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“Inevitable Discovery”— Law, Narrative, Retrospectivity

Peter Brooks*

INTRODUCTION

The place and status of narrative in the law and in legal studies strike me as uncertain and ambiguous. On the one hand, trial advocates know—have known, presumably, since antiquity—that success in the court of law depends upon telling an effective and persuasive story. The discipline of rhetoric originated essentially to teach courtroom practitioners how to do just that. And academic study sympathetic to “law and literature” has recently given considerable attention to narrative and its uses throughout the law, as institution and as praxis.¹ On the other hand, one looks in vain in legal doctrine, and in judicial opinions, for any explicit recognition that “narrative” is a category for adjudication: that rules of evidence, for instance, implicate questions of how stories can and should be told. Recently, Justice David Souter evoked a concept of “narrative integrity” in one of his Supreme Court opinions²—so far as I can tell, the first recognition that the literary and cultural category of narrative needs to be imported into legal thinking, and one that thus far has had no sequels.

Legal scholarship first registered the importance of narrative through an attention to “storytelling for oppositionists”—the claim that narrative is an important tool for individuals and communities

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1. See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000); *LAW'S STORIES* (Peter Brooks & Paul Gewirtz eds., 1996); RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1998).

2. *Johnny Lynn Old Chief v. United States*, 519 U.S. 172, 183 (1997). I have discussed this opinion at greater length in *Policing Stories*, in *LAW'S MADNESS* (Austin Sarat et al. eds., forthcoming 2003).

who need to tell the concrete particulars of their experience in a way normally excluded by legal reasoning and rule.³ More recently, Anthony Amsterdam and Jerome Bruner make the claim that “[l]aw lives on narrative.”⁴ If the traditional supposition of the law was that adjudication could proceed by “examining free-standing factual data selected on grounds of their logical pertinency,” now “increasingly we are coming to recognize that both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*.”⁵ If this seems convincing, even obvious to students of narrative, I do not believe that Amsterdam and Bruner’s “we” who think in terms of “choice . . . of overall narrative” includes most judges, or many others who contribute to official legal doctrine. Those who expound what the law is do not overtly recognize “narrative” as an instrument in the process of legal adjudication.

I want to argue that reading the law from the perspective of the literary “narratologist” offers more than a playful exercise in interdisciplinarity—that it may in fact tell us something about the law. I note that a thoughtful commentator on “law and literature,” Jane B. Baron, has recently claimed that writing in the field has “not been sufficiently interdisciplinary,” largely because it “has not questioned what the category ‘law’ consists of and has thus tended inadvertently to reinforce the notion of law as autonomous.”⁶ While I believe that breaching the autonomy of the law—or what I would prefer to call its hermeticism—is no easy task since the law tends to reject transplants from other bodies of thought, Baron’s challenge must be taken up.⁷ An area of legal thought that seems to cry out for a breaching of law’s hermeticism—an opening up to literary thinking and narratological analysis—is that concerned with Fourth Amendment reasoning on “searches and seizures.” Any talk of search and seizure almost inevitably implies a narrative, and recently—doubtless because the “war on drugs” has produced so many instances—these narratives have become increasingly tortuous and dubious. Moreover, the search narrative offers a particularly striking instance of the necessary though unarticulated

3. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989). A number of other essays on this same theme may be found in the same issue of the *Michigan Law Review*.

4. AMSTERDAM & BRUNER, *supra* note 1, at 111.

5. *Id.*

6. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1061 (1999).

7. On the hermeticism of the law, see Peter Brooks, *Law, Culture, Therapy*, 13 YALE J.L. & HUMAN. 227 (2001).

retrospectivity of legal narrative, its structuring by its ending. Where that narrative is a hypothetical one, its teleological structure becomes all the more evident and questionable. What follows is not an attempt to deal with the vast and complex domain of Fourth Amendment jurisprudence, but with some concrete narratological problems arising from the ways in which certain searches are recounted by the courts. What interests me here is not so much the events evoked by legal decisionmakers as the way they are told. Stories are not events in the world, but the way we speak them—a distinction easily forgotten.

I. SEARCHING FOR PAMELA POWERS'S BODY

The case of *Brewer v. Williams*,⁸ decided by the Supreme Court in 1977, turns on a fateful ride in a police cruiser over the “snowy and slippery miles” between Davenport and Des Moines, Iowa, on December 26, 1968. In the police cruiser, Detective Leaming delivers what has become known as “the Christian Burial Speech” to the man he has in custody, Robert Williams, suspected of murdering ten-year-old Pamela Powers. Addressing Williams, whom he knows to be a deeply religious person, as “Reverend,” Leaming evokes the weather conditions, the forecast of several inches of snow, and the likelihood that the young girl’s body will be buried and unlocatable. Since Williams must know where the body is, he could take the police officers to it—and then her parents could give her a decent Christian burial. “I want to give you something to think about while we’re traveling down the road,” Leaming says:

They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. . . . I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.⁹

Williams eventually directs the police to a service station, where he claims to have left the girl’s shoes, then to a rest area where he claims to have left a blanket in which the body was wrapped, and finally leads them to the body itself.

8. 430 U.S. 387.

9. *Id.* at 392-93.

The problem is that the Davenport attorney representing Williams has obtained a promise from the police that his client will not be questioned during the ride—from which the attorney has been excluded—and that promise has been confirmed in a phone call to Williams’s attorney in Des Moines. Thus the information about the location of the body elicited by the “Christian Burial Speech” is obtained through a violation of Williams’s Sixth Amendment right to the assistance of counsel and, by the Supreme Court’s 5-4 decision in *Brewer v. Williams*, should not have been allowed as evidence. The Court remanded the case for retrial, noting that at retrial evidence of the body’s location and condition “might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been obtained from Williams.”¹⁰ That discovery “in any event” would then be the issue at contest when the case of Robert Williams—convicted of first-degree murder at his second trial, and sentenced to life imprisonment—returned to the Supreme Court in 1984 as *Nix v. Williams*.¹¹

Back to December 26, 1968. While Detective Leaming and Robert Williams were shut in the police cruiser making its way west on Interstate 80, a search party of some 200 volunteers directed by Agent Ruxlow of the Iowa Bureau of Criminal Investigation was searching for the body of Pamela Powers. The search party set off at 10 a.m., moving westward through Poweshiek County into Jasper County. Ruxlow had marked highway maps of the two counties as grids, and assigned teams of four to six persons to search each grid. The searchers were instructed to “check all the roads, the ditches, any culverts. . . . If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any places where a small child could be secreted.”¹² The search party did not find the body. At about 3 p.m., Leaming sent word to Ruxlow that Williams would lead him to the body, and the search was called off. At this point, searchers were some two and a half miles from where the body lay, near a culvert in Polk County. The map of Polk County had not yet been divided into grids for searching, but Ruxlow testified that he had that county map, and would have marked it off for the search party had it been necessary for the search to continue. The body was found in the easternmost part of Polk County. Another three to five hours of searching should have been sufficient to discover it.

On the basis of this record, the Supreme Court in *Nix v. Williams*,

10. *Id.* at 407 n.12.

11. 467 U.S. 431.

12. Transcript of Hearings on Motion to Suppress, *quoted in* *Nix v. Williams*, 467 U.S. at 448-49 (alteration in original).

in an opinion written by Chief Justice Warren Burger, accepted the notion that the so-called "exclusionary rule" barring evidence illegally seized allows for an exception for "inevitable discovery." This was the conclusion of the trial court when Williams was retried and convicted. As summarized and underlined by Burger:

The trial court concluded that the State had proved by a preponderance of the evidence that, if the search had not been suspended and Williams had not led the police to the victim, her body would have been discovered "*within a short time*" in essentially the same condition as it was actually found. The trial court also ruled that if the police had not located the body, "the search would clearly have been taken up again where it left off, given the extreme circumstances of this case and the body would [have] been found *in short order*." In finding that the body would have been discovered in essentially the same condition as it was actually found, the court noted that freezing temperatures had prevailed and tissue deterioration would have been suspended.¹³

In other words, the inevitable discovery exception to the exclusionary rule—accepted in a large majority of courts, both state and federal, but not explicitly by the Supreme Court before the present case—appears to depend on a factual narrative, one that can precisely prove, or at least forcefully suggest, true inevitability. The search party had proceeded methodically across those grids in Poweshiek and Jasper counties; it was about to enter Polk, which was about to be grid-lined as well; it was only two and a half miles from the site. "The child's body was found next to a culvert in a ditch beside a gravel road in Polk County, about two miles south of Interstate 80, and essentially within the area to be searched."¹⁴ Like "the place where the three roads meet" in Sophocles's *Oedipus Tyrannos*—where Oedipus meets and slays his unknown father—the place of Pamela Powers's body is designated as a place of fatal and inevitable convergence. The body was there, preserved by the freezing weather, waiting to be discovered.¹⁵

But counsel for Williams makes an ingenious attempt to rebut the doctrine of inevitable discovery, arguing that it is "only the 'post hoc rationalization' that the search efforts would have proceeded two and one-half miles into Polk County where Williams had led the

13. 467 U.S. at 437-38 (citation omitted).

