supra* note 14, at 207 (“One of the most remarked upon features of Bond’s characterization is his fastidious adherence to personal custom and etiquette. He always smokes Morelands, he always drinks vodka martinis, he always wears a black knit tie . . .”); WINKS, *supra* note 11, at 53 (describing James Bond as “Ian Fleming’s walking set of brand names”).

105. CAWELTI & ROSENBERG, *supra* note 12, at 148 (“[T]here is always an edge of irony and burlesque in [Fleming’s] style and in his inventions.”); PANEK, *supra* note 14, at 236 (contrasting the “fantasies of Fleming” with *le Carré*’s portrayals of “an enervated Britain reeling from its fall from international power and its own internal problems”).

106. SYMONS, *supra* note 3, at 224. As Symons explains, “Into the British post-war atmosphere of virtuous puritanism he brought a celebration of physical pleasures, including those of sadism and masochism.” *Id.* at 223–24.

easier to fight for than principles. . . . But don't let me down and become human yourself. We would lose such a wonderful machine."<sup>107</sup>

Unlike le Carré, Fleming does not depict a “discrepancy between the agent’s goals and those of his control.”<sup>108</sup> British intelligence in Fleming’s work is consistently on the side of the good, and evil is depicted with equal clarity and consistency.<sup>109</sup> The villains in the Bond novels tend to be cartoonish as well: Dr. No, Goldfinger, and others, as one critic puts it, “All have crashed their ways into the Gentleman’s Club, but they do not belong—they are as common as linoleum.”<sup>110</sup> Often the villain has exaggerated physical traits, like obesity, baldness, or other grotesque elements of physiognomy.<sup>111</sup> Often, too, the villain plays a broad ethnic stereotype in sharp contrast to the pure English of Bond’s persona.<sup>112</sup> These caricatures are in marked contrast to the world of le Carré, in

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107. Umberto Eco, *Narrative Structures in Fleming*, in *THE POETICS OF MURDER: DETECTIVE FICTION AND LITERARY THEORY* 93, 95 (Glen W. Most & William W. Stowe eds., 1983) (quoting IAN FLEMING, *CASINO ROYALE* 137–38 (Berkeley Books 1982) (1953)). Eco goes on to explain that with these words,

Bond is to abandon the treacherous life of moral meditation and of psychological anger, with all the neurotic dangers that they entail. . . . From that moment Bond does not meditate upon truth and justice, upon life and death, except in rare moments of boredom, usually in the bar of an airport but always in the form of a casual daydream, never allowing himself to be infected by doubt . . . .

*Id.* at 95–96.

108. DAVID MONAGHAN, *THE NOVELS OF JOHN LE CARRÉ: THE ART OF SURVIVAL* 106–07 (1985).

109. Eco writes about how Fleming exploits classic structures of mythology in his Bond stories, with a set of dichotomies including the hero/villain dichotomy with “all the characteristics of the opposition between Eros and Thanatos,” and says:

Thus arises the suspicion that our author does not characterize his creations in such and such a manner as a result of an ideological opinion but purely for rhetorical purposes. By “rhetoric” I mean an art of persuasion which relies on *endoxa*, that is, on the common opinions shared by the majority of readers.

Fleming is, in other words, cynically building an effective narrative apparatus.

Eco, *supra* note 107, at 114.

110. PANEK, *supra* note 14, at 208–09 (noting how Bond’s enemies are “*nouveau riche* slobs . . . [who] cheat at cards”). Panek also observes that the villains of Fleming’s novels “are more gangster than political antagonist.” *Id.* at 205; *see also* SYMONS, *supra* note 3, at 223 (noting that “[a]s Kingsley Amis has pointed out, ‘throughout all Bond’s adventures nobody English does anything evil,’” and that “to use foreigners as villains was merely ‘a convention older than our literature’”).

111. *See, e.g.*, FLEMING, *THUNDERBALL*, *supra* note 15, at 48 (depicting the villain, Ernst Stavro Blofeld, as obese: “Nothing about Blofeld was small”).

112. *See, e.g.*, IAN FLEMING, *LIVE AND LET DIE* 18 (Berkeley Books 1982) (1954) (depicting the villain, Mr. Big, as a Haitian man who “had been initiated into Voodoo as a child”); *see also* CAWELTI & ROSENBERG, *supra* note 12, at 128–29 (“Where the hero is pure Anglo-Saxon, the villain is invariably from an ‘inferior’ race or some curious racial mixture.”).

which ambiguity and duality are ever-present and there is “little or no moral distinction between hero and supposed villain.”<sup>113</sup>

### III. LAW AS ORDERING RELATIONS BETWEEN INDIVIDUAL AND STATE

Another central function of law is to order relations between the individual, or a collection of individuals, and the state. In the history of detective fiction, this aspect of law is plainly on display. Detective fiction has permitted exploration of the expectations and attitudes of a society toward the legal institutions that it has constructed for itself.<sup>114</sup>

In the law and order narratives of the classic or golden age of Christie, Sayers, and others, law is a benevolent force that reliably restores order to a community whenever a rogue individual has sought to undermine it.<sup>115</sup> The state is a construct that is ordered by law and that allows individuals to thrive under its protective mantle.<sup>116</sup> The function of law in the mysteries of the classic era is to determine who the aberrant

113. MONAGHAN, *supra* note 108, at 107. Monaghan observes that, in le Carré’s novels, the “heroes either fall short of the goal of their mission, are killed, or, having been made aware of the humanity of their antagonist, are dissatisfied with their success.” *Id.* at 108.

