Crime Fiction and the Law

Edited by
Maria Aristodemou,
Fiona Macmillan
and Patricia Tuitt

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This book opens up a range of important perspectives on law and violence by considering the ways in which their relationship is formulated in literature, television and film. Employing critical legal theory to address the relationship between crime fiction, law and justice, it considers a range of topics, including: the relationship between crime fiction, legal reasoning and critique; questions surrounding the relationship between law and justice; gender issues; the legal, political and social impacts of fictional representations of crime and justice; post-colonial perspectives on crime fiction; as well as the impact of law itself on the crime fiction's development. Introducing a new sub-field of legal and literary research, this book will be of enormous interest to scholars in critical, cultural and socio-legal studies, and to others in criminology, as well as in literature.

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Taylor & Francis
Taylor & Francis Group
http://taylorandfrancis.com

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Birkbeck
LAW PRESS

First published 2017
by Birkbeck Law Press
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

and by Birkbeck Law Press
711 Third Avenue, New York, NY 10017

Birkbeck Law Press is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available
from the British Library

Library of Congress Cataloging-in-Publication Data
A catalog record for this book has been requested

ISBN: 978-1-138-81846-0 (hbk)
ISBN: 978-1-315-74522-0 (ebk)

Typeset in Baskerville
by Apex CoVantage, LLC

In memory of Professor Patrick McAuslan (1937–2014)


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Foreword

This edited collection grew out of a symposium on Crime Fiction and the Law, jointly organised by Birkbeck School of Law and the Birkbeck Institute for the Humanities in December 2012. The book, which is the result of the collaboration of a range of colleagues, has taken shape slowly but surely. The generosity of those who have contributed chapters is visible to the naked eye, but we are no less grateful for it on that account. We also wish, however, to express our gratitude to those whose contribution might not otherwise be evident. The students who have participated in our undergraduate module on Crime Fiction and the Law have had a special role in the development of our ideas, and it is our hope that this book will provide stimulating source material for future students on this course. We owe particular thanks to Henrique Carvahlo, who rendered us extensive assistance with the editing process. Colin Perrin and Laura Muir gave us unceasing help in getting the book into print – like the wise publishers they are they know exactly how to balance pressure and patience.

Our special thanks go to Dorrette McAuslan for permission to publish the chapter written by her late husband, our much-missed colleague Professor Patrick McAuslan. Most within the academy would have known of Patrick for the way in which he revolutionised teaching and scholarship in the fields of land, property and planning law. All will know that he was at the forefront of three significant experiments in legal education – having founded the Law Schools in Dar es Salaam, Warwick and, his last affiliation, the Law School at Birkbeck. However, few would have known of his passion for the crime novel – especially for the contemporary police procedural. Involved in the early design of the undergraduate Crime Fiction and the Law module, Patrick was working on his chapter, which appears at the end of this collection, at the time of his death. This volume is dedicated to his memory, not only with inevitable sadness for his loss but also in celebration of his extraordinary energy, productivity and enthusiasm for life.

Maria Aristodemou
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London, April 2016

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Chapter 1

The introduction didn't do it

Maria Aristodemou

1 The invitation

'The English', writes Jorge Luis Borges (1999, p. 11), 'live with the turmoil of two incompatible passions: a strange appetite for adventure and a strange appetite for legality.' Both passions, he claims, find satisfaction in detective fiction. A collection of essays on crime fiction and the law, following the teaching of a course and a symposium on the subject at a London law school, may appear to lend strong support to Borges' claim. The purpose of this introduction is to examine this claim by interrogating the desires that animate not only crime fiction, but the teaching, symposia, and writing of such volumes. The claim, contra Borges, is that these twin passions are neither incompatible, nor (only) English: they are animated by the same limiting and limited human condition which seeks solace in law and, failing law in its symbolic manifestations, seek satisfaction in law's imaginary depictions.

Several decades after the law and literature movement took off on both sides of the Atlantic, crossed the Channel and took firm roots in old and new worlds, it may seem anachronistic if not reactionary to begin by questioning the movement's purpose and achievements. This is, nevertheless, what this introduction hopes to do. A school of thought, after all, is only as relevant as its continuing contributions, and a school that has ceased to question its purposes and consequences (intended or unforeseen) is no longer a school of thought. Let's rewind then to some of the ideas and ideals that spearheaded the law and literature movement and animated its enthusiastic participants, who, timidly at first, then more and more boldly entered the legal curriculum to the extent that, several decades on, the study of law and literature is not only tolerated but positively encouraged in the academy.