14. *Id.* at 436.

15. It should be noted, however, that the habeas petition—though not the trial records—in Williams's case suggests that the body might not have been so inevitably subject to discovery: It was covered with snow, and in a culvert not visible from the road. See Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349, 372-73 (1983).

police to the body.”¹⁶ The point may be well taken. The doctrine of inevitable discovery clearly starts from the end of the trail of the search—at the dead body—and then traces the path, be it inevitable or merely probable, that would have led to it. “Inevitable discovery” implicitly suggests that narratives work back from their ends, which are the real determinants of their vectors, the direction and intention of their plotting. A number of theorists of narrative have argued that such is the logic of narrative: that a large part of the coherence of narrative derives from the knowledge that an end lies in wait, to complete and elucidate whatever is put in motion at the start.¹⁷ Narratives tend to make their endings appear inevitable since that is part and parcel of their meaning-making function. If, as Aristotle claims in his *Poetics*, stories have a beginning, a middle, and an end, it would be the poor (or particularly challenging) story in which there appeared to be no relation between beginning and end. And in this sense, Williams’s lawyer’s effort to contest “inevitable discovery” may be on target: inevitable discovery perhaps has less to do with the way things happen in the world than with our narrative expectations. The body was there, waiting for the search party to discover it—just as, in a famous Chekhov example, the gun hung on the wall in Act I of the play is waiting to be discharged at someone’s head in Act III.¹⁸ To call discovery inevitable is to view the story from the perspective of the end and to subscribe to a possibly mechanistic notion that plots grind on to their logical outcome, in a version of Jean Cocteau’s “infernal machine.”¹⁹

Justice William Brennan—joined by Justice Thurgood Marshall—dissents in *Nix v. Williams* precisely on a version of this point. Brennan accuses the Court, “[i]n its zealous efforts to emasculate the exclusionary rule,” of losing sight of “the crucial difference between the ‘inevitable discovery’ doctrine and the ‘independent source’ exception from which it is derived.”²⁰ The “independent source” exception allows the use of evidence found by an independent and

16. *Nix v. Williams*, 467 U.S. at 448.

17. See, e.g., ROLAND BARTHES, *S/Z* (1970); PETER BROOKS, *READING FOR THE PLOT* (1984); FRANK KERMODE, *THE SENSE OF AN ENDING* (1967); JEAN-PAUL SARTRE, *LA NAUSÉE* (1938).

18. ANTON CHEKHOV, *LITERARY AND THEATRICAL REMINISCENCES* 23 (S.S. Koteliansky trans., 1974). I find another version of Chekhov’s remarks in an important essay by the Russian Formalist Boris Tomachevsky, in a discussion of narrative “motivation,” that is, the narrative economy by which all properties and episodes must be made functional: “Chekhov referred to just such compositional motivation when he stated that if one speaks about a nail being beaten into a wall at the beginning of a narrative, then at the end the hero must hang himself on that nail.” Boris Tomachevsky, *Thematics, in* RUSSIAN FORMALIST CRITICISM 79 (Lee T. Lemon & Marion J. Reis eds. & trans., 1965). On a similar concept of “motivation,” see my quotation from Gérard Genette, *infra* p. 84.

19. See JEAN COCTEAU, *LA MACHINE INFERNALE* (1933).

20. *Nix*, 467 U.S. at 459.

lawful investigation even when there has been a constitutional violation elsewhere in the search. "Inevitable discovery" similarly requires an independent and lawful investigation, but

it differs in one key respect from its next of kin: specifically, the evidence sought to be introduced at trial has not actually been obtained from an independent source, but rather would have been discovered as a matter of course if independent investigations were allowed to proceed.

... The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule.²¹

Brennan finds that inevitable discovery contains a measure of the hypothetical—what Williams's lawyer calls a "post-hoc rationalization"—and therefore concludes that it requires a higher standard of proof than the "preponderance of the evidence" test accepted by the majority. Instead, says Brennan, the Court should insist upon "clear and convincing" evidence when the inevitable discovery exception is invoked. That is, since inevitable discovery, unlike independent source evidence, depends on a hypothetical narrative, it requires a heightened burden of proof, upon which the lower courts failed to insist.

The distinction between evidence in fact discovered by an independent investigation and that which "inevitably" would have been discovered seems more crucial than the majority in *Nix v. Williams* allows. The hypothetical "would have been discovered," operating post hoc, may be determined more by the narrative logic of retrospectivity than the Court sees or admits. In the case of Pamela Powers's body there was an actual search party on course to reach the object of the search with high probability, if not true inevitability. In some subsequent cases, the inevitable discovery doctrine has been given far more dubious uses. For instance, cocaine found in a person's baggage in a search not incident to his arrest, a search only held later without apparent probable cause, was allowed as evidence on the grounds that the cocaine would inevitably have been discovered since there would have routinely been an "inventory search" of the suspect's possessions.²² This doubles the "would have." Even more dubiously, courts have held that evidence found in an illegal warrantless search was admissible because a search warrant could have and would have been obtained if the

21. *Id.*

22. *See United States v. Andrade*, 784 F.2d 1431 (9th Cir. 1986).

police had sought it.²³ On this logic, the exclusionary rule could become a dead letter whenever one could plausibly argue that evidence would have been legally discovered if the police had discovered it by legal means.

Standing at the vantage point of the end of the story, the proof that the suspect was in fact guilty of illegal activity, the post-hoc logic of the inevitable discovery doctrine can be used to justify practically anything. It simply espouses the very logic of narrative, which makes sense by way of its end. Note that an application for a search warrant itself involves telling the story of what you expect to find in the search—an expectation that then will be confirmed or falsified by the search itself. When you elide the difference between the standpoint from which you state what you expect will be the outcome, and the standpoint of the outcome from which you state that this was what you expected all along, you begin to efface the difference between the probable—the hypothetical fiction—and the actual. You confuse the logic of the telling of the story with the putative logic of the events the story tells.

I shall return to the logic of narrative in a moment. First, I need to explore a bit more the hypothetical search versus the real search. In an Eighth Circuit Court of Appeals case in 1988, *Feldhacker v. United States*,²⁴ Julia Lynn Feldhacker and Mark David Critz claimed that the government obtained the names of five witnesses (purchasers of drugs from Feldhacker) through statements of the defendants subsequently ruled to have been illegally obtained. The prosecution responded that the identities of the purchasers-witnesses would inevitably have been discovered because it legally discovered two address books containing the names of the purchasers. To which the defense responded that the prior “tainted knowledge” permitted the prosecution to pick out the relevant names from the lists of addresses, which were fragmentary and vague. The Court of Appeals ruled in the government’s favor, but conceded in a footnote:

There are reasonable limits to the scope that courts will impute to the hypothetical untainted investigation. An investigation conducted over an infinite time with infinite thoroughness will, of course, “ultimately or inevitably” turn up any and all pieces of evidence in the world. Prosecutors may not justify unlawful extractions of information *post hoc* where lawful methods present only a theoretical possibility of discovery. While hypothetical discovery by lawful means need not be reached as rapidly as that actually reached by unlawful means, the lawful

23. See *United States v. Levasseur*, 620 F. Supp. 624 (E.D.N.Y. 1985); *State v. Butler*, 676 S.W.2d 809 (Mo. 1984).

24. 849 F.2d 293 (8th Cir. 1988).

discovery must be inevitable through means that would actually have been employed. *Cf. Williams . . .*²⁵

This comment opens the dizzying perspective of a kind of narrative utopia, where an infinitely extended search of infinite thoroughness would inevitably discover everything in the world. It registers a breathtaking confidence in the legibility of the world, and the capacity of human intelligence to decipher it. Or is the court being ironic, simply offering a *reductio ad absurdum* of search doctrine? Whatever the intended tone here, the comment stands with the premises of the classic detective story—in the tales of Sherlock Holmes, for instance—or Wilkie Collins's *The Moonstone*, where Sergeant Cuff believes that if you search the detritus of civilization long enough, the needed clues will come to light.²⁶ But it also figures a kind of eventual impasse of narrative as discovery in the infinitely protracted search for all the evidence in the world—something that might figure in a story by Jorge Luis Borges. In fact, Borges's *Funes the Memorious* instances the narrative problem created when someone has infinite powers of memory, resulting in the recreation of a past in every detail, which means that going over that past will take as much time as the past itself.²⁷ The doctrine of "infinite discovery," as one might call it, may return us in disquieting ways to the hypothetical narratives of "inevitable discovery," which depend—as narrative always does—on a selection of what is considered to be relevant, and thus on the creation of a sense of the inevitable.