114. These expectations and attitudes about a culture’s legal institutions and precepts are not only time specific, but also culture specific: the detective fiction of a Sicilian novelist like Andrea Camilleri presents a legal culture quite different from that of the Swedish police procedurals of Henning Mankell’s Kurt Wallander. *See, e.g.*, ANDREA CAMILLERI, *EXCURSION TO TINDARI* (Stephen Sartarelli trans., Penguin Books 2005) (2000); HENNING MANKELL, *FACELESS KILLERS* (Steven T. Murray trans., Vintage Books 2003) (1991). These cultural variations provide one of the pleasures of a broad reading of detective fiction. *See generally* Clive James, *Blood on the Borders: Crime Fiction from All Over*, *NEW YORKER*, Apr. 9, 2007, at 91, 93 (observing that “[i]n most of the crime novels coming out now, it’s a matter not of what happens but of where,” and that “[e]ssentially, they are guidebooks”).

115. Indeed, in the Golden Age detective stories with which we are so familiar, law is a comforting presence that restores not only order in general but class hierarchy in particular. The peculiarly English upstairs/downstairs dynamic of most of these novels operates to reify the class structure and privilege of the pre-War period, long after many of those hierarchies had begun, in reality, to erode. *See, e.g.*, D.A. MILLER, *THE NOVEL AND THE POLICE* 36–39, 45–46 (1988) (observing these dynamics in the work of Wilkie Collins). In that respect, law in these fictional narratives is unambiguously benign in its operation on individuals; only the guilty are punished, and there is no doubt about their moral dessert by novel’s end.

116. In these narratives, law also operates to foster class hierarchies that are depicted as benevolent. Often, the deviant actor in the story is one who seeks to challenge or upend these established relations between classes. *See, e.g., id.* at 40–41.

members are and to expel them from the community through the institutions and procedures of law enforcement and justice.

In the world of hard-boiled detective fiction, there is an embattled relation between the individual detective and the corrupt bureaucracy of law enforcement.<sup>117</sup> This problematic relation reflects a growing attitude of mistrust of legal actors and institutions in a society in which those institutions burgeoned quickly and appeared to intrude into many aspects of the social order.<sup>118</sup> The fundamental premise of the classic detective novels—that even if individual police officers were occasionally imperfect or even incompetent,<sup>119</sup> law acted with benevolent neutrality to restore order and hierarchy<sup>120</sup>—was no longer an accepted norm. Detectives like Philip Marlowe and Sam Spade emerged as individuals who mistrust not only the bad guys but also the good guys—police officers and police departments that were “on the take,” judicial systems that permitted or facilitated “frame-ups,” and lawmakers who were more interested in reelection and the perks of power than in the community they were paid to serve.<sup>121</sup> This was a very different expression of the

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117. See generally McCANN, *supra* note 9 (discussing how “hard-boiled crime fiction” became “a complaint against social corruption,” which writers indicated “was part of a moral struggle against dishonesty”). The problematic relation between individual and state is a hallmark of the hard-boiled mystery and reflects a growing attitude of mistrust of legal actors and institutions. See, e.g., PORTER, *supra* note 2, at 197–98 (noting how in hard-boiled fiction “the victims are ordinary citizens who have recourse neither to their political leaders nor to the law because both politics and law enforcement are part of the corrupt system”); George Grella, *The Hard-Boiled Detective Novel*, in *DETECTIVE FICTION: A COLLECTION OF CRITICAL ESSAYS* 103, 111 (Robin W. Winks ed., 1980) (“In the devastated society of the hard-boiled novel, crime is not a temporary aberration, but a ubiquitous fact.”).

118. See *id.* at 105.

119. See, e.g., SIR ARTHUR CONAN DOYLE, *THE ADVENTURE OF THE NORWOOD BUILDER* (1903), reprinted in *THE RETURN OF SHERLOCK HOLMES* 39, 43–44, 48, 60 (The Mysterious Press 1987) (describing how Inspector Lestrade errs in concluding prematurely, and gloating with certainty, that Holmes’s client has committed murder, but later acknowledges his error).

120. See SYMONS, *supra* note 3, at 21 (“[W]hat crime literature offered to its readers for half a century from 1890 onwards was a reassuring world in which those who tried to disturb the established order were always discovered and punished.”).

121. See, e.g., CHANDLER, *THE BIG SLEEP*, *supra* note 6, at 113–14; Grella, *supra* note 117, at 106 (“The private detective always finds the police incompetent, brutal, or corrupt, and therefore works alone.”). As George Grella observes, “Criminals and policemen are not the only moral offenders; culpability often begins at the highest social levels.” Grella, *supra* note 117, at 111; see also PORTER, *supra* note 2, at 198 (“The big house, that enduring symbol of social stability through hierarchical order in the British tradition, takes in Chandler the form of the Sternwood mansion (*The Big Sleep*) . . . . The ostentatious luxury of the decor serves chiefly to point up the ironic contrast with the moral corruption of the inhabitants.”).

relationship between the individual and the legal system than had undergirded the fiction of Christie, Sayers, and others.

