

## Detecting Doctrines: The Case Method and the Detective Story

Simon Stern\*

[A]ssuming that good detective fiction must be good fiction in general terms, we may . . . give our attention to those qualities . . . which give to it its special character. . . . [T]he theologian, the scholar and the lawyer have a common characteristic: they are all men of a subtle type of mind. They find a pleasure in intricate arguments, in dialectical contests, in which the matter to be proved is usually of less consideration than the method of proving it. The pleasure is yielded by the argument itself and tends to be proportionate to the intricacy of the proof.

— R. Austin Freeman, *The Art of the Detective Story*<sup>1</sup>

When lawyers are not being villainized in popular culture, they are often portrayed as having many of the same admirable traits as a shrewd detective. If this characterization conforms to an image that some lawyers embrace, it also speaks to a frequently rehearsed analogy in the literature on legal education and reasoning. Legal forms of explanation, pedagogy, and analysis invite comparison with detective stories for many reasons. Some commentators focus on the shared sense of inevitability in the whodunit and in the written opinion. On this view, the judicial habit of slowly working up to a seemingly inexorable conclusion resembles the detective story's shrewd distribution of clues in such a way as to settle guilt on a culprit whose status appears similarly inevitable in retrospect,

---

\* Assistant Professor, University of Toronto Faculty of Law & Department of English. Ph.D., UC-Berkeley; J.D., Yale Law School. For comments on earlier drafts, thanks to Charles Barzun, Scott Boorman, Gregg Crane, Bill Eskridge, Monika Fludernik, Robert Gordon, Janet Halley, Bruce Hay, Charles Rzepka, Vanessa Ryan, and Elaine Scarry, and to the editors at the *Yale Journal of Law & the Humanities*—Lawrence Kornreich, Kathleen Neace, and Allison Tait—and to audiences at the University of Toronto Faculty of Law, the University of Freiburg, the University of Virginia Law School, and the Humanities and Cognitive Theory and the Arts Seminar at Harvard. Thanks also to Walton Green for inspiring this line of thought when he loaned me his grandfather's copy of the Randolph Mason stories.

1. R. Austin Freeman, *The Art of the Detective Story*, 95 NINETEENTH CENTURY & AFTER 713, 716 (1924).

as if this figure had always been the only eligible candidate.<sup>2</sup> Other commentators emphasize the pedagogical value of narrative, which can make an explanation compelling and memorable in ways that a more abstract and methodical account cannot. For these scholars, who focus on the role of the detective mentality in the classroom, suspense and vividness are features that law professors should borrow from mysteries. In narratives that unfold by maintaining the audience's suspense, each new event or detail attracts further attention. The lesson emerges at the end in a powerful crescendo that is memorable because the explanation doubles as the narrative resolution.<sup>3</sup> Likewise, narratives abounding in vivid descriptions and psychologically plausible motives facilitate engagement because they give human features to legal actors (who might otherwise remain skeletal or abstract)<sup>4</sup> and show how legal doctrines dovetail—or clash—with real-world events.<sup>5</sup>

---

2. On inevitability in judgment-writing, see Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008 (2002); and Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 213-16 (1990). Peter Brooks comments on the shared drive for inevitability in detective fiction and legal explanation in *Inevitable Discovery—Law, Narrative, Retrospectivity*, 15 YALE J.L. & HUMAN. 71, 87 (2002). See also Rosanna Cavallaro, *Solution to Dissolution: Detective Fiction from Wilkie Collins to Gabriel Garcia Marquez*, 15 TEX. J. WOMEN & L. 1 (2005) (discussing narrative closure in detective fiction and its relation to legal culture); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 688 (1994) (discussing lawyers' interest in "the sense of inevitability" in detective fiction).