II. POISONED FRUIT AND NARRATIVE LINKS

Before exploring further the "narratological" implications of inevitable (and possibly infinite) discovery, I need to say something more about the context of these Fourth Amendment "exclusionary rule" cases. The argument in these cases often turns on whether the evidence in question is "tainted" because it is "fruit of the poisonous tree"—that is, derived from an illegally-obtained and therefore tainted source—or rather whether the evidence has been found by means sufficiently distinguishable to be "purged" of that taint. The rule that evidence illegally obtained cannot be used for prosecution

25. *Feldhacker*, 849 F.2d at 296 n.4 (citing *Nix*, 467 U.S. at 448-50).

26. See, for example, the Superintendent's contemptuous remark, "There *is* such a thing, Sergeant, as making a mountain out of a molehill. Good day," to which Cuff replies, "There is such a thing as making nothing out of a molehill, in consequence of your head being too high to see it." WILKIE COLLINS, *THE MOONSTONE* 104 (Oxford World's Classics 1999) (1868).

27. JORGE LUIS BORGES, *Funes the Memorious*, in *LABYRINTHS* 59 (James E. Irby trans., 1962). See also Borges's meta-detective story, *Death and the Compass*, in *LABYRINTHS*, *supra*, at 76.

derives from the 1920 case, *Silverthorne Lumber Co. v. United States*,²⁸ where Justice Holmes wrote: “The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.”²⁹ The language of tree and fruit seems then to be introduced in 1939, in *Nardone v. United States*,³⁰ a wiretap case where Justice Frankfurter, considering whether the evidence was obtained from an “independent source” or not, wrote:

Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . . The burden is, of course, on the accused in the first instance to prove to the trial court’s satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.³¹

In considering how the “taint” of illegally obtained evidence might be “dissipated,” Frankfurter arrives at the metaphor of the “fruit of the poisonous tree.” It then assumed its classic, oft-cited form in 1963, in *Wong Sun v. United States*.³² By 1985, in *Oregon v. Elstad*³³—a case concerning whether or not the defendant’s confession was illegally obtained—Justice O’Connor can write: “The arguments in favor of suppression of respondent’s written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent’s confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the ‘tainted fruit of the poisonous tree’”³⁴

Here is the metaphor in full. Somewhere in the background one seems to hear a Miltonic echo:

28. 251 U.S. 385.

29. *Id.* at 392.

30. 308 U.S. 338.

31. *Id.* at 341.

32. 371 U.S. 471, 488 (1963) (referring to “fruit of the poisonous tree”).

33. 470 U.S. 298.

34. *Id.* at 341.

Of Man's first disobedience, and the fruit
 Of that forbidden tree whose mortal taste
 Brought death into the World, and all our woe . . .³⁵

Now, in *Paradise Lost*, the Tree of Knowledge, of good and evil, is not itself poisonous, but rather forbidden, which makes its fruit poisonous to Adam and Eve. In the Fourth Amendment analogy, the use of search methods that are constitutionally forbidden makes the fruits of that search tainted. But note that the Court's metaphor assigns poisonousness to the tree itself, tainting its fruits. The question is thus one of judging whether or not the "taint" has been "dissipated." In *Elstad*, Justice Brennan in dissent claims that O'Connor's opinion is "completely at odds with established dissipation analysis"³⁶ and that it "marks an evisceration of the established fruit of the poisonous tree doctrine."³⁷ Brennan's image is curiously vivid if somewhat baroque, suggesting eviscerated fruit hanging on the limbs of that poisoned tree.

I cite these metaphors because they highlight the Court's need to find language to speak of the ways in which illegally-obtained evidence and its use or exclusion can be thought through. The Court's problem is one of narrative discourse. If you've got a poisonous tree, by what process can the taint attaching to its fruit be dissipated—or does the poison linger on? The Court's resort to metaphor—and *Elstad*, for instance, is shot through with metaphor—implies that it cannot work through the problem by logic alone, no doubt because it is not a problem in logic, but one in narrative, one having to do with connections, how you view them, how you may attenuate or break them. *Elstad* also uses images of releasing springs, identifying a "break in the stream of events," letting "the cat out of the bag." Overall, one finds the Court searching—vainly in this case—for language to represent the relevant terms of connection. The problem is succinctly stated in *Brown v. Illinois*, in 1975, when Justice Blackmun writes:

Thus, even if the statements in this case were to be found voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, Wong Sun requires not merely that the statement meet

35. JOHN MILTON, *PARADISE LOST* bk. I, ll.1-3 (Northrop Frye ed., Holt, Rinehart & Winston 1963) (1667).

36. *Elstad*, 470 U.S. at 338.

37. *Id.* at 346.

the Fifth Amendment standard of voluntariness but that it be “sufficiently an act of free will to purge the primary taint.”³⁸

The metaphor of the causal chain—which must be broken to allow the taint to be purged—images a narrative connection broken, allowing a different story—one without taint—to be told. That “chain,” made of interconnected links, is a sure sign that we are dealing in a specifically narrative logic.

“‘You reasoned it out beautifully,’ I exclaimed in unfeigned admiration. ‘It is so long a chain, and yet every link rings true.’”³⁹ Thus Dr. Watson to Sherlock Holmes, at the end of *The Red-Headed League*. Similar statements can be found at the conclusion of many of the Holmes stories: they image a process of narrative reasoning that brings the detective to his discovery. In a variant: “‘Wonderful!’ cried the colonel. ‘Wonderful! You might have been there!’”⁴⁰ Discovery is so acute that it mimics eyewitness. This last line comes at the end of *Silver Blaze*, a case in which Holmes is faced with the disappearance of the famous racehorse only a week before the running of the Wessex Cup in which he is the favorite, and the apparent murder of his trainer, John Straker, found bludgeoned to death in a hollow on Dartmoor.

Holmes’s discoveries in *Silver Blaze* occur because he is looking for them, he expects to find them. For instance, at the scene of the crime:

“Hullo!” said he suddenly. “What’s this?” It was a wax vesta, half burned, which was so coated with mud that it looked at first like a little chip of wood.

“I cannot think how I came to overlook it,” said the inspector with an expression of annoyance.

“It was invisible, buried in the mud. I only saw it because I was looking for it.”

“What! you expected to find it?”

“I thought it not unlikely.”⁴¹

That which is hidden reveals itself when you know it must be there,

38. *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

39. ARTHUR CONAN DOYLE, *The Red-Headed League*, in *THE ADVENTURE OF THE SPECKLED BAND AND OTHER STORIES OF SHERLOCK HOLMES* 83 (1965) [hereinafter *STORIES OF SHERLOCK HOLMES*].