Espionage fiction takes this relation to another level. The ironic skepticism of the hard-boiled detective is further deepened to a depiction of the state as a terrifying entity so estranged from the individual and the individual's needs as to be malevolent; the individual, even a savvy player like Leamas the career spy, is its vulnerable prey.<sup>122</sup> Here, law is no benevolent or consoling force but is instead a juggernaut of authoritarian abuse whose theoretical commitment to the rights of the individual has become so remote as to be indiscernible.<sup>123</sup> As Leamas puts it in the final hours of the novel:

“Oh Liz,” he said desperately, “for God’s sake believe me. I hate it, I hate it all; I’m tired. But it’s the world, it’s mankind that’s gone mad. We’re a tiny price to pay . . . but everywhere’s the same, people cheated and misled, whole lives thrown away, people shot and in prison, whole groups and classes of men written off for nothing. And you, your party—God knows it was built on the bodies of ordinary people. You’ve never seen men die as I have, Liz . . .”<sup>124</sup>

Le Carré’s protagonists are deeply skeptical about the motives and goals of the state, as they witness public authorities like Control committing the most serious wrongs for some ostensible public good.<sup>125</sup> Leamas’s recognition of the state’s malevolent abuse of power—represented by Liz’s death at the hands of the East German police—impels him to climb back down to the Eastern side of the Wall to meet

122. Throughout most of the novel, Leamas appears to the reader as a man in control of events, but we learn at the conclusion that we have been grossly misled and that, instead, Leamas is a pawn in a battle between nation-states and that the risks that he has accepted are far greater than he has understood. See LE CARRÉ, *supra* note 14, at 205 (“[Leamas explains to Liz,] ‘We’re a tiny price to pay . . . but everywhere’s the same, people cheated and misled, whole lives thrown away, people shot and in prison, whole groups and classes of men written off for nothing.’” (ellipsis in original)).

123. As Liz explains to Leamas:

“You don’t understand. You don’t want to. You’re trying to persuade yourself. It’s far more terrible, what they [the British] are doing; to find the humanity in people, in me and whoever else they use, to turn it like a weapon in their hands, and use it to hurt and kill . . .”

*Id.* at 204 (ellipsis in original).

124. *Id.* at 205 (ellipses in original).

125. See *id.* at 199 (“[Leamas tells Liz,] ‘We are witnessing the lousy end to a filthy, lousy operation to save Mundt’s skin. To save him from a clever little Jew in his own department who had begun to suspect the truth. They made us kill him, d’you see, kill the Jew. Now you know, and God help us both.’”).

his death beside her.<sup>126</sup> She has already been sacrificed by Control to an end that is hardly an obvious good: protecting and preserving the anti-Semitic killer Mundt.<sup>127</sup>

In this narrative, the state, so far from providing a protective mantle to individual citizens, uses and disposes of them, raising disturbing questions about the purpose of law. The long-accepted liberal premise that law operates through state institutions to preserve and protect individual rights and autonomy<sup>128</sup> is turned on its head when Liz is hailed into East Germany to be used against her deep feelings of attachment to Leamas,<sup>129</sup> and Leamas is placed at risk while being kept in the dark as to the true object of his mission.<sup>130</sup> Ironically, this treatment of Liz and Leamas is all in the name of preserving England against the scourge of a totalitarian socialist state, whose iconic attributes are those to which Liz and Leamas are subjected by their own government.

The state, in this depiction, is created and empowered by law; it has all the information and withholds it from individuals based upon the covert utilitarian calculations of a few and at an extraordinary moral cost.<sup>131</sup> In addition, in this representation, the State has become estranged from the individual and mechanistic in its enforcement of norms that are unlinked to fundamental human moral norms.<sup>132</sup> Although the East German State is held up to derision for its statist control of employment, residence, and even food supplies, in the end it is the British power elite whose control

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126. See *id.* at 212 (“For a moment he hesitated, then quite slowly he climbed back down the same rungs, until he was standing beside her.”).

127. See *id.* at 199 (“We are witnessing the lousy end to a filthy, lousy operation to save Mundt’s skin.”).

128. See, e.g., Gerald B. Wetlauffer, *Systems of Belief in Modern American Law: A View from Century’s End*, 49 AM. U. L. REV. 1, 9 (1999) (describing the “Master Paradigm” of Liberalism, “the larger system of belief within which the others all arise,” as espousing a belief that “the proper role of the state is to protect the rights of . . . individuals and to provide a mechanism for the mediation for . . . their conflicting desires”).

129. See LE CARRÉ, *supra* note 14, at 175–85 (describing Liz’s appearance before the tribunal and noting that “[s]he didn’t know whether to lie, that was the terrible thing. . . . She couldn’t lie unless she knew what was at stake; she would fumble on and Alec would die—for there was no doubt in her mind that Leamas was in danger”).