3. A classic analysis of this structure appears in William F. Brewer & Edward H. Lichtenstein, *Stories Are to Entertain: A Structural-Affect Theory of Stories*, 6 J. PRAGMATICS 473 (1982). David Velleman offers an intriguing critique of this use of narrative structure and its use in the courtroom in *Narrative Explanation*, 112 PHIL. REV. 1 (2003), as does David Luban, with respect to legal academic arguments, in *The Art of Honesty*, 101 COLUM. L. REV. 1763, 1765-66 (2001). For other discussions exploring the legal uses of this technique, see Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 J. LEGAL WRITING INST. 127, 132 (2008); Christine Alice Corcos, *Legal Fictions: Irony, Storytelling, Truth, and Justice in the Modern Courtroom Drama*, U. ARK. LITTLE ROCK L. REV. 503 (2003); and Philip N. Meyer, *Retelling the Darkest Story: Mystery, Suspect and Detectives in a Brief Written on Behalf of a Condemned Inmate* 58 MERCER L. REV. 665, 696 (2007).

4. The call for narrative detail appears frequently in discussions of "legal storytelling." Robert C. Power makes the point by reference to detective fiction in "*Just the Facts*": *Detective Fiction in the Law School Curriculum*, in MURDER 101: ESSAYS ON THE TEACHING OF DETECTIVE FICTION 178, 178 (Edward J. Rielly ed., 2009). See also John R. Dorocak & S.E.C. Purvis, *Using Fiction in Courses: Why Not Admit It?*, 16 LAW & LIT. 65, 77 (2004) (discussing the uses of narrative vividness); Lawrence M. Friedman & Issachar Rozen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 UCLA L. REV. 1411 (2001) (discussing the uses of narrative vividness).

5. It has long been recognized that legal concepts are more likely to be remembered if they have been inculcated through exposure to concrete disputes. In an early nineteenth-century book review of a new volume of case reports, the reviewer observed that it is easy to forget the "nice distinctions and subtle refinements in [the] elaborate volumes of digested jurisprudence," that is, in digests that merely summarize the doctrine, but

[n]ot so . . . with that [knowledge] acquired by reading interesting law reports. The facts in these cases serve as bonds of association, by which the principles interwoven with them are held together, and kept long and strongly fastened in the mind. . . . Thus it is that the student, so far as he can read reported decisions intelligently, is sure of learning his law more accurately, as

According to perhaps the most intellectually ambitious account, however, the connection between legal analysis and detective fiction does not depend on a shared sense of inevitability, or on an argument for dense and compelling narrative detail, but instead turns on the logical procedures of the detective story—its use of a structure that promotes logical reasoning.<sup>6</sup> This way of formulating the analogy speaks to forms of legal reasoning both in written judgments and in the classroom, and echoes the rationales offered by the advocates of the case method when it was first being endorsed in the late nineteenth century—although those scholars had little reason to acknowledge any kinship between their innovations and a form of popular fiction that many would have seen as degraded and lacking in intellectual rigor. A few turn-of-the-century lawyers called attention to the analytical habits of Sherlock Holmes and his colleagues, but more often the analogy came from the other side: proponents of detective fiction were apt to insist on the lawyerly habits inculcated by the genre, because these commentators sought to emphasize the stories' potential for cultivating the reader's logical abilities. Those efforts to elevate the genre were largely successful, with the result that today the comparison is commonplace and is just as likely to come from lawyers as from literary critics or logicians.<sup>7</sup>

The analogy between detection and legal thinking is intimately linked to the case method and may be readily discerned in the justifications for this form of pedagogy that were offered by its early sponsors. For that reason, generic similarities between detective stories and legal writing are more readily observed in legal judgments edited for casebooks than in the typical judgment issued by a court. Yet even in the latter, certain features borrowed from the structure of detective fiction have a surprising persistence. For example, while judgments often abide by the principle of

---

well as more pleasantly, than he can in any other way.

James Madison Porter, *REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SECOND CIRCUIT*, 9 N. AM. REV. 167, 182 (1828) (book review).

6. Neil C. Sargent, *Murder and Mayhem in Legal Method: or, the Strange Case of Sherlock Holmes v. Sam Spade*, in *LAW, MYSTERY AND THE HUMANITIES* 39 (Logan Atkinson & Diana Majury eds., 2009); Brooks, *supra* note 2, at 87; W. Russel Gray, *Supralegal Justice: Are Real Juries Acting Like Fictional Detectives?*, 21 J. AM. CULT. 1 (1998); Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L.R. 109, 180-81 (1991).