40. ARTHUR CONAN DOYLE, *Silver Blaze*, in *STORIES OF SHERLOCK HOLMES*, *supra* note 39, at 168.

41. *Id.* at 158.

when you have postulated its discovery as inevitable. The “wax vesta” match had to be there since Straker would have had to strike a light in order to perform the delicate operation—nicking Silver Blaze’s tendon—that Holmes now knows Straker must have planned. Similarly, since “[t]he horse is a very gregarious creature,” Silver Blaze cannot be running wild on the moor; he must have gone to a stable—if not his own, King’s Pyland, then the nearby rival, Mapleton:

He is not at King’s Pyland. Therefore he is at Mapleton. Let us take that as a working hypothesis and see what it leads to. This part of the moor, as the inspector remarked, is very hard and dry. But it falls away towards Mapleton, and you can see from here that there is a long hollow over yonder, which must have been very wet on Monday night. If our supposition is correct, then the horse must have crossed that, and there is the point where we should look for his tracks.⁴²

So it is that the finding of the very tracks to be followed is determined by what Holmes calls his “working hypothesis,” a prediction of what is to be discovered. They find the tracks, then lose them for half a mile, then pick them up again close to Mapleton stables, and now a man’s footprints appear next to the horse’s. Tracks of horse and man now make a sharp turn back toward King’s Pyland, but Watson quickly perceives that the same prints reappear parallel to the first track, now returning toward Mapleton. As Holmes reconstructs the scene, Mapleton’s trainer, Silas Brown (who has heavy stakes on Silver Blaze’s rival) encountered the horse wandering on the moor early in the morning, recognized him, and in a first impulse thought to return him to King’s Pyland. He then changed his mind, led him to Mapleton, and there painted over his silver blaze to disguise him.

Now, Holmes need only confront Silas Brown:

“He has the horse, then?”

“He tried to bluster out of it, but I described to him so exactly what his actions had been upon that morning that he is convinced that I was watching him.”⁴³

The clues, the tracks, are so exactly followed that Holmes “might have been there.”⁴⁴ Even when found, Silver Blaze, his blaze

42. *Id.* at 159.

43. *Id.* at 161.

44. Kim Lane Scheppele has argued that American evidence law embodies a “ground zero” theory of evidence—very much like Holmes’s “you might have been there.” Kim Lane Scheppele, *The Ground Zero Theory of Evidence*, 50 HASTINGS L.J. 321 (1998).

concealed, is not detected by his owner, Colonel Ross. It is only after the horse has won the Wessex Cup that Holmes dramatically discloses his discovery to the others: the identity of the horse, and the horse's identity as the murderer—in self-defense—of John Straker.

The most memorable exchange in *Silver Blaze* concerns the dog in the night. Inspector Gregory asks Holmes:

“Is there any point to which you would wish to draw my attention?”

“To the curious incident of the dog in the night-time.”

“The dog did nothing in the night-time.”

“That was the curious incident,” remarked Sherlock Holmes.⁴⁵

That the dog did nothing during the night while *Silver Blaze* was being abducted from the stable, indicates to Holmes that the abductor must have been a familiar of the dog, who would otherwise have barked. So what sounds like a Monty Python routine is one more indication of how the chain of discovery gives significance to each incident that constitutes one of its links, even that incident which is a non-occurrence.

The chain of discovery offers one example of what Gérard Genette calls “the determination of means by ends . . . of causes by effects.” Genette states further:

This is that paradoxical logic of fiction which requires us to define every element, every unit of the narrative by its functional character, that is to say among other things by its correlation with another unit, and to account for the first (in the order of narrative temporality) by the second, and so on . . .⁴⁶

The linking of events means that their enchainment is determined by the post-hoc reasoning of the discoverer, then laid out as a plot leading from beginning to discovery. The discourse of narrative “motivation”—as in Chekhov's example of the gun hung on the wall—plots the story from end to beginning, then recounts it from beginning to end. The continuing popularity of detective fiction may in part derive from its dramatizing so evidently—perhaps too facetly—the very process of narrative plotting.

“Discovery” in *Silver Blaze* is not inevitable—indeed, all the would-be discoverers are stumped until Holmes comes on the scene.

45. *Id.* at 163-64.

46. GÉRARD GENETTE, *Vraisemblance et motivation*, in FIGURES II 94 (1969) (my translation).

But it is part of Holmes's prestige and continuing appeal to make discovery *appear* inevitable. The Holmes stories postulate a knowable world, a universe governed by laws that are ultimately discoverable to the percipient and patient investigator—like that world imaged in the strange footnote to *Feldhacker*. Crime is an aberrancy in the world, the introduction of the menace of chaos. But discovery through reason shows that the chaos is only apparent. Holmes's discovery sounds as a victory of law over chance, reason over aberrancy, and restores a world of perfect order.

III. SEARCH AND THE HUNTSMAN'S PARADIGM

In an ambitious argument that touches on Sherlock Holmes, on Freud, and on the prototype of a kind of discovery procedure used by both that was elaborated by the art historian Giovanni Morelli—whose premise was that in order to authenticate a painting, one should look to minute details such as earlobes and fingernails, where an artist's unique characteristics would be better revealed than in the ensemble—Carlo Ginzburg undertakes to isolate and define a special form of cognition by way of clues.⁴⁷ Knowing by way of clues, following the traces left by one's quarry, is of course the detective's method. It doesn't work by deduction from a general law (though it may call upon fragments of general wisdom, e.g. "the horse is a gregarious animal"), nor does it quite work inductively from part to whole. It is rather a science of the concrete and particular that achieves its discoveries through putting particulars together in a narrative chain. Ginzburg identifies this science with the huntsman's lore:

Man has been a hunter for thousands of years. In the course of countless pursuits he learned to reconstruct the shapes and movements of his invisible prey from tracks in the mud, broken branches, droppings of excrement, tufts of hair, entangled feathers, stagnating odors. He learned to sniff out, record, interpret, and classify such infinitesimal traces as trails of spittle. He learned how to execute complex mental operations with lightning speed, in the depth of a forest or in a prairie with its hidden dangers.⁴⁸

Even in a post-hunting society, searches reach their discoveries by such tracking of details, making them into a chain of meaning,

47. CARLO GINZBURG, *Spie. Radici di un paradigma indizario*, in MITI EMBLEMI SPIE 158-209 (1986) [hereinafter GINZBURG, SPIE]. For an English translation, see CARLO GINZBURG, *Clues: Roots of an Evidential Paradigm*, in MYTHS, EMBLEMS, CLUES 96-125 (John Tedeschi & Anne C. Tedeschi trans., 1990) [hereinafter GINZBURG, CLUES]. I have modified the Tedeschi translation in places in order to give a more literal rendition.

48. GINZBURG, SPIE, *supra* note 47, at 166; GINZBURG, CLUES, *supra* note 47, at 102.

uncovering their connections. Ginzburg speculates that this kind of knowing may in fact lie at the inception of narrative itself:

This knowledge is characterized by the ability to move from apparently insignificant experiential data to a complex reality that cannot be experienced directly. And the data is always arranged by the observer in such a way as to produce a narrative sequence, which could be expressed most simply as “someone passed this way.” Perhaps the very idea of narrative (as distinct from the incantation, exorcism, or invocation) was born in a hunting society, from the experience of deciphering tracks.⁴⁹

On Ginzburg’s hypothesis, narrative would be a cognitive instrument of a specific type, one “invented” for the decipherment of details of the real that only take on their meaning when linked in a series, enchained in a manner that allows one to detect that “someone passed this way.” This is what Sherlock Holmes’s searches—for a wax vesta, for hoofprints in the muddy hollows of the moor—are all about. And the “hunter’s paradigm” may indicate in more general terms the use-value of narrative as a form of speech and cognition: it is the instrument we use when the combination of particulars into a meaningful sequence seems to be the only way to track down our quarry, whatever it may be. Working from Ginzburg’s suggestions, Terence Cave argues that the hunter’s or “cynegetic paradigm” points us toward that most basic and enduring and useful of plots: the story that leads to *anagnorisis* or recognition:

The sign of recognition in drama and narrative fiction belongs, then, to the same mode of knowledge as the signature, the clue, the fingerprint or footprint and all the other tracks and traces that enable an individual to be identified, a criminal to be caught, a hidden event or state of affairs to be reconstructed.⁵⁰

Signs of recognition in literature reach back to antiquity and forward to modernity: see the scar on Odysseus’s thigh that enables his old nurse Eurykleia to recognize him by touch, or the hidden birthmark of Shakespeare’s *Cymbeline*, or the notorious *croix de ma mère* of nineteenth-century melodrama, the token which at the denouement allows the orphan to be recognized, true identities established. It is easy to recognize that the law, particularly when dealing with issues of evidence, must make use of the hunter’s paradigm, seeking to show how finding signs and deciphering tracks will lead to the apprehension of what passed that way.