130. The one thing Leamas particularly asks is that Liz not be part of the mission; he says to Control, “I just want her left alone . . . . I just don’t want her to be messed about. I don’t want her to have a file or anything. I want her forgotten.” *Id.* at 47. This is the opposite of what Control in fact does.

131. These costs include the accepted deaths of Leamas’s network of agents, of Fiedler, and even of Liz and Leamas, as well as the resultant triumph of an amoral killer, Mundt.

132. See *infra* Part IV.

of information and cynical manipulation of human feelings of love and protectiveness appears devastatingly inhumane and amoral.<sup>133</sup>

What the state, through law, does operate to preserve, le Carré suggests, is a crude subsistence existence that mirrors the East Germany of popular imagination<sup>134</sup> and is depicted through Leamas's "cover" identity as a drone laborer in an obscure library.<sup>135</sup> Although it is a safe life, the work is menial and mind-numbing,<sup>136</sup> and provides only enough income for both Leamas and Liz to live in bare poverty, in tiny flats, eating the cheapest food.<sup>137</sup> Moreover, the workplace is presented as a scale replica of the relation of authoritarian state to citizen, with a boss who is, without explanation, arbitrary, inhumane, and demeaning.<sup>138</sup> The employees work in alienated silence; even when they somehow manage to forge a connection, it is impersonal, anonymous.<sup>139</sup> Liz appears desperate to find meaning first by joining "the Party" and imagining a

133. See, e.g., LE CARRÉ, *supra* note 14, at 77 ("[Upon learning that the lover of one of his agents had been murdered in West Berlin, Leamas muses,] 'He wondered why Control had never told him Elvira had been murdered. . . . It was useless speculating. Control had his reasons; they were usually so bloody tortuous it took you a week to work them out.'").

134. See *id.* at 151–53 (describing Liz's visit to an East German party meeting).

135. See *id.* at 24–29 (describing Leamas's work in the library).

136. Liz explains, "It's just a question of checking that all the books are in the shelves. . . . When you've checked you pencil in the new reference and mark it off on the index." *Id.* at 25.

137. Le Carré says of Leamas's flat:

[It] was small and squalid, done in brown paint with photographs of Clovelly. It looked directly on to the grey backs of three stone warehouses, the windows of which were drawn, for aesthetic reasons, in creosote. Above the warehouse there lived an Italian family, quarrelling at night and beating carpets in the morning. Leamas had few possessions with which to brighten his rooms. He bought some shades to cover the light bulbs, and two pairs of sheets to replace the hessian squares provided by the landlord. The rest Leamas tolerated: the flower pattern curtains, not lined or hemmed, the fraying brown carpets and the clumsy darkwood furniture, like something from a seamen's hostel. From a yellow, crumbling geyser he obtained hot water for a shilling.

*Id.* at 21.

138. See *id.* at 26–28 (describing Leamas's supervisor, Ms. Crail, who upbraids him for bringing his shopping bags into the library and for putting his coat on her peg; Leamas "[h]ad become the enemy of Miss Crail, and enemies were what Miss Crail liked. Either she scowled at him or she ignored him.").

139. See *id.* at 29 ("[Liz] always knew that there was something deeply wrong with Leamas, and that one day, for some reason she could not understand, he might break and she would never see him again.").

utopian alternative to her own shabby loneliness,<sup>140</sup> then by inviting the silent and sullen Leamas to dinner at her flat, just “a bed-sitting-room and a kitchen,” with “two armchairs, a divan bed, and a bookcase full of paper-back books.”<sup>141</sup> There, in her domestic enclave, she struggles to make a personal connection to Leamas, questioning him about his beliefs, only to be rebuffed by his brusque sarcasm and refusal to divulge anything about his past:

“You must believe in something,” she persisted: “something like God—I know you do, Alec; you’ve got that look sometimes, as if you’d got something special to do, like a priest. Alec, don’t smile, it’s true.”

He shook his head.

“Sorry, Liz, you’ve got it wrong. I don’t like Americans and public schools. I don’t like military parades and people who play soldiers.” Without smiling he added, “And I don’t like conversations about Life.”<sup>142</sup>

Despite his tough exterior, however, Leamas does ultimately develop protective feelings for Liz, so that when she is made the tool of Leamas’s impeachment and exposure before the East German tribunal, we see Leamas finally lose his self-control.<sup>143</sup> As Mundt’s attorney explains:

“Somewhere . . . in Leamas’ long sojourn in the wilderness, he would have to break faith with his oath of poverty, drunkenness, degeneracy, above all of solitude. He would need a companion, a mistress perhaps; he would long for the warmth of human contact, long to reveal a part of the other soul within his breast. . . . Leamas, that skilled, experienced operator, made a mistake so elementary, so human that . . .” He smiled.<sup>144</sup>

Throughout the novel, le Carré draws a sharp contrast between the elites who act for the state—Control, Smiley—and the working man for whom they purport to act. The elites enjoy an education, connections, and privileges that are unknown to the library workers or the local grocer.<sup>145</sup> They live in domestic comfort, dining well at home and at

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140. *See id.* at 151 (describing Liz’s visit to Leipzig, “Austerity pleased her—it gave her the comfort of sacrifice,” and “[i]t was like living in a religious community . . . . You felt the world was better for your empty stomach”).