7. In addition to the examples cited above, see, for example, SIEGFRIED KRACAUER, *THE MASS ORNAMENT: WEIMAR ESSAYS* 15 (Thomas Y. Levin ed. & trans., 1995); MICHAEL E. TIGAR, *NINE PRINCIPLES OF LITIGATION AND LIFE* 153-57 (2009); Kola Abimbola, *Abductive Reasoning in Law: Taxonomy and Inference to the Best Explanation*, 23 CARDOZO L. REV. 1683, 1686-88 (2001); Michael Scriven, *Methods of Reasoning and Justification in Social Science and Law*, 23 J. LEGAL EDUC. 189, 195 (1970); and Douglas Walton & Fabrizio Macagno, *Common Knowledge in Legal Reasoning about Evidence*, 3 INT'L COMMENTARY ON EVIDENCE 1, 18-21, 24-25 (2005).

legal writing that demands a full outline of the argument in advance, it is nonetheless common to see courts flout this principle, and to begin with a short summary of the issues, waiting to announce the result until the analysis is complete.<sup>8</sup> Judges' use of this approach, even if only in a minority of cases, is a remarkable testament to the appeal of a narrative structure that urges the reader to follow the logical pattern as it unfolds, rather than presenting the result as a *fait accompli* at the beginning, with the argument working its way towards an endpoint that has already been spelled out. Even when judgments do not follow this pattern, casebook editors often mold them into that form, promoting a particular view of what it means to "think like a lawyer," and of "what the practicing lawyer has to do."<sup>9</sup> According to one of the most prominent studies on these alternative narrative schemas, the difference between them is the difference between a story that holds the reader's suspense and a story that, by revealing the conclusion immediately, is incapable of producing any affective response.<sup>10</sup> It might seem obvious that legal writing should not strive for an affective response, at least in a decision's overall structure. However, the frequent resort to a plot-oriented schema that announces the outcome only once, at the judgment's end, suggests that many jurists and casebook editors find something of value in a structure that cultivates some degree of suspense, even if it would not occur to them to explain their motives on that ground.<sup>11</sup>

But even when judgments themselves—as rendered by courts or edited

---

8. For a few recent examples, see, for example, *Snyder v. Phelps*, 131 S. Ct. 1207, 1210 (2011) (Roberts, C.J.); *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1178 (2011) (Roberts, C.J.); *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1187 (2011) (Scalia, J.). Of course, current decisions appear with a syllabus preceding the text of the decision and summarizing the holding, but the point remains that the opinions themselves often dispense with the "front-loaded" structure so often recommended by teachers of legal writing.

9. *Report of the Committee on Legal Education*, 15 ANN. REP. A.B.A. 317, 357 (1892). This was a common reason for recommending the case method among its early supporters.

10. William F. Brewer & Edward H. Lichtenstein, *Event Schemas, Story Schemas, and Story Grammars*, in IX ATTENTION AND PERFORMANCE 363, 365 (J. Long & A. Baddely eds., 1981); see also their related study, cited in *supra* note 3. For a recent discussion that extends these ideas through a contrast between narrative openness and closure, focusing on the idea that suspense and curiosity arise when the reader is made aware that information is being withheld, see Eyal Segal, *Closure in Detective Fiction*, 31 POETICS TODAY 153 (2010).

11. Without drawing on the Brewer-Lichtenstein model, commentators on other genres have found similar—arguably unwitting—commonalities involving the development of suspense. See, e.g., Barbara Czarniawska, *Management She Wrote: Organization Studies and Detective Stories*, 5 CULTURE & ORG. 13 (1999), reprinted in CZARNIAWSKA, WRITING MANAGEMENT: ORGANIZATION THEORY AS A LITERARY GENRE 79 (1999). A deliberate effort to cultivate this effect in a judgment would normally be regarded as irreverent, as we may see, for example, in the rendition of a hard-boiled detective story in the dissent from the denial of certiorari in *Pennsylvania v. Dunlap*, 129 S. Ct. 448 (2008).

