Peter Brooks

*Clues, Evidence, Detection: Law Stories* (for Columbia Law workshop)

The Situation of this paper

In teaching over a number of years at Yale Law School and Virginia Law School—often co-teaching with a law professor—I thought my role might be to bring something from literary analysis and theory to the study of law. Teaching law students, I could play the role of humanities gadfly: providing a close analysis of legal texts, messing up traditional legal interpretations, demonstrating how law relies on rhetorical moves of which it largely seems unaware. I could see myself as a useful *other* of traditional legal analysis and argument—and in fact I have argued in print that literature is in some sense law’s other, like a twin separated at birth (if you think of the near identity of law and rhetoric in Antiquity). But for the past few years I have instead been teaching in a liberal arts context—in an institution without a law school—and I have had to rethink the relations of law and humanities, and to ask what it might mean to bring legal discourse into dialogue with humanities. In the present paper, I hope to suggest some ways in which legal and literary cultures intersect in the use of languages, perspectives, and ways of telling that may be mutually illuminating.
At the moment, I am teaching an undergraduate course called “Clues, Evidence, Detection: Law Stories,” which does not aim in any way at being a “pre-law” course, or to claim any true legal expertise—yet nor is it a “law in popular culture” kind of course (of which there are plenty of examples) since I do want to teach the students something about how “the law” goes about thinking about certain kinds of problems, in this case ones concerned largely with criminal procedure and the use of evidence. For here, I would argue, we find a meeting of legal and literary traditions that may be illuminating to both. The detective story is the most literary of genres (and the one most often written by academics) for a reason: its processes of investigation and detection touch on the very rationale of narrative; it very often gives narratives that speak to and exemplify the narrative process, what is sometimes called “narrativity.” To the extent that this narrative process is about discovery and the creation of a meaningful sequence, it touches closely upon a subject at the center of criminal justice.

The classical detective story generally begins with a dead body. The inquest into the crime which we as readers follow—the detective’s finding of clues and fitting them into a meaningful sequence—exists in order to realize, to understand, to make present the story that led to the crime. So that the story in the present exists to retrieve the story of the past. Once that is done, the tale is over. And in the present story, the detective goes over the traces left from the past: he repeats the movements of the perpetrator in order to find him. A
number of the Sherlock Holmes tales show this very clearly: in The Musgrave Ritual, for instance, we see the detective solving a problem in trigonometry, then pacing off the points marked by the criminal, until he reaches the place of the crime. The detective story is about solution, integrating an aberrant past into the present, writing an end to an unfinished narrative. "'You reasoned it out beautifully,' I exclaimed in unfeigned admiration. 'It is so long a chain, and yet every link rings true.'" 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. This model seems to me pertinent to law in a non-trivial way, as I shall attempt to make clear.

Let me say at the outset that the place and status of narrative in the law and in legal studies strikes me as uncertain and ambiguous. On the one hand, trial advocates know—have known, presumably, since antiquity—that success in the law court 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. 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. Not so long ago, Justice David
Souter evoked a concept of “narrative integrity” in one of his Supreme Court opinions—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 little in the way of sequel.  

Legal scholarship, I believe, 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 who need to tell the concrete particulars of their experience in a way normally excluded by legal reasoning and rule. More recently, Anthony Amsterdam and Jerome Bruner have made the claim that “Law lives on narrative.” 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.” If this seems convincing, even obvious to students of narrative, I don’t 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.

A few years back I wrote an essay entitled “Inevitable Discovery.” Let me reprise (and revise) some of the points I made there in an attempt to suggest the
ways in which narrative, as a cognitive and ordering instrument, works in the construction of our understanding of reality. An area of legal thought that seems to cry out for a breaching of law’s hermeticism—an opening up to narrative 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” 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 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 decision makers as the way they are told. Stories are not events in the world, but the way we speak them—a distinction easily forgotten.

*Searching for Pamela Powers’ Body*

The case of *Brewer v. Williams*, 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, 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. And then:

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. (430 U.S. 387, 392-93)

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.
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’ 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’ 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” (at 407, note 12). 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.