2 Terms of endearment

There is no doubt that in its early manifestations the law and literature movement had much to address, and much to complain about. The woefully dry nature of legal education, faithful to legal positivism's dictum that what the law is can be

and should be separated from what the law ought to be, produced not only disheartened and cynical students, but equally cynical and despondent teachers: law divorced from its social, political, historical and literary roots, was law, they did not dare to admit, in its final stage of impotence.

The enthusiasm with which law and literature (and variations on this theme, such as law and film, law and culture) were welcomed in the legal academy was owed to the fact that until recently, legal education on both sides of the Atlantic was an admirable manifestation of the influence of positivist philosophy and the reliance on observed, empirical facts to the exclusion of supposedly unverifiable statements of value or causes. Legal positivism's tenets determined both the perception of the nature of law and the methods of its instruction. While historically (and despite Plato's infamous attempt to exclude poets from his ideal state) law, politics, humanities and religion were intellectually as well as professionally interdependent, with modernity legal study became more specialised, technical, and increasingly utilitarian. The insistence was that law is a science unto itself, one that could and should be studied in isolation from external influences and from other disciplines.

Injecting literary works onto tired legal syllabi had, initially, a two-pronged rationale: on the one hand, proponents claimed, works of literature would teach lawyers how to read and write more effectively, more persuasively, more beautifully even. For what is the use of a lawyer armed with an arena of legal precedents, if her rhetoric fails to convince judge and jury? In arguments that were reminiscent of Plato's *Gorgias*, law and literature advocates insisted that their teaching would produce more accomplished lawyers, ones whose success at the art of persuasion would be enhanced and perfected.

At the same time as praising literature's utilitarian values, and without any seeming acknowledgement of the contradiction, law and literature advocates offered a parallel rationale for the use (and abuse) of literature. The claim was that legal education that confines itself to teaching law as it is without paying attention to what it ought to be leads students to ignore the social impact of law in their society: that it is only a short step from arguing that what the law is is separate from what it ought to be, to believing that what the law ought to be is irrelevant to legal education. Not only was literature 'useful' then, but it also furthered, the argument went, the pursuit of truth, even a higher truth than that offered by legal positivist education. What did this truth consist of? The hope, more or less loudly advertised by its advocates, was that the truth law missed would and could be found in the archives of literature. This, again full of hope, wasn't just any truth, but a truth with a mission and a goal: it was, to simplify if not generalise, to 'humanise' lawyers, make them, without a shade of irony, more attentive to the plight and suffering of others, starting, of course, with their clients.

So literature would broaden and enhance students' 'ethical consciousness' by exposing them to and reminding them of the value judgements implicit in their work. Assuming that great literary works are the repository of society's cultural values, literature, it was argued, would widen the dimensions of a problem,

demystify law's claims, encourage self and social criticism, give an impetus for change and reform, indeed liberate! Literature would teach lawyers to understand and empathise with the problems of others, qualities without which they would not crave, much less attain, justice. So those engaged in the project confidently asserted, as the saying used to go, 'they would make a better man of the lawyer and a better lawyer of the man'. Not only would they teach lawyers to read and write more effectively, but they would also teach them moral values and make them better persons. At which point, some of us, initially excited by the invitation, started wondering, do we actually want to go to this party?

3 Cold feet

Both the instrumental argument, that the study of literature will produce better lawyers, and the humanistic belief, that the study of literature will make lawyers better persons, are problematic. Claims about the 'liberating' or 'humanising' potential of literature cannot be assumed without inquiring into whether morality can be taught at all and, if so, how. Knowing about morality, humanity must sadly admit, does not make us moral and understanding the 'moral law' does not necessarily lead us to act in accordance with it. The Socratic view that immorality is due to ignorance of the good must also be balanced against Plato's elitist view that only the wise can acquire knowledge of the good. It is therefore idealistic, if not dangerous, to expect, and there is no reason to assume, that lawyers immersed in literature will have better abilities to identify and apply moral values than other lawyers.