141. *Id.* at 29.

142. *Id.* at 30 (“[Liz asks Leamas,] ‘Alec, what do you believe in? Don’t laugh—tell me,’ [and he replies,] ‘I believe an eleven bus will take me to Hammersmith. I don’t believe it’s driven by Father Christmas.’”).

143. *See id.* at 175 (“[Liz] was interrupted by the sound of movement; the screech of furniture forced aside, and Leamas’ voice, hoarse, high-pitched, ugly, filling the room. ‘You bastards! Leave her alone!’”).

144. *Id.* at 171 (final ellipsis in original).

145. *See id.* at 45 (describing the room in George Smiley’s house where Leamas meets with Control: “There were books everywhere. It was a pretty room; tall, with eighteenth-century mouldings, long windows and a good fireplace”).

their country houses and clubs, while Liz struggles to make ends meet.<sup>146</sup> They appear to be married, with children and families, while the workers are isolated, lonely, divorced, and alienated even from family.<sup>147</sup> Le Carré suggests that it is in the state's interest to perpetuate this schism between the elite and the working classes to facilitate the paternalistic "Control." This is not the benign social hierarchy that is a source of comfort in the upstairs/downstairs country houses of Agatha Christie, where people happily occupy and know the boundaries of their "place" and eagerly enact their roles as servant or benefactor,<sup>148</sup> but a darker vision of a divided and deteriorated society.

If law is designed to order relations among citizens,<sup>149</sup> then it is, in this respect, a failure because the relations established by the legal order of le Carré's England are hierarchical, impersonal, and static. There is no room for mobility between the classes he describes, and there is little incentive for those at the bottom to participate in the social enterprise.<sup>150</sup> As with the phenomenon of identity, this aspect of law promotes alienation, isolation, and despair.

Again, Fleming's Bond appears as a counterpoint to le Carré, offering a fantastic society of hedonistic pleasure and ever-changing opportunities for excitement and adventure.<sup>151</sup> There is little in Fleming's novel to tell us how the rest of the world lives, but for Bond, surrounded by luxury goods and beautiful women, the social order cannot be improved. Bond is permitted to be occasionally flippant with his boss, to exercise broad discretion in the completion of his missions, and to enjoy long

146. See *id.* at 29 (describing Liz's flat as "a bed-sitting-room and a kitchen"); *id.* at 180 ("[During the trial, Karden questions Liz:] 'How much money do you earn, Elizabeth?' 'Six pounds a week.' 'Have you any savings?' 'A little. A few pounds.'").

147. See *id.* at 10 ("Somewhere long ago there had been a divorce; somewhere there were children, now in their teens, who received their allowance from a rather odd private bank in the City.").

148. See, e.g., CHRISTIE, *supra* note 37, at 203–07 (discussing the solution to the crime, Hercule Poirot explains that "'the company assembled [on the train] was interesting because it was so varied—representing as it did all classes and nationalities,'" which helped Poirot reach the conclusion that all of them, including the servants of the victim's family, conspired to avenge the death of a kidnapped child).

149. See Wetlaufer, *supra* note 128.

150. See LE CARRÉ, *supra* note 14, at 28 (describing Leamas's return home from work to a flat where the electricity has been cut off for nonpayment).

151. See, e.g., CAWELTI & ROSENBERG, *supra* note 12, at 126 ("[Fleming's Bond is] a heroic spy interested in sex and good living, presented with a strong dose of wit and a large tongue in the cheek. One could enjoy this hero's adventures and affairs without being burdened with a heavy load of political and moral seriousness.").

restful breaks between assignments.<sup>152</sup> Very little of this autonomy and glamour dovetails with the experience of the typical reader or worker in the England of Fleming's generation. Instead, the novels act as an escapist antidote to a postwar society of limiting divisions and scant pleasures.<sup>153</sup> In this respect, too, Fleming affirms le Carré's vision of a dispiriting set of social relations constructed by law.

#### IV. LAW AS THE POSITIVE EXPRESSION OF MORAL NORMS

A third aspect of the function of law is as an expression of moral norms.<sup>154</sup> We understand law as an instantiation of those norms within a particular culture or legal order. The classic detective story reinforces law as hierarchy, while also affirming norms whose source is essentially the Ten Commandments: the edicts that you shall not steal, you shall not commit adultery, and you shall not murder are the taboos that form the essence of classic or golden age mysteries. Similarly, in the hard-boiled detective story, these biblical norms are still well established, although their violators are more flagrant and their number has grown, so that their misconduct is unsurprising, almost acceptable, to all but the

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152. See, e.g., FLEMING, *supra* note 14, at 003–09 (beginning with Bond returning from one such recuperative break).

153. For a description of the postwar hardships of England, see *History of England, The 20th Century*, <http://www.britannia.com/history/nar20hist5.html> (last visited July 22, 2010) (“Stringent financial measures, imposed to meet the enormous war debt, caused undue hardship that was only made worse by one of the worst winters on record, monstrous gales and floods wiped out farms and destroyed agricultural products. A fuel shortage severely curtailed exports, food was still severely rationed, and in 1948 even bread and potatoes were rationed . . .”).