by law professors—are not modeled on the structure of suspenseful narratives, they are often treated in the classroom as the basis of a clue-driven search. That way of teaching legal reasoning is easier with a narrative form that reenacts the underlying assumptions of this pedagogical method, but the same approach may be pursued even when the cases do not take that form—just as one might, for example, take a legal treatise and approach it as a picaresque novel.<sup>12</sup> Thus while the following discussion often refers to the form of written judgments, the argument is more concerned with a way of *using* cases in the service of legal reasoning. The two are not entirely distinct, because a view of how legal reasoning works is very likely to inform a writer's ideas about how to frame a persuasive legal argument, and thus case-method training is likely to promote distinctive styles of writing. However, this factor is only one among many that informs judges' ideas about how to express the justification for a decision. I explore the detective impulse here in the same way that a social scientific model might seek to explain the effects of a particular factor without claiming that it controls the operations of a complex network.

Case-method pedagogy promotes a style of reasoning that understands legal concepts as things that must be excavated from the depths of the cases because they often fail to bear their meaning on their surface.<sup>13</sup> This mode of investigation, central to the case method and to the detective story, reflects a style of thought that treats its products as a kind of buried artifact. The correspondence is not surprising, because the new legal educators of the later nineteenth century and the new style of detective fiction that emerged around the same time have common intellectual roots in the forms of reconstructive science that had been developed some decades earlier. In various scientific fields, particularly geology, the practice of tracing effects back to causes attracted increasing interest that became even more pronounced in the wake of Darwin's work on evolution. The new science had widespread influence in many areas of thought. Scholars have discussed its connection to the detective story, and have hinted at its relation to legal education, but have not examined the interrelation between these developments.

The new style of legal education, introduced at Harvard in 1870 and

---

12. Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451, 451 (1974).

13. For a recent discussion of methodological questions that arise from the surface/depth model of interpretation, see Stephen Best & Sharon Marcus, *Surface Reading: An Introduction*, 108 REPRESENTATIONS 1 (2009).

adopted at most American law schools by 1920,<sup>14</sup> had dramatic effects. Once legal reasoning takes the form described above, the search for buried concepts does not merely serve as yet another procedure that might help to illuminate the decisions, but instead it helps to inform legal thinkers' beliefs about how to craft an argument. Today, few would subscribe to Langdell's premise that certain fundamental legal principles have an objective existence and are merely awaiting discovery, but there is nevertheless widespread support for the idea that a powerful legal argument will bring out implicit considerations that ought properly to drive future decisions, rather than merely reiterating the rationales already stated explicitly in the leading decisions handed down thus far.

Today, the excavation of hidden premises and principles is one of the most familiar moves in legal analysis. "Thinking like a lawyer" entails, among other skills, the ability to dissect an opinion, isolating the essential components of the analysis and parsing the court's language and reasoning to bring out the underlying assumptions, value judgments, policy decisions, and contradictions, along with the difficulties that the decision glosses over. The same skill can be applied to statutory questions, transactional dilemmas, and the like, but for more than a century, it has been taught primarily through the appellate opinion. The student's academic diet thus consists mainly of concrete disputes, packaged with an overview of the dispute's origins and an explanation of the court's rationale for its resolution.

In what follows I explore the relations between detective fiction and case-method teaching by showing in more detail what was new about each of these in the later nineteenth century. Part I begins with the striking example of Melville Davisson Post, whose fiction of the 1890s aligns legal thought with detection, drawing on the example of Sherlock Holmes in stories that present legal principles as puzzles to be solved. This part then turns to the changes in legal education associated with Christopher Columbus Langdell at Harvard, and discusses the intellectual roots of the case method, the justifications offered in its support, and the narrative tendencies that it relies on and promotes. Part II turns to the origins of the modern detective story near the end of the nineteenth century and shows how the genre developed from the same scientific background as the case method. This section then examines in greater detail some of the ways in

---

14. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION FROM THE 1850S TO THE 1980S*, at 41, 63-64, 112-13 (1983); Bruce A. Kimball, *Mr. Langdell's Emblematic 'Abomination': The Proliferation of Case Method Teaching, 1890-1915*, 46 *HIST. EDUC. Q.* 190 (2006).