Above all, the view that education can have a transformative power cannot ignore the fact that both law and literature are part and parcel of society and that somebody will be educating the educators. Cultural texts, no less than legal ones, proclaim, knowingly and unknowingly, consciously and unconsciously, the ineluctable rules and mores that make up the social order, whether we are aware of them or not, like them or not, suffer them, tolerate them, or enjoy them. Far from standing outside or escaping the dominant ideology, cultural texts too often bolster, maintain and perpetuate it. To follow my own law and literature thesis over a decade ago, cultural texts are just as influential and norm-making, if not more so, than so-called 'real' laws (Aristodemou 2000). The fear, therefore, is that, dissatisfied with law, the law and crime fiction critic finds compensation and consolation in literature: in that sense, crime fiction and art generally serve not to critique, or undermine but to supplement and thereby bolster the legal edifice.

Janet McCabe's chapter in this collection takes us behind the scenes to uncover the business deals and negotiations that go into producing these cultural and legal 'fictions'; the vast (and lucrative) *Wallander* project, she quotes a producer admitting, 'was designed so that broadcasters would be satisfied'. What is produced, we must remember, is not just 'entertainment' precisely because no cultural product is 'just' entertainment: what is produced is ideas, views, values which are just as norm-creating and influential if not more so than the norms we find in law

books. These supposed 'local' norms and values are tailored, as McCabe shows, for global marketing and consumption, following what she aptly terms a 'glocalisation strategy'.

Barbara Villez's paper addresses the popularity of French television crime fiction and examines how, while initially crime narratives stopped when the culprits were caught, with no view of the judicial handling of cases, new series *Engrenages* follows the criminal justice investigation in all its stages, including the trial of the culprits. In contrast to earlier series where the depiction of the French criminal justice system erroneously replicated procedures familiar from the American system, the new *Engrenages*'s fidelity to French legal procedures has led to critical acclaim, and even judicial approval. Villez examines the changes in the series and the reasons for its acceptance among judges and lawyers; fiction, after all, cannot successfully perform the ideological role of eliciting interest, as well as faith, in the system, if its televisual depiction is dismissed by the public as unrealistic and indeed at times, ridiculous.

4 The party

Despite our reservations, we have arrived at the law and literature party and indeed started enjoying ourselves. As one would expect at the start of the evening, food and spirits are plentiful. There is no doubt that in its heyday the law and literature movement delivered a plethora of analyses of the perennial jurisprudential questions on the nature and aims of law: the relationships between natural and positive law, between moral and legal obligation, between law and justice, justice and revenge, law and punishment, rule and discretion, law and power, order and hierarchy, were, after all, themes that literature had been addressing with as much persistence and for much longer than lawyers. We learned from these analyses not only not to take legal discourse for granted but also more methods with which to challenge it. We questioned insistently whether law was reasoned argument alone or does it (or should it) cater for other, perhaps irrational, elements of the human condition; whether legal definitions of guilt and innocence are universal or does law insist on its own standards and classifications by ignoring, and oppressing, alternative systems of values; whether law's claim to its own absolute legitimacy is justified, or is its domination achieved by collapsing every situation into its own mould? If the latter, what consequences does this have for those excluded from its empire? Above all, how do we account for the intimate, indeed incestuous, relationship between law and violence? If violence is the founding act of every order, including the legal system, what, if anything, explains, let alone justifies, law's insistence on a monopoly on violence?

Crime fiction was an inexhaustible reservoir for this party providing the music, drinks and drugs for its enthusiastic revellers. By inserting it into the legal curriculum, Borges' two supposedly irreconcilable enjoyments could be impudently and scandalously enjoyed side by side: students, and teachers, could enjoy law and its transgression, fidelity to law serving as absolution and the price for the illegal

trespassing into fiction. In the process, attention to crime fiction could claim to draw attention to, as well as challenge, some of legal discourse's most treasured creeds: the idea, for example, that human beings are rational and self-interested rather than self-destructive and masochistic; or that human instinct is to resist rather than embrace authority; that legal language is used to exclude and oppress rather than include and liberate; the assumptions we make about free will and responsibility; the view that law is based on rationality and consent rather than oppression and fear. In classrooms we relished the paradox that while lawyers and legislators in debates about criminalising or decriminalising conduct assume there is a stigma attached to criminality, in many portrayals of criminals in crime fiction the criminal is depicted as a hero, a fascinating human being. Above all, crime fiction drew attention to the violence at the heart of the law itself, both at its inception as a system that monopolises violence, as well as for the maintenance of its supremacy in wielding force; a theme, as we will see, meticulously analysed by Macmillan and Boge in the final chapter of this collection.