Ginzburg further specifies the relation of the hunter’s paradigm

49. GINZBURG, SPIE, *supra* note 47, at 166; GINZBURG, CLUES, *supra* note 47, at 103.

50. TERENCE CAVE, RECOGNITIONS: A STUDY IN POETICS 250 (1988).

to law in his discussion of the arcane subject of divination, as in the Mesopotamian tradition, based on the minute investigation of seemingly trivial details: "animals' innards, drops of oil on the water, stars, involuntary movements of the body."⁵¹ According to Ginzburg, Mesopotamian jurisprudence was similarly oriented toward the interpretation of particulars: "Mesopotamian legal texts themselves did not consist of collections of laws or statutes but of discussions of concrete examples."⁵² So that the same paradigm can be found in the divinatory and jurisprudential texts, with this difference: the former are directed to the future, the latter to the past. Ginzburg then further stretches his hypothesis to suggest that narrative modes of knowing (such as archaeology, paleontology, geology) all make what he calls "retrospective prophecies,"⁵³ which he sees as the key to the popularity of detective fiction.

The "case method" of American legal study—introduced by C.C. Langdell at Harvard Law School shortly before Conan Doyle began his Sherlock Holmes tales—resembles the Mesopotamian approach in its insistence that argument be worked up from concrete particulars.⁵⁴ Here the concept of "retrospective prophecy" is also relevant: that which is plotted forward to the predictable outcome can be so ordered because one in fact stands at the point of the outcome. The point of the exercise, in a pedagogical and cognitive sense, is to retrace how that outcome was inevitable from the "facts of the case." And if we enjoy the mental processes activated by detective fiction and legal argument, it must be in part because of the satisfaction derived from the demonstration of inevitability: it had to be this way, and no other way.

Searches for evidence may always include a "retrospective prophecy" factor. In an example noted earlier, an application for a search warrant must contain a prediction of what is to be found. The warrant application sets forth the evidence that the police believe they (inevitably) will find if given permission to search. Warrants must be based on "probable cause" that what is sought will be found. In this sense, searches for evidence always involve a prior story, a hypothetical story which the search intends to confirm.

The doctrine of "inevitable discovery," however, offers a particularly clear instance of "retrospective prophecy." It makes the claim that a trail to the quarry exists, and that the (hypothetical) following of the traces and tracks making up this trail would (certainly) lead to the quarry. In other words, it takes the logic of the

51. GINZBURG, SPIE, *supra* note 47, at 168-69; GINZBURG, CLUES, *supra* note 47, at 104.

52. GINZBURG, SPIE, *supra* note 47, at 168-69; GINZBURG, CLUES, *supra* note 47, at 104.

53. GINZBURG, SPIE, *supra* note 47, at 183; GINZBURG, CLUES, *supra* note 47, at 117.

54. I am grateful to Simon Stern for bringing this parallel to my attention.

hunter's paradigm—the logic of narrative knowing—and, in its hypothetical application of the paradigm (to a case in which the quarry was not but would have been found) exposes the logic of discovery, as a narrative process. In the doctrine of inevitable discovery, we know that the quarry is there, at the end of the trail. The question is whether following the trail would inevitably have led to it. When you decide—as in *Nix*—that it would have, you subscribe to the logic of narrative discovery in a particularly telling way, accepting that the hunter's lore is infallible, and infallibly cognitive. When as a legal decisionmaker you so decide, you may be simply affirming the nature of the law as discipline: affirming its belief in evidence as the meaningful entailment of tracks and traces.

If pushed to its limits, the inevitable discovery doctrine can indeed result in some (limited) version of the “all pieces of evidence in the world” becoming admissible in some putative search of “infinite thoroughness.” For instance, as I noted earlier, in cases where police claim that a passenger's luggage or the trunk of a car would inevitably have been subject to an “inventory search,” the fruits of an illegal search have sometimes been admitted on grounds that they would have inevitably been discovered by the later routine search.⁵⁵ Yet more dubiously, the doctrine has been used to admit evidence found in an illegal, warrantless search on the grounds that a warrant could have and would have been obtained, and thus the evidence would have been inevitably discovered.⁵⁶ Both these instances further lay bare the device, and further suggest how assumptions about the narrative outcome shape the story, and confer, precisely, the sense of inevitability on the unfolding of its plot.

The hunter's paradigm may be said to intersect in modern societies with an identity paradigm. The classic detective story came into being and flourished in an era during which emergent bourgeois society became increasingly anxious about signs of identity of its criminal elements. Cities were growing rapidly, especially from an influx of the poor from the provinces looking for work. The laboring classes, as Louis Chevalier so well demonstrated, came to appear dangerous classes.⁵⁷ The increasingly undifferentiated mass of city dwellers called for positive identification of its malefactors and marginals. Prostitutes in Paris, for instance, were required to register

55. See *United States v. Andrade*, 784 F.2d 1431 (9th Cir. 1986). *But see United States v. Six Hundred Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in United States Currency*, 944 F.2d 712 (D.C. Cir. 1992).

56. See *United States v. Levasseur*, 620 F. Supp. 624 (E.D.N.Y. 1985); *State v. Butler*, 676 S.W.2d 809 (Mo. 1984).

57. See LOUIS CHEVALIER, *CLASSES LABORIEUSES ET CLASSES DANGEREUSES* (1958). For an English translation, see LOUIS CHEVALIER, *LABOURING CLASSES AND DANGEROUS CLASSES* (Frank Jellinek trans., 1973).

with the police, to carry a card if streetwalkers, to be assigned a number if in a brothel. When *la marque*—the practice of branding convicts' bodies with letters signifying their sentence—was abolished on humanitarian grounds in France in 1832, a new anxiety developed concerning the identification of recidivists.

Balzac, who so often captures the spirit of his time, dramatized the use of *la marque* in the person of his arch-criminal, Jacques Collin, alias Vautrin, alias the Reverend Father Carlos Herrera, alias *Trompe-la-Mort*, or Cheat-Death. Balzac was writing about a period in which *la marque* still existed, but from the retrospect of its abolition. In *Splendeurs et misères des courtisanes*, he stages a scene where Collin, in his disguise as the Spanish priest Herrera, is brought before the examining magistrate Camusot and stripped to the waist.⁵⁸ The bailiff then strikes him on the shoulder with an ebony bat, to see if the letters of *la marque*—TF, for *travaux forcés*, forced labor—will reappear. Readers of the earlier novel *Le Père Goriot* know that Collin is so marked—we've seen the mark. But now it appears to have disappeared, its place taken by scars, some seventeen holes in the flesh. The bailiff remarks that the cross bar of the T might lie between two holes, and that another might mark the foot of the letter. But the scars are "capriciously" distributed on the shoulder, the result of shotgun wounds, according to Collin (he has in fact inflicted the wounds himself, to efface the fatal letters). There are hence suggestions of letters, but nothing that can be read definitively: "It's nonetheless quite vague," Camusot concludes.⁵⁹ The identity of the criminal once branded in his very flesh has become an indecipherable text.

The need to identify recidivists in particular, and to categorize and classify the criminal population in general, led to various other systems, all considered "scientific" in their time. Photography, almost from the moment of its invention, was turned to recording the features of those apprehended by the police. Then "bertillonage"—the cranial and bodily measurements invented by Alphonse Bertillon—became the standard. An elaborate set of measurements and identifying marks were entered on index cards, which then were filed so as to be retrievable by way of cranial type and size, not by name—since impostors and aliases were, after all, part of the problem. At the same time, Cesare Lombroso and his followers were working out the classification of criminal "types" of physiology, convinced that criminality had organic origins and took

58. HONORÉ DE BALZAC, *SPLENDEURS ET MISÈRES DES COURTISANES*, in 6 *LA COMÉDIE HUMAINE* 751 (Bibliothèque de la Pléiade 1977) (1838-47). For an English translation, see A HARLOT HIGH AND LOW (1970).

59. *Id.* at 751.

somatic forms. If identification and triage of a European criminal population was difficult, the problem posed by the subject peoples of the colonies was far worse. To European eyes, they all looked the same. They had no “identifying marks.”⁶⁰

Eventually, an official of the British Raj “discovered” fingerprinting. It seems probable that Bengalis had long used *tip sahi*, a kind of fingerprint signature, and their English rulers then merely adapted it to their own uses. The technique quickly migrated back to Europe. When systems were worked out for categorizing and retrieving prints according to type, fingerprinting became the queen of identifying marks. Western cultures came to believe in two infallible characteristics of fingerprints: their uniqueness (no two people have the same) and their permanency (time and aging do not change them). In turn, we came to accept the claims of experts that they could identify a “match” between prints. But the line that separates science from pseudo-science shifts over time. Now DNA promises a surer identification, wrested from minute samples of blood or hair. And at the same time, the reliance on fingerprinting has been questioned.