which case-method pedagogy may be said to cultivate the same habits as detective fiction, and concludes with some examples in which courts have expressly invoked the analogy to describe their own procedures or have crafted doctrines with the aid of propositions borrowed from detective stories. Part III considers some examples of detective fiction, pursuing the analogy further by asking why lawyers often figure as detectives in these stories. In part, this investigation reaffirms the point that lawyers are convenient exponents of the analytical methods that detective fiction claims to demand of its readers. This section also shows how detectives, like lawyers, may use these methods to bring new facts into being, and may validate their professional credentials by expressing a disinterested view that treats the analytical enterprise as a certain kind of game. Finally, in a short conclusion, I show how the analogy with detective fiction might apply to a particular case (*MacPherson v. Buick Motor Co*), as edited for a casebook. I close by considering the doctrinal implications of the analytical procedures described here, noting that the late nineteenth century witnessed the emergence of a new doctrinal approach in Supreme Court jurisprudence—an approach that discovered underlying rights behind express constitutional guarantees.

#### I. POST AND LANGDELL ON THE CASE

The legal and detective instincts were combined in the early stories of Melville Davisson Post, who later became one of the pioneers of American mystery fiction.<sup>15</sup> Post completed his law studies in 1892,<sup>16</sup> and began law practice at a time when the case method was becoming a subject of widespread discussion not only among law professors, but among lawyers more generally.<sup>17</sup> In 1896, Post published his own casebook—not a textbook for law students, but a collection of stories based on various doctrines in criminal law, with citations to real cases thrown in to appease the skeptical reader, or to entice the curious. *The Strange Schemes of Randolph Mason* centers on a Sherlock Holmesian lawyer who broods in his office, waiting for challenging problems that will save him from ennui. (In the book's introduction, Post refers specifically to Doyle's detective, who had his first run in the *Strand Magazine* from 1891 to 1893.)<sup>18</sup> In each story, after demanding the

---

15. CHARLES A. NORTON, MELVILLE DAVISSON POST: MAN OF MANY MYSTERIES (1973).

16. *Id.* at 20-21.

17. STEVENS, *supra* note 14, at 60.

18. MELVILLE DAVISSON POST, THE STRANGE SCHEMES OF RANDOLPH MASON 3 (New York,

client's unwavering compliance, Mason delivers a set of seemingly absurd instructions. Inevitably, it transpires that he has spotted a loophole that allows the client to commit an immoral act with impunity, but Post reveals this only at the end, when he explains the doctrine that guides the plot. Once it becomes clear that Mason's schemes are always shrewd efforts to skirt the law, the reader learns to scrutinize his advice in order to predict the rule that Post will eventually unveil.

In the volume's most frequently anthologized story, *The Corpus Delicti*, Mason advises a blackmail victim to kill his tormenter and to dissolve her body in sulfuric acid. Without witnesses, the prosecution must rely on circumstantial evidence. Since a conviction requires direct evidence of the crime, the murderer is freed.<sup>19</sup> In *The Error of William Van Broom*, a man who has gambled away his sister's inheritance recuperates the loss by gaining a jeweler's trust on the strength of a forged letter of introduction, and then "borrowing" several thousand dollars' worth of gems. Presented with the letter, the jeweler's attorney explains that it cannot support a claim for fraud because the document does not purport to create any legal liability.<sup>20</sup> In *The Men of the Jimmy*, Mason tells some down-and-out criminals how to revive their fortunes by falsely informing a millionaire that they are about to learn the location of his kidnapped son. After they have collected the reward and have been arrested for failing to produce the child, Mason frees them by arguing that a false representation must refer to an already extant circumstance, and so a false claim about the future is not actionable.<sup>21</sup>

In each instance, Post uses a structure borrowed from detective fiction to examine legal doctrines, in stories that are accompanied by case squibs to validate them. Though no one would mistake *The Strange Schemes* for a law casebook, the similarities are nevertheless striking. Anyone trained by the case method will recognize the cognitive demands of reading a narrative and picking out the operative details that will drive the legal analysis. In both instances, the reader who accepts the challenge is trying to predict how the story will turn out and why. In Post's stories, this