5 In the kitchen

Slowly but surely the more obvious interrelation between law and literature, that is, the examination of how law and lawyers were depicted *in* literature, became both common and popular. While some revellers were enjoying themselves in the lounge and garden, dancing the night away, other, more introvert guests, could be found in the kitchen earnestly debating the latest developments in theories of language and suggesting that it's all very well for lawyers to examine how literature depicted law, but have we forgotten the much more interesting dimension that law itself was always already literature? From such humble kitchen chats began what came to be called the law *as* literature movement, particularly beloved by lawyers on both sides of the Atlantic craving to infuse their academic ramblings with certain continental *je ne sais quoi*, generously on offer in 1980s parties.

Ironically, while mainstream legal education had little trouble tolerating the revellers in the house, the ideas being conjured up in the kitchen met with more suspicion and outright condemnation. While, and as we just saw (and not without justification), the main party was perceived as harmless distraction for bored children, for many the stirrings in the kitchen were much more ominous: legal theory's resort to positivism to explain the binding quality of legal norms, was, after all, premised on the possibility of a scientific knowledge of the law. The desire for the 'scientisation' of law, and the insistence on distinguishing law from other disciplines, aimed to base law on a secure foundation with its promise of pure presence and essential, final meanings. The lawyer, the faith was, could search for and discover, like the detective or archaeologist, the origin and truth of the law. This origin, truth, or 'right answer', as Ronald Dworkin would call it, was not 'made' but 'found', and, once found, it was possible to believe in it in the same way one believes in one true God. The desire for a right answer, is, as Anton Schütz shows in this collection, and as psychoanalysts note, profoundly religious: even and

perhaps because of modernity's so-called murder of God, the desire for a master who possesses the right answer, persisted and was displaced elsewhere. Where one once believed in God consciously, now one believes in god (with a small 'g') unconsciously: if in the court room this unconscious god takes the form of Dworkin's herculean judge, in crime fiction, as we will see, she takes the form of an eccentric but nevertheless unerring detective.

The work of critical legal scholars alerted us to the fallacies involved in the positivist enterprise and the losses incurred by their insistence on law as fact divorced from politics, history or literature. The analytic tradition's attempt to eliminate metaphor from legal discourse ignored the fact that law is also, even first and foremost, a text. In the same way that, as Hayden White (1978, p. 99) argued, the fetishism of facts led history to 'lose sight of its origins in the literary imagination', lawyers also craved for a law that was outside and beyond interpretation. Yet neither law, nor the past, exist 'out there' ready for us to appropriate: they arrive, if at all, through the traces they leave in texts. The lawyer's attempt to accord these textual sources with meaning cannot take place without selecting, hierarchising, supplementing, suppressing and subordinating some traces to others. This process cannot be other than literary and the lawyer's tools are no different from those of the literary critic.

The losses incurred from the attempt to banish the law's textual origins are not small: the attempt to distinguish law from fiction, the suppression of metaphor and the speculative led to the exclusion of what, had the same teachers taken their own masters seriously, was fundamental to law. It was Bentham, after all, who understood, and insisted that the nature of law was fictional: just as language is fictional, bringing something that is absent into presence through representation, legal concepts are fictional constructs whose existence depends on our collective belief in them. Take belief away (as even positivists like H.L.A. Hart appreciated) and the rules evaporate, bringing the system tumbling down. Peter Fitzpatrick's contribution in this volume draws attention to the fictive nature of law, the 'mysterium tremendum' as he calls it, which, once 'a transcendent and transgressive reference of realized being', was ignored in legal discourse. Drawing examples from Kafka's fiction, Fitzpatrick shows how that immanence is nevertheless recognised in literature. Literature's generative force, Fitzpatrick argues, typifies the genre of detective fiction, a genre, he concludes, which instances the fictive force of law.

