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JOSEPH IN LAWYERLAND

Robin West*

As Alice wanders through Wonderland in an unreal space in real time—a dream—learning backward truths from illogical creatures who speak in paradoxes, so Joseph figuratively wanders through lawyerland in an unreal time, but in a very real space—Manhattan—conversing with his thinly fictionalized friends, all of whom happen to be lawyers, about their lives and practices in law. As Joseph’s lawyers talk with him about the law they practice, they uncover, through White Rabbit and Cheshire Cat-like illogical precision, a chaotic, unkempt, unconscionably reckless, often cruel, and sometimes pathological legal wilderness. The legal terrain these lawyers occupy is not an inviting one: Lawyerland, according to Joseph and his friends, is an inhumane place. Even more striking, though, than the cruelty of their world, is what Joseph’s lawyers in Lawyerland tell Joseph about the nature of lawyers’ knowledge. What lawyers know of law, and of people, Joseph’s lawyers tell him, and he tells us, are the limits of our knowledge, both ours and theirs, regarding both law and the human condition. In this regard, Joseph’s lawyers are virtually ironic templates (or as one of his conversationalists would put it, ironic “phenotypes” (pp. 67–69)): Like all ironists, what Joseph’s lawyers know, they know from and of experience; and what they know, is that lawyers know the boundaries of what we know. They know, for example, that nonlawyers don’t know the nature of the legal beast (pp. 14–15); they know that lawyers keep secrets (p. 193); they know lawyers “secrete” (p. 186); and they know that lawyers defraud others (p. 183). They know that lawyers lie, even if only by necessity and if only by virtue of knowing too much (p. 72); they know that lawyers “invented spin,” and, when they have to, “change the story” (p. 74); they know that lawyers use knowledge to game the system (p. 91); and they know that there is much that lawyers don’t know precisely because lawyers don’t want to know it (p. 89).

But Joseph’s lawyers—manic-depressed, ironic templates all—are not only that. On occasion, Joseph’s lawyers also note “the evidence of things not seen” (p. 160). Joseph borrows this provocative phrase from the title of a James Baldwin book, The Evidence of Things Not Seen, which was in turn an essay on the Wayne Williams, early 1980s murder case from Atlanta, Georgia—in which the defendant, Wayne Williams, suspected of murdering at least twenty black schoolchildren, was eventually apprehended and convicted for two murders on the basis of carpet-fiber evidence found in Williams’s car.1 Baldwin, in turn, as one of Joseph’s law-

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yers explains, took the phrase from Saint Paul, and put Paul’s usage in an epigraph as well as in the title of his book. “Faith,” said Paul, “is the substance of things hoped for, the evidence of things not seen.” Both Baldwin and Joseph seem to use the phrase to refer to pieces of evidence that are so small as to be “unseen,” such as carpet fibers or DNA. But the phrase is obviously ambiguous: It can also refer to the evidence of things that are themselves not seen. Of course, the phrase can also mean both simultaneously: The thing evidenced as well as the evidence might not be seen—as was the case with Williams’s unwitnessed homicides, and as is also true of faith, the substance of things hoped for, as well as the evidence of things not seen.

Joseph’s lawyers undercut their own sophisticated irony through repeated and poignant references to unseen evidence of unseen realities. Thus they comment, variously, on the reality and presence of unseen and unappreciated beauty (p. 128), the reality of the human desire for communion and connection with another (p. 187), the reality of an untouched and impenetrable design (p. 32), the reality of deep, fundamental rules to be neither fully apprehended nor breached (p. 35), the reality of unforgivable moral “wrongs” (pp. 74–75), and the reality and the consequentiality of common virtues (p. 74). They speak of the reality of a truth “between what can be proved and what cannot be proved” (p. 127), and of the reality of the law that Rainer Maria Rilke notes in the epigraph, which lies deep beyond the confusion of surfaces. They note the unseen evidence of such unseen things, and when they do, Joseph’s world-weary and street-savvy ironic lawyers become awkward: uncharacteristically sweet, sometimes childish, awestruck, occasionally tragic, aware of what they lack, and painfully vulnerable. What Joseph shows in Lawyerland is what lawyers in lawyerland know: that neither they nor the rest of us know of such things, even when we apprehend, or “ferret” (p. 127) or “discern” (p. 63), the unseen evidence of their reality. The mental world of lawyers—lawyerland—the real instead of constructed Herculean knowledge accumulated over the ages by practicing lawyers—is the knowledge of that lack. Appearances—including appearances of justice and fairness in law—are just that, while the deeper reality is unseen but evidently there, and Joseph’s lawyers know that. This leaves


3. Ronald Dworkin described a mythic judge, Hercules, in his classic defense of liberal legalism in order to suggest the sort of heroic knowledge of the legal universe an ideal judge would possess, who could successfully resolve every legal question brought before her. Ronald Dworkin, Taking Rights Seriously 105–30 (1977). Joseph’s lawyers know a lot of law, but what they know is strikingly different than the idealized world of principled rights mastered by Dworkin’s Hercules.
his lawyers in a distinctive, always ironic, but sometimes tragic, epistemic stance.