---

G.P. Putnam's Sons 1896). For helpful discussions of these stories, see LEROY PANEK, *THE ORIGINS OF THE AMERICAN DETECTIVE STORY* 179-80 (2006); Francis M. Nevins, *From Darwinian to Biblical Lawyering: The Stories of Melville Davisson Post*, 18 *LEGAL STUD. FORUM* 177 (1994); Patricia J. Brown, *The Image of the Attorney: The Character of Attorney Randolph Mason in Three Books by Melville Davisson Post, 1896-1907* (unpublished manuscript), available at [http://works.bepress.com/patricia\\_brown/1/](http://works.bepress.com/patricia_brown/1/).

19. POST, *supra* note 18, at 11.

20. *Id.* at 143.

21. *Id.* at 169.



strategy has the effect of marking the plot as a legal puzzle with a doctrinal solution that resolves the reader's suspense.

Post's accomplishments should not be exaggerated. It is no accident that his stories are not widely read today, given their wooden characters and dialogue.<sup>22</sup> But the stories seem to have been read with interest in some circles, as may be seen from a decision by the Supreme Court of Appeals of West Virginia in 1897, one year after the publication of *The Strange Schemes*. In a case concerning an attempt by one member of a partnership to defraud the other, the court opined that the defendant's plan resembled "a Randolph Mason scheme."<sup>23</sup> Evidently the allusion was thought to be recognizable without any need for further explanation.

Post's stories highlight, in an unusually explicit and perhaps inadvertently comic fashion, a connection between legal reasoning and detection that many of his contemporaries also noticed.<sup>24</sup> The Randolph Mason stories might almost be described as briefs on behalf of the case method that had been promoted at Harvard since 1870 and that was finally, by the 1890s, beginning to gain more general currency at other law schools. But if Post's stories share the Langdellian insight that the narrative form offers a distinctive vehicle for conveying legal concepts, Langdell would have been disappointed in the doctrinal lessons that Post provides. As the examples above show, the stories are invariably working their way towards a legal principle, but not to reveal basic concepts of the sort that Langdell favored in his explanations of the virtues of the case method. The points that resolve Post's plots are prosaic doctrines that anyone might find stated explicitly in a treatise or a judgment. Hence a reviewer could object that in "showing the many loopholes through which a criminal can escape [with the help of] a shrewd lawyer," the stories merely displayed what an "average intellectual lawyer" would regard as "commonplace, everyday practices."<sup>25</sup>

---

22. In the introduction, Post implicitly acknowledges this defect, remarking that readers seek to have their minds challenged by "the problem of the chess-board when the pieces are living." *Id.* at 2. Post adds that he hit upon the figure of Randolph Mason because the plan for the stories required "a character who should be without moral sense and yet should possess all the requisite legal acumen. Such a character is Randolph Mason, and while he may seem strange he is not impossible. . . . Might not the great lawyer, striving tirelessly with the problems of men, come at last to see only the problem, with the people in it as pieces on a chess-board?" *Id.* at 8-9.

23. *Grobe v. Roup*, 28 S.E. 699, 700 (W. Va. 1897). Post's story *Woodford's Partner* involves a similar fraud, which Mason recommends because a member of a partnership is not criminally liable for converting partnership property to his own use. POST, *supra* note 18, at 93.

24. See *infra* text accompanying notes 85-92.

25. Book Review, *The Strange Schemes of Randolph Mason*, 4 AM. LAW. 421 (1896). H.S. Richards was presumably thinking of stories in this genre when he observed that in "the press and the

Langdell had much greater ambitions for his new method of legal education. In 1870, when he introduced the case method, most American law courses were taught through lecture and memorization. The professor laid out the principles, decanting his knowledge into the students' heads, and the students demonstrated their mastery of the material through recitation.<sup>26</sup> Cases were used to show how the principles *applied* rather than providing the means through which they were *discovered*. With the analytical work done in advance, students needed only to demonstrate that they could replicate the pattern. A central premise of Langdell's approach was that the case method "put the responsibility on the student," creating "[the] feeling that he has built up a knowledge of law for himself."<sup>27</sup> Only by retracing the judge's reasoning, Langdell contended, could the student arrive at the essential concepts animating the doctrine. Textbooks therefore had to take care not to use chapter headings and section names that might "giv[e] the student the answer before he has done the problem."<sup>28</sup> It was crucial to keep students focused on the case itself and to prevent them from obtaining summaries that "contrived to unlock its mysteries."<sup>29</sup>

Langdell was not the first to propose that legal study might be centered on cases rather than treatises. As early as 1829, a young English lawyer named John Barnard Byles could question the use of "study[ing] . . .