154. See, e.g., Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 817, 826 (1986) (observing that legal liberals posit “that law is both autonomous from politics and essential to the moral progress of civilization,” and that “[i]n secular, Blackstonian terms, the law prohibits not what ought rationally to be deterred or what is inefficient, but what is morally wrong”). West also contends that “[t]he legal positivist insists that the morality of a norm is neither a sufficient nor a necessary condition of its legality. The legality of a norm is solely a function of social facts and carries with it no moral implications.” *Id.* at 817 n.3. *But see* RONALD DWORKIN, *LAW'S EMPIRE* 97 (1986) (“Law is . . . different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone's conception of justice is his theory, imposed by his own personal convictions, of what these rights actually are. Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions . . .”), *cited in* Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41 (2002); H.L.A. HART, *THE CONCEPT OF LAW* 181–82 (Oxford Univ. Press 1982) (1961) (describing the so-called separability thesis as the “simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so”).

detective hero.<sup>155</sup> It is through the hard-boiled hero that these norms are affirmed.<sup>156</sup>

As with other aspects of law dealt with above, spy fiction expresses a deep cynicism about this aspect of law, a cynicism succinctly captured in the iconic epithet “licensed to kill” that is associated with James Bond.<sup>157</sup> The oxymoronic juxtaposition of a term signifying formal legality or validity—*licensed*—with the clearest cross-cultural moral prohibition—*to kill*—offers a jarring satire of this critical function of law.<sup>158</sup>

With this sobriquet, Fleming’s Bond represents a fantasy of the individual freed from the constraints of law, the “spy” who has extraordinary

155. See, e.g., KNIGHT, *supra* note 9, at 113 (describing the private eye of this era as one who “always decides to continue with his inquiries, to satisfy himself and some personal sense of justice,” and who “is not, in the crucial part of the story, an employee: his time, his courage, above all his values, are controlled by himself”). As George Grella explains:

Like the lonely man of the forests, [the hard-boiled detective] works outside the established social code, preferring his own instinctive justice to the often tarnished justice of civilization. The private detective always finds the police incompetent, brutal, or corrupt, and therefore works alone. . . . Finding the social contract vicious and debilitating, he generally isolates himself from normal human relationships. His characteristic toughness and his redeeming moral strength conflict with the values of his civilization and cause him, like Natty Bumppo or Huckleberry Finn, to flee the society which menaces his personal integrity and spiritual freedom.

Grella, *supra* note 117, at 106 (footnote omitted).

156. See, e.g., Grella, *supra* note 117, at 108 (quoting Philip Marlowe, Raymond Chandler’s character in *The Long Goodbye*, as saying, “I’ve got a five-thousand dollar bill in my safe but I’ll never spend a nickel of it. Because there was something wrong with the way I got it”).

157. See FLEMING, *supra* note 14, at 003 (“As a secret agent who held the rare double-O prefix—the license to kill in the Secret Service—it was his duty to be as cool about death as a surgeon.”).

158. The moral prohibition “thou shalt not kill” is the substance of one of the Ten Commandments. See *Exodus* 20:13 (“You shall not murder.”). It has also been a taboo in every culture of every age. See, e.g., West, *supra* note 154, at 825 n.32 (“When civilization laid down the commandment that a man shall not kill the neighbour whom he hates . . . this was clearly done in the interest of man’s communal existence, which would not otherwise be practicable. For the murderer would draw down on himself the vengeance of the murdered man’s kinsmen and the secret envy of others, who within themselves feel as much inclined as he does for such acts of violence. . . . Insecurity of life, which is an equal danger for everyone, now unites men into a society which prohibits the individual from killing and reserves to itself the right to communal killing of anyone who violates the prohibition. Here, then, we have justice and punishment.” (quoting SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 51–52 (James Strachey ed. & trans., 1961)).

access to hedonistic and consumerist pleasures as a corollary of his liberation. But this figure must operate in the realm of fantasy because no individual can actually be “licensed to kill.” The idea of such a lawless privilege is both destabilizing and terrifying, implying as it does that there might well be others acting lawlessly, even murderously, to achieve their own political or corrupt aims.<sup>159</sup> When a James Bond is “licensed to kill,” law has thereby been severed from morality and ceases to have any moral authority.

Similarly, le Carré’s novel, *The Spy Who Came in from the Cold*, presents a moral and legal world so topsy-turvy that his protagonist chooses death rather than a return to its confines and betrayals.<sup>160</sup> Executions, of both the guilty and the innocent, are allowed. Lies are acceptable because they advance the political agenda of the home state. In both writers’ imaginations, it appears that law has lost any moral authority and become, at best, a joke and, at worst, a nightmare.