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 10am, 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.” The search party did not find the body: at about 3pm, 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, in an opinion written by Chief Justice Warren Burger, accepted the notion that the so-called “exclusionary rule”—excluding evidence illegally seized—allows of 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.  (at 437-38)

In other words, the inevitable discovery exception to the exclusionary rule—accepted in a large majority of courts, 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” (at 436). Like “the place where the three roads meet” in Sophocles’ Oedipus the King—where Oedipus meets and slays his unknown father—the place of Pamela Powers’ body is designated as a place of fatal and inevitable convergence. The body was there—and preserved by the freezing weather—waiting to be discovered.8
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 police to the body” (at 448). 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. 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’ 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. 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.”

Justice William Brennan—joined by Justice Thurgood Marshall—dissents in *Nix v. Williams* precisely on a version of this point. Brennan accuses the Court, “In its zealous efforts to emasculate the exclusionary rule,” of losing sight of the “the crucial difference between the ‘inevitable discovery’ doctrine and the ‘independent source’ exception from which it is derived” (at 459). The “independent source” exception allows the use of evidence found by an independent and 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.” Brennan finds, then, that inevitable discovery contains a measure of the hypothetical—what Williams’ 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, which the lower courts failed to insist on.

The distinction between evidence in fact discovered by an independent investigation and that which “inevitably” would have been seems more crucial than the majority in Nix v. Williams allows. The hypothetical “would have been discovered,” operating post-hoc, may be more determined by the narrative logic of retrospectivity than the Court sees or admits. In the case of Pamela Powers’ 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 (United States v. Andrade, 784 F.2d 1431). This doubles the “would haves.” 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 police had sought it (United States v. Levasseur, 620 F.Supp. 624; State v. Butler, 676 S.W. 2d). 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—because it is the very logic of narrative, which makes sense by way of its end. Note that 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*, 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, whereas 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 discovery must be inevitable through means that would
actually have been employed. Cf. Williams . . . (849 F.2d 293, 296 n. 4)
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 such as Wilkie Collins’ The Moonstone, where Sergeant Cuff believes
that if you search the detritus of civilization long enough, the needed clues will come to light. 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’ *Funes the Memorious* instances the narrative problem created when someone has infinite powers of memory, which result 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. 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, thus on the creation of that sense of the inevitable.

*Searching on Dartmoor*

“‘Wonderful!’ cried the colonel. ‘Wonderful! You might have been there!’” Discovery is so acute that it mimics eyewitness. This line comes at the end of *Silver Blaze*, a case in which Sherlock Holmes is faced with the disappearance of the famous race horse 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.” (158)

That which is hidden reveals itself when you know it must be there: 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 “The 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.

(159)

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 then 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. In other words—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—but then changed his mind, led him to Mapleton, and there painted over his silver blaze to disguise him.

Holmes need now 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.” (161)

The clues, the tracks, are so exactly followed that Holmes “might have been there.”

Even when found, Silver Blaze, his blaze concealed, is not detected by his owner, Colonel Ross, and 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. (163-64)

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 
familiar to 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-happening.

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 . . . 

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 facilely—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. But it is part of Holmes’ 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’ discovery sounds as a victory of law over chance, reason over aberrancy, and restores a world of perfect order.

*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 ear lobes 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. 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. (Spie, 166; Clues, 102)
Even in a post-hunting society, searches reach their discoveries by such tracking of details, making them into a chain of meaning, 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. (Spie, 166; Clues, 103)

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’ searches—for a wax vesta, for hoofprints in the muddy hollows of the moor—are all about. And the “huntsman’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 putting together 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 huntsman’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,” says Cave, “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.”