A U.S. District Court decision by Judge Louis H. Pollak in January 2002 expressed doubt that fingerprint identification met the standard of “scientific evidence” set by *Daubert v. Merrell Dow Pharmaceuticals* in 1993.⁶¹ Pollak noted that other recent federal cases have called fingerprint identification “the very archetype of reliable expert testimony”⁶² and “scientific knowledge,”⁶³ but that it failed on the grounds of testability and especially falsifiability.⁶⁴ Pollak cited Justice Harry Blackmun in *Daubert* (himself citing an evidence treatise): “Scientific methodology today is based on

60. On these points of history, see the very rich study by SIMON A. COLE, *SUSPECT IDENTITIES* (2001). On the individual and his traces, see ALAIN CORBIN, *DE LA RÉVOLUTION À LA GRANDE GUERRE* 419-36 (Michelle Perrot ed., 1987); 4 *HISTOIRE DE LA VIE PRIVÉE*, (Philippe Ariès & Georges Duby eds., 1987). For an English translation, see ALAIN CORBIN, *FROM THE FIRES OF THE REVOLUTION TO THE GREAT WAR* (Arthur Goldhammer trans., 1990).

61. The first Pollak opinion comes in *United States v. Llera Plaza*, 179 F. Supp. 2d 492 (E.D. Pa. 2002), *vacated by* 188 F. Supp. 2d 549 (E.D. Pa. 2002). See also *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993).

62. 179 F. Supp. 2d at 501 (quoting *United States v. Havvard*, 117 F. Supp. 2d 848, 855 (S.D. Ind. 2000), *aff'd* 260 F.3d 597 (7th Cir. 2001).

63. *Id.* (quoting *United States v. Joseph*, 2001 U.S. Dist. LEXIS 6399, 2001 WL 515213, *4 (E.D. La. May 14, 2001).

64. In a lucid exposition of the problem of fingerprint evidence—written before *Llera Plaza*—Jennifer Mnookin points out that the error rate in fingerprint identification is essentially unknown, and has never really been tested. When fingerprint evidence entered U.S. courtrooms early in the twentieth century, it was rapidly accepted—no doubt because it belonged to the identificatory paradigm we have been discussing—and never truly subjected to scientific testing. See Jennifer Mnookin, *Fingerprint Evidence in an Age of DNA Profiling*, 67 *BROOK. L. REV.* 13, 19 (2001).

generating hypotheses and testing them to see if they can be falsified.”⁶⁵ It is the test of falsifiability that allows one to know not only that a proposition is true a good deal of the time, in many cases, but that it is universally true. Fingerprint identification, while mustering a considerable body of expertise, does not in the final analysis meet this test. It is indeed the final step in fingerprint identification—the determination of a match between two sets of fingerprints—that involves a subjective judgment rather than a scientific procedure. Pollak cited forensic scientist Dr. David Stoney: “The determination that a fingerprint examiner makes . . . when comparing a latent fingerprint with a known fingerprint, specifically the determination that there is sufficient basis for an absolute identification is not a scientific determination. It is a subjective determination standard. It is a subjective determination without objective standards to it.”⁶⁶

Therefore Pollak ruled that experts may present analysis of fingerprints and point out observed similarities between prints, but “will not be permitted to present testimony expressing an opinion of an expert witness that a particular latent print matches, or does not match, the rolled print of a particular person and hence is, or is not, the fingerprint of that person.”⁶⁷

In this decision, Pollak appeared to return fingerprint identification from the realm of “science” to the domain where it may more properly belong: that of description and analysis and inference. It is part of that search for identity through signifying marks discussed by Ginzburg, and part of modern societies’ concern with the identity paradigm. Pollak noted, citing another forensic expert, that “[t]raditionally, fingerprint training has centered around a type of apprenticeship, tutelage, or on-the-job training.”⁶⁸ This, too, suggests that the processes of fingerprint identification constitute essentially a refinement of the “hunter’s paradigm.” The kind of “knowing” achieved in this paradigm, in the Holmesian work of identification, and in narrative cognition in general, is not scientific; it does not work from testable hypotheses, it is not falsifiable. It rather enchains a series of concrete particulars in a “case,” and shows how they are linked to one another toward identification of an

65. *Llera Plaza*, 179 F. Supp. 2d at 505 (quoting Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643 (1992), quoted in *Daubert*, 509 U.S. at 593 (internal quotation marks omitted)).

66. *Id.* at 507.

67. *Id.* at 518.

68. *Id.* at 514 n.26.

animal, or person, who has been there and left traces. We are, as in the detective story or the melodrama, in a paradigm of recognition.

But Pollak reversed himself in March 2002, arguing that the test of science was the wrong one to employ, that technical knowledge is rather the issue, and on these grounds fingerprint identification passes muster.⁶⁹ This readmits fingerprint testimony without truly resolving the question of its objectivity and ultimate reliability. One of the merits of Pollak's original decision—had it stood—might have been to reclassify the kind of knowing activated by fingerprint identification, to reconceive it as part of the hunt for identity that has long been a concern of human intuition and narrative cognition. Western culture in the wake of Romanticism liked to believe that each person's body had a unique "signature." But Bertillon's descriptions of human faces and expressions now read to us like the descriptions of a nineteenth-century novelist become excessively formulaic and repetitive. Is it predictable that fingerprints may one day seem to fall in the same domain as *la croix de ma mère*: the token that permits recognition because it belongs to a narrative convention of cognition, to the signs on which this form of cognition has decided to confer significance? At the present vantage point—with much still to be learned about the craft of fingerprint analysis and its claim to pass muster as scientific evidence—one cannot say with any certainty. But one can say that the law needs to consider more carefully the status and probative value of a kind of evidence that probably does not meet a strict *Daubert* test, but is nonetheless central to the identification paradigm.⁷⁰ The law needs to think more deeply about the kinds of knowing on which its claims of proof repose. And part of that thinking should concern the narrative construction of evidence.

69. See *United States v. Llera Plaza*, 188 F. Supp. 2d 549 (2002). Pollak cites the extension of *Daubert* to include non-scientific expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). But it is not clear that *Kumho Tire* should be read as a relaxation of *Daubert* so much as an attempt to extend the *Daubert* "gate-keeping" function of judges to other kinds of evidence.

70. Mnookin asks: "How, then, do we evaluate other forms of knowledge, tacit knowledge, craft knowledge, knowledge based on experience, or hybrid knowledge, part science, part craft, like fingerprinting?" Mnookin, *supra* note 64, at 68. See further her remark, in an Internet exchange:

That fingerprint examiners have been permitted (since 1911!) to testify in a language of certainty (routinely giving their opinion that they are 'positive' that the prints came from the same person), without any rigorous statistical basis for this claim, is something of a scandal. At the same time, fingerprinting is nonetheless probably a whole lot more reliable than a great deal of nonexpert evidence that we routinely permit (take, for example, eyewitness testimony), so it seems somewhat perverse to exclude it.

Richard Friedman, D.H. Kaye, Jennifer Mnookin, Dale Nance, & Michael Saks, *Expert Testimony on Fingerprints: An Internet Exchange*, 43 JURIMETRICS J. 91, 96 (2002).