---

popular magazines . . . . [t]he lawyer is portrayed as the player of a game, prone to mystery, and expensive circumlocution, an obstructionist at best." H.S. Richards, *Address of the President*, 4 AM. L. SCH. REV. 83, 85 (1915).

26. WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 23-25 (1994); STEVENS, *supra* note 14, at 54, 61, 67 n.24, 70-71 n.83, 80, 157, 161 (1983); George Chase, *Methods of Legal Study*, 1 COLUM. JURIST 69 (1885); Simeon E. Baldwin, *The Recitation System*, 2 COLUM. JURIST 1 (1885); William Dennis, *Object-Teaching in Law Schools*, 21 AM. L. REV. 228 (1887); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 574-82 (1997).

27. STEVENS, *supra* note 14, at 54.

28. SAMUEL WILLISTON, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at iii (1903). For other examples, see JOSEPH HENRY BEALE, JR., A SELECTION OF CASES AND OTHER AUTHORITIES UPON CRIMINAL LAW, at v (Cambridge, Harvard Law Review Publishing Ass'n 1894) ("That students may get the benefit to be derived from studying cases, it is necessary to omit headnotes."); JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY v (Cambridge, Charles W. Sever 1888) ("As one of the main objects in the study of cases is to acquire skill and confidence in extracting the *ratio decidendi*, the omission of head-notes from a collection like this is an essential part of the scheme."); WILLIAM A. KEENER, A SELECTION OF CASES ON THE LAW OF QUASI-CONTRACTS, at vii (New York, Baker, Voorhis 1888) ("As the printing of head-notes would be inconsistent with this system of teaching, they have been omitted."); and JAMES BRADLEY THAYER, SELECT CASES ON EVIDENCE AT THE COMMON LAW, at iv (Cambridge, Charles W. Sever 1892) ("In omitting headnotes . . . I have had in mind the special use for which this book is intended.")

29. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406, 1417 (1985).

general rules, and common treatises . . . without accompanying examples in the shape of cases.”<sup>30</sup> Byles emphasized that “the practical lawyer must divide, and distinguish, and decompose,” and that these skills could be developed only by “go[ing] at once to the fountainhead, and draw[ing] . . . knowledge from the reports.”<sup>31</sup> While the course of case study advocated here has much in common with Langdell’s, it lacks Langdell’s emphasis on fundamental principles to be discerned as the ultimate basis for the court’s judgment. Byles describes a way to cultivate certain lawyerly skills, but not necessarily by means of the “penetrating analysis” that the case method would be credited with promoting. Moreover, Byles’s recommendations were not adopted as the basis of an institutionalized program of study but instead were left for individual students to implement as best they could. Langdell’s achievement was to fuse an approach to legal analysis—already available in legal thinking but hardly the dominant perspective—with a pedagogical style that satisfied long-felt needs among lawyers.

Without expressly drawing on the example of the detective story, advocates of the case method emphasized its mystery-solving capacity, explaining that students should be “compel[led] to discover the principles which [the cases] have settled.”<sup>32</sup> The first major survey of the effects of case-method teaching in American law schools, published in 1914, observed that the advantage of the new approach over the “older text-