Signs of recognition in literature reach back to antiquity and forward to modernity: see the scar on Odysseus' thigh that enables his old nurse Eurykleia to recognize him by touch, see the hidden birthmark of Shakespeare's Cymbeline, see the notorious la 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 huntsman'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 huntsman’s paradigm 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.” 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” (168-69; 104). So that the same paradigm can be found in the
divinatory and jurisprudential texts, with this difference that 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” (183;
117), 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. And here, too, the concept
of “retrospective prophecy” is 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. Consider that 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. But the doctrine of “inevitable discovery” 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 huntsman’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 sign on to the logic of narrative discovery in a particularly telling way, accepting that the huntsman’s lore is infallible, and infallibly cognitive. When as a legal decision maker 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. The inevitable discovery doctrine, pushed to its limits, 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.”

*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, in a reading back from the end. 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.

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.

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 $a$. 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. 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 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 is a contestable picture of the world, it may be 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”—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.\(^{22}\) 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” (Bruner, 8). One wonders if it has been neglected as well by students of the law. One tends to find attention to the creation and
critique of legal storytelling mainly consigned to the courses on courtroom advocacy and legal writing, which have marginal status within law school. And, as I suggested earlier, one scans legal opinions in vain for any mention of narrative as a category that needs thinking about. Justice Souter’s riff on “narrative integrity” in *Old Chief* remains exceptional. It is the only moment I’ve encountered where the Court considers what a student of mine has called the “epistemology of the particular”: the way in which stories create certain meanings that cannot otherwise be conveyed. Souter registers the need for “evidentiary richness and narrative integrity in presenting a case.” He goes on to say that “making a case with testimony and tangible things . . . tells a colorful story with descriptive richness.” And he continues:

Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.25

Curiously, though, this major statement on the importance of narrative in the law is used in the instant case to claim that while a jury needs to hear a full narrative of events—“a syllogism is not a story,” he writes—too much story, for
instance that of Old Chief’s past felony and conviction, could “overpersuade” the jury. Story is dangerous as well as persuasive. The law needs to keep it channeled.

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. And when we start probing the interesting piece of Fourth Amendment doctrine known as “inevitable discovery,” we find implicated within in 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. The issue, then, extends far beyond Fourth Amendment cases. Consider the obvious instance of rape. I have taught the famous case from Baltimore, Rusk v. Maryland and Maryland v. Rusk (recently the object of a fine essay by Jeannie Suk26) where the “same story” is retold four times—by majority and dissent at two different appellate levels—with crucially differing outcomes. “What happened” was never in dispute. What it meant made all the difference—and that meaning was all in the way the happening was told, with different narrative connectives, with a differing understanding of how events fit together to make the chain of meaning. And it
is easy to see that in all branches of the law, from trial court to Supreme Court, the telling of “the facts” underlies all adjudication.

_Narrative Construction, Law, the Humanities_

Courtroom advocates, appellate judges—very much including justices of the Supreme Court—“know” in some unacknowledged way that there are moments (very often when they are writing in dissent) where the particulars of how “the facts” are told make all the difference. There are times when they would subscribe to Joseph Conrad’s famous dictum for novelists: “My task . . . is by the power of the written word, to make you hear, to make you feel—it is, before all, to make you see. That—and no more, and it is everything.” 27 If I am right that the poetics of the particular narrative count in the law, we have reached an intersection of the legal and—I’m not sure quite what to call it: let’s say the interpretive humanities insofar as they have thought not only about literary and linguistic analysis but also about their anthropological function. I have found in my own recent experience that attempting to teach non-law students something about how and why legal opinions reach the decisions that they do reach has alerted me to a need for interdisciplinary knowledge that seems to me more than simply playful: crucial in fact. An awareness that usually there are no facts of a search independent of the narrative form given to them would seem to belong in everyone’s cognitive toolkit. And generalizing from
this, it would seem that teaching directed to the place of the law in our narrative construction of reality belongs both to legal and non-legal educational contexts.

Robert Post has made the persuasive argument that study (and teaching) of the law makes sense only within a “pragmatic horizon.”