Thus, to take an example quite randomly from many, Robinson, Joseph's criminal lawyer prototype, prototypically knows the moral rot at law's core. And, he knows that nonlawyers don't know it. Robinson knows that Joe nonlawyer Schmo, particularly when he sits on a jury, has an ill placed reverence of law: an admiration, for instance, of exalted legal concepts such as "reasonable doubt" and "mens rea." He knows that Joe Schmo's reverence is accompanied by an ignorance of the brutality of law-in-practice that would leave his over trusting soul shocked, and horrified, and decimated, should he become ensnared in its tentacles (pp. 15-16). Joseph's Robinson knows, more generally, that the consent we tender to the social contract, and the legal system at its heart, is not informed, because we haven't been told that the system to which we have granted so much power over us is bound to fail, at least as a vehicle of justice (p. 16). This lesson—of law's unappreciated, but inevitable injustice—is expressed in the first legal narrative of the book in which Robinson's client, a teenage, borderline retarded son of immigrants, unwittingly burgles an Assistant U.S. Attorney's apartment (pp. 8-16). Because of that he is doomed, well before any trial or process, no less than was Alice similarly doomed upon insulting the Queen—both for having pierced the entitlement to security of the already secure. What Robinson the criminal lawyer knows is that any salvation for his client will not be forthcoming from a fair and proportionate legal system. Rather, the mitigation for the absurdly harsh and cruel convictions secured by the vengeful U.S. Attorney and the ambitious prosecutor will be had through the lawyer's lawyerly knowledge, not of the law, but of the rot: The knowledge that others game the system is one key to power. Thus, Robinson uses his knowledge of the judge's inappropriate knowledge of the "foxy D.A. prosecuting the case," and the victim, who was himself an Assistant U.S. Attorney, to secure his client a shorter sentence (p. 16). Robinson knows, in short, that the claim and appearance of justice is a fraud; and more important for his client, knows how to manipulate the felt need of his opponents to perpetuate the fraud.

This knowledge, though, of people's ignorant, misplaced faith in law, is obviously not confined to lawyers. What Joseph's criminal lawyer also knows is the evidence of things unseen. Robinson's unseen truth is this: Criminal law—not crime, or criminals, or criminality—Robinson

tells Joseph, is society's "pathology" (p. 22). This is a startling statement, and Joseph presses for an explanation, to which Robinson responds: The pathology that is criminal law is the "essence of the ... thaaaang" (p. 22). It is the key to what Robinson has figured out about civilization. Criminal law is pathological, or, if it's not, then civilization is impossible. Why? Well, Robinson explains, the very idea of civilization presupposes a morally exalted human being: The human, unlike the rest of God's creatures, is more than an animal that talks. It is a talking animal with a soul. Criminal law, in turn, presumes that someone can be such a human being—a morally exalted, talking creature with a soul—and form and act on an intent to kill, and still be sane and therefore a proper object of punishment (p. 22). But this is, simply, a lie: Incarcerated murderers, Robinson knows, are insane, virtually by definition. To presuppose otherwise is a pathological, crazily anti-social belief. If sane humans can kill, there is no moral exaltation in the human status, and no civility in civilization. Otherwise, if the fairy tale that criminal law relates of murderers who are as sane as the rest of us but inexplicably form evil intents to kill, accurately reflects us—i.e., if this is part of our human potential—then there are, in the world, only vermin, cockroaches, lawyers, and criminals, and all of these life forms are interchangeable, Kafka-style: vermin to cockroaches; lawyers to criminals (p. 22). We can't have it both ways. If to be human is to be civilized, and to be civilized is to be moral, then sane human beings don't kill. A human being capable of the intent and knowledge that are prerequisites of the legal definition of homicide is not capable of killing another human being. Robinson's contempt for the illogic, cruelties, and pathologies of criminal law is the flip side of his faith in civilization—civilization being, to return to Saint Paul's usage, "the [unseen] substance of [unseen] things hoped for, the evidence of things not seen" (p. 160). Not criminal law, but rather, Robinson's awareness of the cruel absurdity of criminal law, is Robinson's evidence of things not seen: That knowledge is a reflection of his faith.