IV. NARRATIVE RETROSPECT

All the practices of identification by way of signs interpreted as clues in the narrative of what happened, who passed by, involve a “retrospective prophecy,” a construction of the story of the past by way of its outcome, what it was leading to. It is in the peculiar nature of narrative as a sense-making system that clues are revealing, that prior events are prior, and causes are causal only retrospectively. As Genette argued, narrative offers “the determination of means by ends . . . of causes by effects.” If the narrative went nowhere—never became a complete story—there would be no decisive enchainment of its incidents, no sense of inevitable discovery; the units of the narrative would cease to be functional. Such, Jean-Paul Sartre argued, is the difference between living and telling. To tell is to conceive life as adventure, in the etymological sense of the *ad-venire*, that which is to come, and by its coming to structure what leads up to it. It is worth quoting at some length the reflections of Sartre’s fictional spokesman, Antoine Roquentin, on the problem. When you begin to tell a story, you appear to start at the beginning. But, says Roquentin:

In reality you have started at the end. It is there, invisible and present, it is what gives these few words the pomp and value of a beginning: “I was out walking, I had left the town without realizing, I was thinking about my money troubles.” This sentence, taken simply for what it is, means that the guy was absorbed, morose, a hundred miles from an adventure, exactly in a mood to let things happen without noticing them. But the end is there, transforming everything. For us, the guy is already the hero of the story. His moroseness, his money troubles are much more precious than ours, they are all gilded by the light of future passions. And the story goes on in the reverse: instants have stopped piling themselves up in a haphazard way one on another, they are caught up by the end of the story which draws them and each one in its turn draws the instant preceding it: “It was night, the street was deserted.” The sentence is thrown out negligently, it seems superfluous; but we don’t let ourselves be duped, we put it aside: this is a piece of information whose value we will understand later on. And we feel that the hero has lived all the details of this night as annunciations, as promises, or even that he lived only those that were promises, blind and deaf to all that did not herald adventure. We forget that the future wasn’t yet there; the guy was walking in a night without premonitions,

which offered him in disorderly fashion its monotonous riches, and he did not choose.⁷¹

On this statement, any narrative telling presupposes an end that will transform its apparently random details “as annunciations, as promises” of what is to come, and that what-is-to-come transforms because it gives meaning to, makes significant the details as leading to the end. Carlos Fuentes has provided an appropriate commentary and confirmation in a short story called *Aura*, where the plot works precisely backwards, from death to birth.⁷²

Roland Barthes once suggested that narrative may be built on a generalization of the philosophical error of “*post hoc, ergo propter hoc*”: narrative plotting makes it seem that if B follows A it is because B is somehow logically entailed by A.⁷³ And certainly it is part of the “logic” of narrative to make it appear that temporal connection is also causal connection. This indeed may be one of the uses of narrative: we need to be able to discover connections in life, to have it make sense, to rescue passing time from meaningless successivity. One of the projects of complex narratives—such as novels—has often been to question such connections, to ask about the possible randomness of existence. If we associate the random and arbitrary with modernist questionings of traditional plotting—see, for instance, the inconclusive wanderings of such a film as Michelangelo Antonioni’s *L’Avventura*,⁷⁴ or the last line of Camus’s *The Stranger*, where Meursault gives himself up to the “tender indifference” of the universe⁷⁵—the nineteenth-century novel often suggests through its multiple plots the contingencies that attend upon the ways things turn out. Novels often appear to stage a struggle between chaos and meaning. But their very existence as novels, as writing about life rather than life itself, must generally assure that they conclude, however tenuously, in favor of meaning.

In the inevitable discovery doctrine, the law comes down firmly on the side of meaning, conjuring away the specter of meaninglessness, a chaotic universe in which searches would not necessarily lead to anything. It is in this context that the footnote of *Feldhacker* appears so portentous: it images law’s belief that an infinitely long and infinitely thorough search would inevitably lead to “any and all

71. SARTRE, *supra* note 17, at 59-60 (my translation).

72. CARLOS FUENTES, *AURA* (1962). For an English translation, see *AURA* (Lysander Kemp trans., 1965).

73. ROLAND BARTHES, *Introduction to the Structural Analysis of Narrative*, in *THE BARTHES READER* 266 (Susan Sontag ed. & Richard Howard trans., 1982).

74. *L’AVVENTURA* (Cino Del Duco 1960).

75. 1 ALBERT CAMUS, *L’ETRANGER*, in *OEUVRES COMPLÈTES* 118 (Club de L’Honnête Homme 1983) (1942).

pieces of evidence in the world.” This remarkable comment presupposes an infinitely knowable world, one laid out in tracks and traces—recall the gridlines marked off by Agent Ruxlow in *Nix*—waiting to be deciphered. If this may be a contestable picture of the world, it is an accurate picture of the law, which assumes that its quarry exists, and that its discovery procedures, if patient and thorough enough, will find it. In the doctrine of inevitable discovery, then, the law is merely affirming—in fairly spectacular form—its own nature. And inevitable discovery allows us to see that its nature is that of the “retrospective prophecy,” of the narrative put together from tracks and traces into a coherent plot that gains meaning from its end, from what it leads to. Inevitable discovery is in this sense what the Russian Formalists might have called a “laying bare of the device”: one of those moments that images the procedures and the very nature of the text in question.

When we speak of “the narrative construction of reality”—in Jerome Bruner’s terms, how narrative “operates as an instrument of mind in the construction of reality”⁷⁶—we must mean, among other things, the ways in which narrative sequence, plot, and intelligibility are used by humans to make sense of their lives and their world. It was precisely his reflection on the workings of narrative structure in the creation of intelligibility and meaning in human action—a reflection continued in his autobiography, *The Words*—that led Sartre eventually to renounce the novel as genre, since it came to appear to him a violation of existential freedom, a misrepresentation of the open-endedness of becoming. Yet one might respond that the renunciation of narrative is not an option, since narrative construction of reality is a basic human operation, learned in infancy, and culturally omnipresent. For better or worse, we are stuck with narrative and its ways of making sense. The conclusion would then seem to be that we should become better narratologists—better analysts of the stories we tell, the ways they work, the effects they have.

Bruner notes that the way the human mind processes knowledge as story “has been grossly neglected by students of mind raised either in the rationalist or in the empiricist traditions.”⁷⁷ One can add that it has been neglected as well by students of the law. While “legal storytelling” has attracted increasing scholarly interest, the main focus, as mentioned earlier, has been on “storytelling for oppositionists”—essentially the claim that narrative can contest and

76. Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 6 (1991).

77. *Id.* at 8.

destabilize the dominant forms of legal reasoning, which tend to exclude story as not sufficiently disciplined by law talk. And, as I suggested earlier, one scans legal opinions in vain for any mention of narrative as a category that needs thinking about—Souter’s opinion in *Old Chief* remains exceptional. Yet, certainly where Fourth Amendment jurisprudence is concerned—when we are talking about searches and seizures and how we understand their workings in relation to constitutional “rules”—the narrative construction of the reality is the reality, and how it is constructed makes all the difference in the defendant’s story.

The Supreme Court’s constitutional jurisprudence itself offers a form of reading back from the end. Constitutional narratives—narratives in which the Court traces the history of an idea, a doctrine, and its interpretations over the course of time—very often claim a return to the beginning, to the text and context of the Constitution itself, in order to track forward the development of text and idea. This may be especially true when the Court is aware it is propounding a new interpretation, one that will not be accepted without resistance.⁷⁸ Thus, for instance, Chief Justice Earl Warren in *Miranda v. Arizona*, claims: “The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence”⁷⁹ He also says:

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized That case was but an explication of basic rights that are enshrined in our Constitution. . . . These precious rights were fixed in our Constitution only after centuries of persecution and struggle.⁸⁰

The ruling in *Miranda*, Warren claims, is simply the emergence into the light of day of what was all along entailed by the Fifth Amendment privilege against self-incrimination. *Miranda* makes good on a long history, it realizes that narrative’s latent meaning.

Inevitably, the dissenters in *Miranda* claim that Warren has the story wrong. To Warren’s assertion that the majority’s ruling is “not an innovation,” Justice Byron White ripostes that “the Court has not discovered or found the law . . . what it has done is to make new law and new public policy”⁸¹ Another dissent by Justice John

78. Innovation in the law may require a particularly confident rhetoric of non-innovation. See the comment on *Miranda* by Joseph Halpern: “In contrast to the dissents, the majority opinion employs a comfortable rhetoric that denies and masks change.” Joseph Halpern, *Judicious Discretion: Miranda and Legal Change*, 2 YALE J. CRITICISM 53 (1987).

79. *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

80. *Id.* at 442.

81. *Id.* at 531 (White, J., dissenting).