“Knowledge,” he writes, “is always produced by the organization of a discipline that is itself arranged so as to accomplish given ends.” That is, to Post law is a certain social praxis, knowledge of the law is organized toward that end, and it doesn’t make sense to study it as anything else. That of course is the primary focus of law school, which may seek to contextualize law in any number of ways, and to bring it into dialogue with economics, psychology, or whatever, but sees these other disciplines as channeling into the social praxis. The law may seek information elsewhere, but it exercises a gatekeeping function that dictates that other information sources must profit the law. And as Paul Kahn has argued, this has the effect of making any radical critique of the law from outside its perimeter become, once within the perimeter, simply one more proposal to reform the law. That is because critique must be harnessed to the pragmatic horizon of legal study. What is the meaning, if any, of a study of law outside the institutions of the law?

That is what I have been trying to figure out in my current teaching. And I have discovered, I think, that one can sketch a rationale for teaching legal culture in dialogue with literary culture. It’s not only that, in the classic phrase, “law is too important to be left to the lawyers.” It’s more importantly that law
is not isolated from culture, that it thinks not only as lawyer but also as storyteller, for instance, and unavowedly as narratologist as well, and that its whole horizon of interpretation is not merely pragmatic but full of cultural understandings (including prejudices). One has only to look at the debate about same-sex marriage to see that the law is at times obliged to follow where culture has first made its demarcations. Freud’s famous “Where Id was shall Ego come to be” (Wo es war soll ich werden) may have some version in the law, which must come to be where there is a cultural demand for legal codification. Law is a form of speech that is called upon in certain circumstances and times, and we can perhaps make better sense of its utterances when they are understood as certain kinds of performative language that we need in specific contexts. To study language and literature inevitably leads one to bump up against the law, or the Law (what tragedy seems to be about, for instance), and understanding it as part of the way we speak the world seems important. In fact, understanding law as language (including its grammar and its rhetoric) might be the place to start, even in law school.

Finally, as proposals come forward (including from President Obama) that law schools consider adopting a more practical, vocational curriculum to be completed within two years, we may want to ask whether the large speculative questions raised by law in society and culture won't in fact inevitably devolve to the liberal arts curriculum. If this occurs, we will not want to abandon these questions but rather to teach them in non-pragmatic contexts, as crucial ways of
thinking about our organization and understanding of knowledge, as imperative constructions of reality. I am by no means pushing the study of “baby law” by undergraduates, but rather something both broader and more rigorous: a study of the place of legal thinking in the context of our other understandings about the systems by which we make meaning in the world.

2/6/14
Among the many debts incurred in thinking through these questions, let me mention especially those to: Paul Gewirtz, Jennifer Mnookin, Michael Seidman, Daniel Ortiz, Simon Stern, Robert Post, Jeannie Suk.


6 Amsterdam & Bruner, Minding the Law, 111.

7 The quotations are from the transcript of Hearings on Motion to Suppress in State v. Williams, and are cited in Nix v. Williams, 467 U.S. 431, at 448-49.
It should be noted, however, that the habeas petition—though not the trial records—in Williams’ case suggest that the body might not have been so inevitably subject to discovery: that 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).


Anton Chekhov, Literary and Theatrical Reminiscences, trans. S.S. Koteliansky (1974), 23. 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.” “Thematics,” in Russian Formalist Criticism, trans. and ed. Lee T. Lemon and Marion J. Reis (Lincoln: University of Nebraska Press, 1965), 79. On a similar concept of “motivation,” see my quotation from Gérard Genette, infra.

La Machine infernale (1934) is the title of Cocteau’s version of the Oedipus story—suggesting that tragedy as a genre is an infernal machine.

See, for example, the Superintendent’s contemptuous remark: “There is such a thing, Sergeant, as making a mountain out of a molehill. Good day.” And Cuff’s reply: “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 ([1868] Oxford: Oxford World’s Classics, 1999), 104.

“Silver Blaze,” 168.

Kim Lane Scheppelle has argued that American evidence law embodies a "ground zero" theory of evidence—very much like Holmes' "you might have been there." See Scheppelle, "The Ground Zero Theory of Evidence," 50 HAST. L. J. 321 (1998).


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


Old Chief v. United States, at 183.

Id. at 187.

Id.