Joseph's lawyers, without exception, testify in this way to both the limits of knowledge exposed by lawyers' knowledge and to the evidence of things not seen. Wylie, a wily transactional lawyer, knows that law is anything but lawful, systematic, or orderly; it is by all appearances chaos, he explains (p. 35), and as such, as impenetrable as any god's design. He knows it is too vast; he knows it can't be known. But he is no cynic. Wylie carefully and emphatically distinguishes himself from the Hobbesian who sees only the interplay of power: There are rules to be followed in law and legal practice; those rules are the evidence of things not seen (p. 35). Judge Day, a federal district court judge, has little hope for law in a society torn by civil wars, which is how she reads our own current condition, but denies that such a civil state belies common virtue (pp. 80–81). Lawyers lie, she tells Joseph, all the time and by necessity, simply because they know too much. Like any biographer, they must choose from too much information, and doing so distorts truth (p. 72). What lawyers know,
then, is that historical truth is unknowable and unspeakable. But this by no means destroys the distinction between honesty and fraud; rather, she insists, there is lying, then there is culpable lying, and lawyers for the most part know the difference (p. 74). That difference is Judge Day’s evidence of things not seen.

Rao, a personal injury lawyer, knows that lawyers know how to keep secrets, and knows that lawyers survive, in part, by not “want[ing] to know” much about the practice of their peers (p. 89). He also knows, though, that “all you need to know” is to take a client’s pain “personally” (p. 98). The pain you take on is Rao’s evidence of things not seen. Ther-aud, a labor lawyer, knows that lawyers “ferret” out the truth, and that truth exists between what can and can’t be proven. The truth lawyers ferret out is the truth of what can’t be known to be either true or false (p. 127). She also senses, though, that this peculiar lawyer’s truth blinds the lawyer to beauty: If the lawyer apprehends truth as existing between the known and the disprovable, and if truth is beauty and beauty truth, then the occupational hazard of lawyers, as she complains, will be an aesthetic dimness, dullness, and stupidity. As a result, lawyers habitually fail to appreciate either subtlety or beauty (p. 128). They don’t take the trouble to learn (p. 128). Shumate introduces both the Baldwin title, *The Evidence of Things Not Seen* (p. 160), in a paired reference to the Wayne Williams case that inspired the Baldwin book, and the paranoia surrounding the Tawana Brawley fiasco, and the “color wheel,” to delineate metaphorically our racially enraged society (p. 162). The color wheel—a racially balkanized society’s pathologically random hate—is the evidence of things not seen. Morand, a young immigration lawyer, speaks of lawyerly fraud, secrets and secretiveness, and—apropos of nothing—blurs out that what law can’t touch is the universal “desire to be perfectly at one with another human being” (p. 187). Joseph ends the book with an allusion to the protective mantle of appearances and shadows; those appearances, his final story suggests, can save our fragile lives (p. 225). Every lawyer in the book knows and speaks to the limits of knowledge, and every lawyer in the book testifies to the evidence of things not seen.

So, what kind of book is this, as David Luban asks? Unlike Luban, I don’t think it’s a book about lawyers’ hopelessness. I read it as a meditation on lawyers’ knowledge: what lawyers know, first, from the evidence of their practice, and what they know, second, from the evidence of things not seen. What they know from their practice is something about knowledge itself: What they know is that what they know is limited, contradictory, and deeply ironic. It is indeed, as Wylie observes, the infinite plenitude of chaos—moral, legal, and otherwise (p. 35). No code of ethics can capture what a lawyer in Robinson’s position should ever do in the machinations of a pathological system of justice (p. 22). No one can state

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6. Luban compares the book to Chandler’s detective novels, but then criticizes Joseph for introducing characters who, unlike Chandler’s, lack hope. Id. at 1770–71.
the law governing a complex transaction; there's too much of it to know. No lawyer can state what he knows to be true, because he knows too much (p. 72), because he is bound to secrecy (pp. 94-95), and because oftentimes what he doesn’t know, he doesn’t want to know (p. 89). What lawyers know is that truth is what can’t be proved and can’t, in principle, be disproved. They know that “what happened” is not that which can be either proved or disproved (p. 127). What the lawyer knows from practice is all about the limits, self imposed and otherwise, of knowledge. Lawyers’ stories—which, like Kafka’s legal parables, are often flat and with unformed points—almost always expose limits. This knowledge, gleaned from practice, constructs those who possess it as ironists.