6 Drunken promises

The dismay with which law *as* literature critics were received by the academy was understandable: to suggest, as some scholars did, that there is no such thing as a right answer to legal cases, that, as Allan Hutchinson (1989) once infamously insisted, there are as many interpretations of the US Constitution as there are readings of Hamlet, appeared anathema to the legal empire. As Patricia Tuitt argues in this volume, however, they needn't have worried: critique soon became stultified instead of blossoming under the 'no right answer' doctrine. In particular,

as she shows, the 'no right answer thesis' proved least well-prepared to respond to the challenges posed by the twenty-first century's changes in legal education and services.

What was it that worried the academy then? Oscar Guardiola-Rivera's, Patrick McAuslan's and Chris Boge's contributions in this volume leave us in no doubt of the threat posed by this branch of law and literature: to lay bare the political nature of representation is also to lay it open to interpretation and appropriation by different groups. Taking their cue from deconstruction and postcolonial theory, these critics pointed out that the stories inherited from mainstream legal education, presented as final and definitive, often obscured the voices of the colonised, robbing them of the opportunity to tell their own stories and create their own norms. Colonial writing had assumed a universalist mantle, purporting to talk for an undifferentiated humanity and time, presenting texts and the values they promulgated as unchanging and universal. In Guardiola-Rivera's and McAuslan's chapters we see how postcolonial writers took up the task of reopening and questioning legal doctrine, thereby creating not only new histories but new norms for those individuals and communities.

At the heart of the texts Guardiola-Rivera and McAuslan address, is the appreciation that although the end of colonialism meant, in legal terms, a change of sovereignty, this did not mean the end of exploitation or effective self-determination. For that, the myth of white superiority and the pervasive influence of European languages, literature and laws had to be challenged. It is supremacy over the latter that was more difficult to dislodge and to which postcolonial writers turned their attention. The first task for these writers was to challenge the view of liberal humanist critics that law, and literature, reflected timeless values irrespective of place, colour or race. Instead, it was imperative to point out that, not only did Western writers assume the authority to speak on behalf of us all, but they also bestowed other oriental qualities they did not choose to acknowledge or repressed in themselves. So, where the white European was rational, the other was emotional, where the European was civilised, the other was savage, where the European was good and saved, the other was evil and lost. The European assumption of the right to speak the universal meant again that language in law and in literature was a major means of exercising domination. Only once such claims were exposed as serving the interests of a white, male, middle class rather than humanity as a whole could the colonised begin to find their own language and start reclaiming their past.

Guardiola-Rivera's analysis of Julio Cortázar's novella *Fantomas Contra Los Vampiros Multinacionales* addresses these themes and suggests that writing, in addition to acting as a witness to injustice, can also actively, prophetically, and radically perform 'the lack in the heart of society, that is, justice'. Behind Cortázar's novella are the events of September 1973 which resulted in the overthrow of the constitutional President of Chile, Salvador Allende. Cortázar was one of a number of Latin American scholars taking part in the second meeting of the citizen's tribunal first convened by Bertrand Russell and Jean-Paul Sartre. In his search for a new

language to express the challenging realities confronted by the tribunal, Cortázar, argues Guardiola-Rivera, undertook the composition of a trans-genre work that combined the languages of literature, visual art, filmography and law. Guardiola-Rivera shows that Cortázar's experimental text corresponds to the novelty of the legal and theoretical concepts that the Latin American members of the tribunal created as they reinvented its legacy for times of military intervention and multinational financial violence.

Cortázar, like other postcolonial writers, had to wrestle with a language that had been used to repress rather than express difference. While military, economic and legal power enabled the oppressor to exercise control of the body of the colonised, it was language itself that entrenched that control by writing the values of the oppressor on the soul of the oppressed. Since these values were inscribed in language, injustice began and was instituted in language: language, that is, in law and in literature, was always a site of struggle and to express new values, not only new laws but a new language was needed. Furthermore, Cortázar appreciated that power and discourse, far from being possessed entirely by the coloniser, is also ambivalent and open to appropriation: Cortázar shows how the coloniser's language can be reopened and exploited to challenge, unsettle and subvert the values it inscribes and in the process subvert its authority. Well known legal concepts, once interpreted to confer a sense of the law as linear progression, and as revealing universal truths, are reopened, as Guardiola-Riveras's account shows, to reveal the raw violence of the law. In the case of *Fantomas*, such a challenge means that the beneficiaries of 'excess profits' from colonial exploitation cannot be let off the hook; writing here moves from passive witnessing to active participation in the struggle for justice.