In the course of his narrative, le Carré paints a picture of the moral inversion that law facilitates. Beginning with a stark moral clarity—East Germany’s intelligence agents, the “bad guys,” have killed all the British agents in East Berlin, the “good guys,” and the good guys must avenge the wrong—le Carré sets the reader upon a path of increasing confusion and accompanying uncertainty. In the novel’s opening pages, Leamas is sure that Mundt has killed his agents or had them killed, and he is sure that Control wishes to punish Mundt by

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159. The occasional scandal involving American or other governmentally sanctioned killings is generally fueled by public horror at such lawlessness. See, e.g., *Former Argentine Navy Officer To Be Tried in Torture Deaths*, N.Y. TIMES, Dec. 11, 2010, at A13 (reporting on the trial of a Navy captain “accused of playing a crucial role in the efforts of the 1976-83 military junta to eliminate leftist dissidents and suspected sympathizers”); Mark Mazzetti & Scott Shane, *After 9/11, C.I.A. Had Plan To Kill Qaeda’s Leaders*, N.Y. TIMES, July 14, 2009, at A1 (reporting that Secretary of the Central Intelligence Agency Leon Panetta cancelled a program “to dispatch small teams overseas to kill senior Qaeda terrorists, according to current and former government officials,” and that questions had arisen throughout the program’s existence under President Bush, including whether “such activities violate international law or American restrictions on assassinations overseas”); Mark Mazzetti, *Outsiders Hired as C.I.A. Planned To Kill Jihadists*, N.Y. TIMES, Aug. 20, 2009, at A1 (“The Central Intelligence Agency in 2004 hired outside contractors from the private security contractor Blackwater USA as part of a secret program to locate and assassinate top operatives of Al Qaeda, according to current and former government officials.”); Michael Slackman, *Experts Say Iran Uses Death Penalty as a Way To Intimidate the Opposition*, N.Y. TIMES, Nov. 23, 2009, at A6 (“A flurry of executions and death sentences in Iran has raised concern that the government is using judicially sanctioned killing to intimidate the political opposition and quell pockets of ethnic unrest around the nation, human rights groups and Iran experts said.”).

160. See LE CARRÉ, *supra* note 14, at 212.

assigning Leamas the task of killing him.<sup>161</sup> He takes on the mission with all its dangers and personal costs, only to find that Control has used and betrayed him, and that the real object of the mission is to provide Mundt with an impenetrable cover so that he can continue to act as a double agent, feeding intelligence to Control.<sup>162</sup>

The British, not the East Germans, then, are the ultimate utilitarians, calculating the value of the lives of several people, both British and East German, and concluding that the loss of Mundt as a data source outweighs them all.<sup>163</sup> By Control's own measure, Mundt is "a very distasteful man. Ex-Hitler-Youth and all that kind of thing. Not at all an intellectual kind of Communist. A practitioner of the cold war."<sup>164</sup> Nevertheless, Control privileges Mundt's life against that of Fiedler, whose only moral flaw, if any, is to resent Mundt's brutality, duplicity, and flagrant anti-Semitism.

Leamas is forced to realize this calculus in the course of the trial of Mundt, and it is he who, in response to Liz's baffled questions, explains just how completely the roles of good and evil have been interpolated:

We are witnessing the lousy end to a filthy, lousy operation to save Mundt's skin. To save him from a clever little Jew in his own department who had begun to suspect the truth. They made us kill him, d'you see, kill the Jew. Now you know, and God help us both.<sup>165</sup>

This realization represents a significant extension beyond the premise of moral equivalence that Control had asked Leamas to accept and acknowledge at the start of the mission.<sup>166</sup> Along the way, law's capacity

161. As Control puts it, "[Mundt is] a killer. . . . He tried to kill George Smiley. And of course he shot the woman's husband [in an earlier novel, *A Call for the Dead*]. He is a very distasteful man. Ex Hitler-Youth and all that kind of thing. Not at all an intellectual kind of Communist. A practitioner of the cold war." *Id.* at 16.

162. On the eve of what he understands will be a show trial of Mundt, Leamas falls asleep "content in the knowledge Fiedler was his ally and that they would shortly send Mundt to his death." *Id.* at 150.

163. *See id.* at 203 ("Mundt is their man; he gives them what they need."); *see also* Most, *supra* note 13, at 362 ("Le Carré's novel implicitly asks the question whether English society has not reached the point at which truth must be suppressed and justice thwarted if the society is to be preserved.").

164. LE CARRÉ, *supra* note 14, at 16.

165. *Id.* at 199.

166. *See id.* at 15 ("I would say that since the war, our methods—ours and those of the opposition—have become much the same. I mean you can't be less ruthless than the opposition simply because your government's *policy* is benevolent, can you now?" He laughed quietly to himself: 'That would *never* do,' he said.").

to express moral norms has itself suffered a mortal blow. Liz—who stands for the reader in her innocence and optimism—witnesses its demise and expresses naïve astonishment that law does not appear to stand for something immutable and good, shouting at Leamas:

“How can you turn the world upside down? . . . Fiedler was kind and decent; he was only doing his job, and now you’ve killed him. Mundt is a spy and a traitor and you protect him. Mundt is a Nazi, do you know that? He hates Jews . . . what side are you on? How can you . . . ?”<sup>167</sup>

Leamas’s unsatisfying rejoinder, a programmatic explication of the necessary immorality of espionage, convinces no one, including Leamas himself:

“There’s only one law in this game,” Leamas retorted. “Mundt is their man; he gives them what they need. That’s easy enough to understand, isn’t it? Leninism—the expediency of temporary alliances. What do you think spies are: priests, saints and martyrs? They’re a squalid procession of vain fools, traitors too, yes; pansies, sadists and drunkards, people who play cowboys and Indians to brighten their rotten lives. Do you think they sit like monks in London balancing the rights and wrongs? I’d have killed Mundt if I could, I hate his guts; but not now. It so happens that they need him. They need him so that the great moronic mass that you admire can sleep soundly in their beds at night. They need him for the safety of ordinary, crummy people like you and me.”<sup>168</sup>

Questions about identity and knowledge that are set out in Part II of this paper surface again in considering this aspect of law, and they are inextricably linked to the capacity of law to function as a meaningful embodiment of moral norms. When an individual, like Leamas or Bond, is asked to abandon his true identity and to perform a false one, as Leamas does in his mission, acting the role of a drunk and dissolute loner who is disaffected from his British masters, le Carré suggests that he might thereby lose his own moral agency and the capacity to judge and implement a satisfying morality.<sup>169</sup> This depiction of identity as performance reveals the subjectivity of morality, and the risk of loss of moral agency when an individual willingly becomes subsumed by his performed identity. The ethical ambiguities that might be insignificant to the removed or transcendent self prove to be both real and problematic to the performed self in particular situations. So

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167. *Id.* at 203. Liz’s aposiopesis underscores her profound confusion and inability to comprehend the moral world in which she finds herself.

168. *Id.* at 203–04.

169. See MONAGHAN, *supra* note 108, at 81–82 (speaking of the spy Verloc in Conrad’s *The Secret Agent*, he says, “With the sacrifice of his ability to feel, a man such as Verloc also loses his sense of identity,” especially when contrasted with the idiot Stevie, recruited by Verloc to wear the destructive device, who “signifies pure feeling”; “through Stevie . . . Conrad asserts that feeling is the basis of all knowledge”).

Leamas finds himself detachedly acting the part of the defector, only to be confronted by Liz and her love for him, whereupon he is forced to abandon his role.<sup>170</sup> But by then it is too late: Leamas's prolonged performance has stripped him of the power to control the outcome or even to protect Liz:

Suddenly the whole world seemed to break into flame; from everywhere, from above and beside them, massive lights converged, bursting upon them with savage accuracy.

Leamas was blinded, he turned his head away, wrenching wildly at Liz's arm. Now she was swinging free; he thought she had slipped and he called frantically, still drawing her upwards. He could see nothing—only a mad confusion of colour dancing in his eyes.

Then came the hysterical wail of sirens, orders frantically shouted. Half kneeling astride the wall he grasped both her arms in his, and began dragging her to him inch by inch, himself on the verge of falling.

Then they fired—single rounds, three or four, and he felt her shudder. Her thin arms slipped from his hands.<sup>171</sup>

In this way, errors about identity spill into other areas of law's concern; if identity cannot be reliably known, then the utility of law as an expression of the moral attitudes of a community is greatly diminished. The instability of identity is thereby equated with amorality.<sup>172</sup>

The ultimate act of illegality, in moral ethical terms, is that Leamas is stripped of his own autonomy and used as an instrument in an assassination that is the inverse of his own freely chosen end.<sup>173</sup> Leamas is used by Control to assassinate Fiedler because Fiedler is "just" in two respects: he is accurate in his suspicions of Mundt's disloyalty, and he is also steadfastly loyal to his own state and its values as against the West.<sup>174</sup> Mundt is permitted to kill Fiedler as a state-sponsored act by a state to which he himself is a traitor and to do so through the agency of Leamas, a now fully dehumanized actor, because it serves Control's interest. In this way, le Carré underscores the degradation of morality,

170. See LE CARRÉ, *supra* note 14, at 175 (describing Leamas's outburst when Liz is brought before the Tribunal).

171. *Id.* at 211.

172. See, e.g., LUDLUM, *supra* note 48 (establishing the fictional premise that the C.I.A. has chosen to erase the identity of its agent in order to free him of moral accountability or remorse, so that he can act as an assassin).

173. That end had been to kill Mundt and thereby to save Fiedler from Mundt's anti-Semitic brutality, based upon Leamas's understanding of Mundt's moral worth.

174. In his Jewish identity, Fiedler also represents the other/outsider/vulnerable victim as against the abuse of power by Mundt.

and of and as repository of moral values, that is the result of incremental instrumentalism.<sup>175</sup>

## VI. CONCLUSION

In their fictional representations of espionage, le Carré and Fleming pose a series of questions for the reader, each question relating to fundamental aspects of law. Are there any rules when states are ideologically opposed? What distinguishes the good from the bad state or the good from the bad individual? Doubt about the righteousness of the state actor in these novels generates either escapist pleasure or deep anxiety. The familiar catchphrase “James Bond, licensed to kill,” in this reading, becomes a reductive critique of law.

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175. Le Carré also depicts the human response to this revelation of the immorality of law: a profound hopelessness seizes Leamas upon his realization that there is no fundamental guiding principal of right. He writes:

Shielding his eyes he looked down at the foot of the wall and at last he managed to see her, lying still. For a moment he hesitated, then quite slowly he climbed back down the same rungs, until he was standing beside her. She was dead; her face was turned away, her black hair drawn across her cheek as if to protect her from the rain.

LE CARRÉ, *supra* note 14, at 212.