But the limits of knowledge do not exhaust lawyerly knowledge. Practicing lawyers, both fictional and historic—and Joseph’s lawyers are both—are also privy to knowledge of things unseen. Kafka is continually paired with Melville in Lawyerland,7 and unlike Kafka’s insanely ironic lawyers, Melville’s Captain Vere, from “Billy Budd, Sailor,”8 it should be recalled, dies with tragic awareness of his moral “smallness,”9 as does the more comical “Wall Street Lawyer” in “Bartleby, the Scrivener.”10 Melville’s lawyers, like Joseph’s, do indeed glean evidence of things not seen. From evidence of things not seen, Joseph’s lawyers know, even if dimly and stupidly, of a moral and natural reality that is profoundly rule governed (p. 35), merciful, open to immigrants (pp. 20, 57, 191) as well as to hearts and souls (pp. 97-98, 128, 150, 189), beautiful (p. 128), and civilized (p. 22), in which human beings, not “lawyers” and “criminals,” but human beings, are not interchangeable with cockroaches, or put in prisons where noise alone causes suicides. It is because Joseph’s lawyers discern, or ferret out, these things not seen, that they are, in the end, recognizable as lawyers, as well as sympathetic and even tragic.

Is this true of lawyers generally, or only those in Joseph’s imagination? I think it might be true of lawyers generally; if so, we could perhaps think of Joseph’s book as itself evidence of things unseen. First, Joseph is surely right that lawyers, maybe distinctively, know a lot about what we and they don’t know. Joseph has captured this peculiarly lawyerly epistemic skepticism perfectly. But lawyers do also, sometimes, intuit, or feel, a few important “thaaang”s about civilization, about the essence of it all, about who we all are. That intuitive knowledge, also borne of practice, burdens them; it makes the rest of what they know and what they know about what they don’t know often unbearable. It is also, though, sometimes, what makes us sympathize and take their side: Joseph’s only quasi-

7. Compare the allusions to Kafka in the opening chapter, “Robinson’s Metamorphosis” (pp. 3-28), with the references to Melville (pp. 50-53).
9. Id. at 359.
10. Herman Melville, Bartleby, the Scrivener, in Billy Budd, Sailor and Selected Tales, supra note 8, at 3, 40.
fictional ironic lawyers—I think like lawyers generally—are often sympathetic and likeable, precisely because they are not pure ironists; they are in fact burdened with knowledge of things not seen. That knowledge, alongside of lawyerly knowledge of the limits of knowledge, is disorienting. Thus, maybe lawyers can’t appreciate beauty, as Tharaud complains (p. 128); but if so, it is partly because they are too jangled. They are jangled by the secrets they must keep; by their knowledge of monstrosity; by life and death stakes turning on their actions; by their awareness of even the positive law having grown beyond their comprehension or mastery; by their awareness of law’s injustice; by having taken on the pain of one too many clients as their own; and by occupying, simultaneously, the moral center of too many hurricanes. They risk their souls to this chaos, and they know, from the evidence of things not seen, that they are doing so. They are in the same position as Alice after the verdict, when the cards began to fall around her. Unlike Alice, they are not dreaming and won’t wake up.

So—the reader, or, maybe, the reader who is also a lawyer—will sympathize with Joseph’s characters. They’re all pretty obnoxious gasbags, but they’re likeable, too. They’re likeable, in part, simply because their stories accurately reveal that law has become too hard a profession. The law is too complicated to master; it is too unjust to have moral weight; and it is too conducive to fraud, gaming, and lies to inspire professional pride. It has become Herculean, but not in the sense meant by Dworkin. We need to cut it down to size, to make it human again, to make it doable. But to do so, Joseph’s lawyers tell us, we are going to have to humanize our civilization. That is the unseen thing that Joseph’s lawyers know. We are going to have to end the civil war and make peace, as Judge Day knows. We have to recognize the human equality of all and treat each other with dignity rather than cruelty, as Robinson knows. We have to both, somehow, open our borders and quiet the chaos, so as to make way for the soul and for knowledge of the other, as Tharaud knows. And perhaps above all, we need to end the epicycles of our color wheel of paranoia, as Shumate insists. It’s a tall order, but it’s one that might resonate with many of Joseph’s readers “who are also lawyers.” That is what Joseph’s characters, “who are also lawyers,” are asking us to do.

11. Joseph tells us in his introductory “Note to the Reader” that “readers who are also lawyers” will know why it is that his book, described as nonfiction, had to be “truthful rather than factual, but solidly based on facts.”
12. See supra note 3.