Before his untimely death, Patrick McAuslan was working on an overview of the relationship between crime fiction, the criminal justice system and the reality of crime in Botswana, Kenya, Nigeria and South Africa, places where he had worked for much of his life. His contribution in this collection pays particular attention to colonial and postcolonial criminal justice systems and explores whether the approach to law and legal systems in the novels he selected differs depending on whether the authors are expatriate or African, colonial or postcolonial. For empires, as his text makes clear, aim to present their narrative as not just the only but as the true one, and crime fiction is enlisted to aid the process: empires are built, as McAuslan's lifetime work showed, not only on brute force but on words and images, and it is their appropriation and domination over language and culture that secures their continuing existence, in law, as in literature.

New empires are no different: Chris Boge's chapter on Christopher Nolan's *Dark Knight* trilogy exposes the hidden ideology of Hollywood blockbusters and their complicity in perpetuating, as well as glorifying, new empires. Where would the American empire be, Boge's text implies, without Hollywood's tall tales of valiant outlaws resorting to, and celebrated for resorting to, extralegal means? Today's Hollywood, Boge shows, performs the task of solidifying and disseminating the American empire's ideology: in a marketing ploy designed to maintain

American exceptionalism and propagate an image of the US as victim of foreign aggression, Hollywood's latest wave of superhero movies, he argues, refashions and promotes the concept of vigilantism. Christopher Nolan's take on one of the earliest characters to emerge from the Golden Age of American superhero stories depicts Batman as an outlaw vigilante who becomes a national icon. The *Dark Knight* trilogy, concludes Boge, 'ultimately seeks to place the US in a dramatic progressivist narrative that tells of Western manifest destiny, and the need for democratic governance to be complemented by private policing'.

7 The crime of crime fiction

Given, as these chapters suggest, cultural texts, far from escaping, all too often strengthen and maintain society's dominant ideology, how do we account for our fascination with literature generally and crime fiction in particular? For lawyers generally, and critical lawyers in particular, we must wonder: does the study of literature aid or stultify critique? The first step to critique, I suggest, is acknowledging the enjoyment at the heart of our own writing, reading and watching. In the case of crime fiction, 'the dead body', as Žižek (1991, p. 143) reminds us, 'is the object of desire par excellence, the cause that starts the interpretive desire of the detective (and the reader): How did it happen? Who did it?'. Crime fiction, more than law and literature in general, taps into desires lying at the root of both the lawyer and the reader. It is not only the fact, as critics of crime fiction appreciate, that any murder, is 'matter out of place', a stain on the general order that needs to be swept clean. It is also that in the very process of 'cleaning' another desire is excited and, more often than not, satisfied for spectator or reader: the enjoyment of making meaning, of 'jouis-sense' as Lacan would call it.

The classical detective story, as analysed by Tzvetan Todorov (1977), consists typically of two stories: the story of the crime, involving action and often blood, followed by the story of the investigation, involving enquiry, revelation and closure. Such stories chart the progress from a community whose order and stability are temporarily disrupted by a crime that breaks the rules, back to order and stability once the criminal has been identified and his/her crime explained by a suitable motive. In the first story, the inability of society's official agents to prevent or solve the crime threatens the validity of that order. An unsolved crime is an uninterpreted sign, resisting integration into society's system of meanings: its obstinate departure from approved rules threatens to discredit the validity of the system and therefore cannot be ignored. In the second story the first story is reconstructed and the aberrant event is integrated into society: the disrupted social order is restored and existing social norms validated.

Humanity's preferred way of defusing and integrating the aberrant event is through narrative: telling and retelling a story helps generate coherence and meaning. The assumption of the detective genre is that not only is there such a true meaning but that the detective can deliver it and narrate it in a form that transmits that coherence to the awaiting audience. The assumption that polyvalent signs