Marshall Harlan refers to “the Court’s new constitutional code of rules for confessions.”⁸² Harlan sets out to mark the point at which the Court “jumped the rails”⁸³—the point at which it deviated, with dire results, from the correct narrative line. He, too, reaches back to origins, to claim that the majority’s reliance on the Fifth Amendment is “a *trompe l’oeil*,” a deceptive reality effect which it has taken for reality itself. After rehearsing what he sees as the correct constitutional narrative, Harlan brands the majority’s ruling as a wholly implausible narrative: “One is entitled to feel astonished that the Constitution can be read to produce this result.”⁸⁴ And in his peroration, Harlan declares, citing the words of a famous bygone Justice, Robert Jackson: “This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.”⁸⁵ There seems to be an interesting, if unintended, pun here, on storeys as features of houses and stories as narrative. In both senses of the word “story” Harlan implies that the new narrative episode written in *Miranda* brings the collapse of the whole narrative. It makes it the wrong story.

For all their discourse of origins, then, both majority and dissent in *Miranda* implicitly rely on the notion that the outcome of the story, the ending written (however provisionally) by the current ruling, determines the meaning of the story’s earlier episodes: the present rewrites the past.⁸⁶ While the argument from origins is undoubtedly sincere and necessary, in its desire to make origins entail a certain outcome it, too, shares the logic of “inevitable discovery.” It has the “double logic” of the “retrospective prophecy,” arguing that the stipulated outcome is the only way to realize the history of constitutional interpretation.

The authors of the “joint opinion” in *Planned Parenthood v. Casey*,⁸⁷ Justices O’Connor, Kennedy, and Souter, touched on an element of this double logic in their eloquent defense of stare decisis. The very concept of the rule of law, they write, requires continuity over time, so that citizens may rely upon the law. Thus, though one might rule differently were the issue at hand coming to adjudication for the first time, the fact it was once ruled upon in a certain way,

82. *Id.* at 504 (Harlan, J., dissenting).

83. *Id.* at 508 (Harlan, J., dissenting).

84. *Id.* at 518 (Harlan, J., dissenting).

85. *Id.* at 526 (Harlan, J., dissenting).

86. Stanley Fish makes a similar point in his critique of Ronald Dworkin. See Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, in *DOING WHAT COMES NATURALLY* 87, 94 (1989).

87. 505 U.S. 833 (1992). *Casey* reaffirmed (with some modifications) the right to abortion first secured in *Roe v. Wade*, 410 U.S. 113 (1973).

and that people have come to rely on that ruling, alters the second adjudication, giving a heavy burden of proof to those who would reverse course. As the joint opinion puts it, to both those who approve and those who disapprove a Constitutional ruling but struggle to respect it, “the Court implicitly undertakes to remain steadfast.”⁸⁸ “Steadfastness” is indeed not only pragmatic—assuring a uniform law that can be relied upon—but also moral: “Like the character of an individual, the legitimacy of the Court must be earned over time.”⁸⁹ Note that “over time”: earned legitimacy depends on a history, a narrative of consistency. The moral Court, like the moral individual, must be true to itself.⁹⁰

Raising the moral stakes, the joint opinion writes further: “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession.”⁹¹ To claim that the Constitution is a “covenant” that runs throughout American history is to foreground the history of constitutional interpretation as a master narrative, into which each new episode—each new Court ruling—must be seamlessly fitted. The narrative must, like a genealogy, be “coherent.” How may this be achieved? Essentially, says the joint opinion, through maintaining the perception of legitimacy through principled rulings:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.⁹²

The narrative of the covenant relies on precedent and *stare decisis* in order that change appear to be incremental and principled, so that sequence appear not random but an instance of consecution. The most apt words in the joint opinion’s sentence may be “sufficiently plausible.” It points us to the rhetoric of the Court: what is “sufficiently plausible” is that which persuades its readership, its audiences, which assures narrative conviction in its narratees.

88. *Casey*, 505 U.S. at 868 (1992).

89. *Id.*

90. See Justice Stephen Breyer’s dissent in *Bush v. Gore*, a ruling which he sees as undermining confidence in the Court: “That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself.” *Bush v. Gore*, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting).

91. *Casey*, 505 U.S. at 901.

92. *Id.* at 865-66.

The logic of the joint opinion is necessarily circular: it claims that rulings by the Court will be accepted if and when they appear to fit seamlessly within the master narrative, which in turn means that their acceptance creates the seamless narrative, the perception that the law is “steadfast,” built on precedent and stare decisis. What “suffices” for the “sufficiently plausible” is . . . what suffices. I don’t think there is anything wrong with this logic. But I want to note that it is to a large degree the logic of narrative. It is again Genette’s “the determination of means by ends . . . of causes by effects.” The doctrine of stare decisis may itself be something of a *trompe l’oeil*, or a cover-up, offering an illusion of entailment of a certain conclusion from precedent, whereas the cognitive process really has begun with the conclusion and then postulated the precedential history. Judicial opinions are full of a rhetoric of constraint: the judge cannot rule otherwise than he is doing because he is constrained by precedent. Whatever his personal preferences in the case, the outcome is imposed upon him by the history leading up to it.

I think the notion of “retrospective prophecy” perfectly characterizes the constitutional narratives written by the Supreme Court, and perhaps indeed most legal narrative in general. It is a prophetic narrative cast in the backward mode, implicitly arguing that the ruling in the case at hand is the fulfillment of what was called for at the beginning—somewhat in the manner that medieval Christian theologians argued that the Gospels offered a fulfillment of the prophetic narratives of the Hebrew Bible, as figure and fulfillment. For Augustine, for instance, Moses is a *figura Christi*, Noah’s Ark a *praefiguratio ecclesiae*.⁹³ Past history is seen as realized, as fulfilled, in the present. It is as if the past were pregnant with the present, waiting to be delivered of the wisdom which the Court majestically presents in its ruling. Recall the joint opinion’s word “covenant” to describe the Constitution, precisely in its historical relation to the citizenry. Each new ruling by the Supreme Court is an episode in the unfolding narrative of that covenant.

The joint opinion’s use of the word “covenant” makes that narrative one in which the meaning of the story is progressively unfolded, as realization of what was there from the start *in potentia*, where the potential there from the start is only known in and by its realization. On this paradigm, constitutional interpretation rightly understood does not make new law, it understands that the apparently new law it is making was there from the start, and that its promulgation—in the Court’s present ruling—gives a new

93. See ERICH AUERBACH, *Figura, in SCENES FROM THE DRAMA OF EUROPEAN LITERATURE* 38 (1959).

understanding of the history leading up to it. The discourse of origins and constraints offered by the Court tells us that it is writing its past history of interpretation in terms of the ending now proposed.

CONCLUSION

The Supreme Court's unspoken reliance upon narrative in its constitutional jurisprudence thus offers something of an arche-teological discourse, one that constantly stresses origins in order to achieve ends. I suggested that there is a measure of cover-up in such a discourse, that it represses its determination by ends to stress its entailment by origins. But such a narrative of the covenant is no doubt merely necessary—covenantal discourse, one might say, is like that. The structure of prophecy and fulfillment is probably requisite in any claim to a master narrative that governs societies. If the discourse of American constitutional interpretation turns out to be remarkably biblical, that should not come as a surprise, since it is difficult to imagine a society without a providential discourse underlying it. If the Constitution is the American myth of origins, we must expect it to be treated like other forms of mythic thinking. All one might ask for is a greater degree of awareness of its own narrative logic. And this awareness is what the encounter of law with literature—more properly, with literary *reading*, in an attention to narrative design and intention—might, in some yet unrealized future dialogue, bring to light.

My argument has come down to this: when we start probing the interesting piece of Fourth Amendment doctrine known as “inevitable discovery,” we find implicated within it a larger problem of legal narrative, which is in turn a problem of narrative as a human function and cognitive instrument. Stories are not events in the world, but rather a way in which we speak the world, and in so doing give it shape and meaning. Stories tend to strive toward discovery, toward what Aristotle called recognition (*anagnorisis*), and strive to make this discovery or recognition inevitable. That is what the rhetoric of narrative is all about. And it is important that legal decisionmakers understand that how one tells shapes and confers intention on what one tells: that there are no facts of a search independent of the narrative form given to them. It is thus not bumptious to propose—from the point of view of a student of narrative—that the legal analytical toolkit could do well to include some “narratology.” That is, if the law makes large use of narrative, its logics and rhetorics—most often without overt recognition that it is doing so—it might sharpen its discussion of certain issues where narrativity is very much at issue—as it always seems to be when

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search and seizure are involved—by some attention to what narrative is and how it functions.