---

30. JOHN BARNARD BYLES, *A DISCOURSE ON THE PRESENT STATE OF THE LAW OF ENGLAND, THE PROPOSED SCHEMES OF REFORM, AND THE PROPER METHOD OF STUDY* 38 (London, S. Sweet 1829). For another contemporaneous endorsement of learning law by studying cases, see Porter, *supra* note 5. For more on Byles, see ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA* 371-73 (Carnegie Foundation for the Advancement of Teaching Bulletin No. 15, 1921) (discussing Byles’s recommendations in relation to Langdell’s introduction of the case method); John H. Landman, *Anent the Case Method of Studying Law: Langdell and the Langdellian Method of Studying Law*, 4 N.Y.U. L. REV. 139, 144 (discussing Byles’s “proposal of the study of Law as the judges themselves have declared it to be.”). Landman adds that Byles “was not a true precursor of the Case Method of studying Law,” because he “suggested the study of cases as problems or illustrations.” *Id.* at 144 n.13. The language quoted above, however, clearly shows that Byles regarded cases as primary sources of knowledge and tools for teaching the skills of legal reasoning. See also STEVENS, *supra* note 14, at 66 n.14 (discussing John Pomeroy’s use of case-method teaching at NYU and Hastings).

31. BYLES, *supra* note 30, at 39.

32. William A. Keener, *The Inductive Method in Legal Education*, 28 AM. L. REV. 709, 723 (1894) (quoting J.C. Gray, *Cases and Treatises*, 22 AM. L. REV. 756, 763 (1888) (internal quotation marks omitted)); see also Edward J. Phelps, *Methods of Legal Education*, 1 YALE L.J. 139, 153 (1892) (explaining that students must be taught “to discover, as the scientific investigator hopes by his experiments with the forces of nature, the fundamental principles underlying the concrete manifestations of their influence.”).

book school” was the ability to train students “in digging out the principles through penetrating analysis of the materials found in separate cases.”<sup>33</sup> This account is consistent with the justifications that Langdell offered when he introduced the case method forty years earlier. He explained that the search would move far beyond the various formulations in which courts couch their holdings (the merely correct statements of law that satisfied Post), to get at a few essential truths: “[T]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance . . . being the cause of much misapprehension.”<sup>34</sup> The careful student would shoulder the burden of discovering the unifying strands connecting these superficially different guises in a process that Langdell described in scientific terms. In one of his most famous pronouncements, he recommended the study of cases as a way to promote “legal science,” a way to turn “the library . . . [into] all that the laboratories of the university are to the chemists and physicists.”<sup>35</sup>

The scientific analogy was a common one among nineteenth-century lawyers who argued for greater clarity, coherence, and consistency within and across legal fields,<sup>36</sup> but it takes on additional significance in the context of Langdell’s efforts. Indeed, the leading explanations of Langdell’s achievement have focused on the relationship between the case method and his views of law as a science.<sup>37</sup> William LaPiana, for example, has discussed Langdell’s focus in the classroom on the “narrow, technical rules that make up the real work of the lawyer” as a means of establishing a pedagogical environment for the “new model legal science”

---

33. Henry S. Pritchett, *Preface to JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS*, at v, viii (1914).

34. CHRISTOPHER COLUMBUS LANGDELL, *Preface to A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vi (1871).

35. Christopher Columbus Langdell, Address to the Harvard Law School Association (Nov. 1886), quoted in ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 175 (1967).

36. For helpful overviews on the subject, see Howard Schweber, *Before Langdell: The Roots of American Legal Science*, in 2 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES* 606 (Steve Sheppard ed., 1999) [hereinafter Schweber, *Before Langdell*]; and Howard Schweber, *The “Science” of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 *LAW & HIST. REV.* 421 (1999) [hereinafter Schweber *Legal Science*]. On Langdell, see especially Schweber, *Legal Science*, *supra*, at 455-64. See also Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 *NEW ENG. L. REV.* 251, 284-85 (2005) (on Langdell and legal science); and Michael H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 *AM. J. LEGAL HIST.* 95 (1986) (same).

37. For a useful overview of the scholarship on Langdell, see Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906-2000s*, 22 *LAW & HIST. REV.* 277 (2004).

devoted to “find[ing] principles in the original sources of the law, which are the cases.”<sup>38</sup> Thomas Grey, similarly, notes that Langdell “shift[ed] the focus of instruction from abstract principles to cases, . . . promot[ing] [a] modern, case-centered view of adjudication”;<sup>39</sup> however, in contrast to LaPiana, Grey argues that Langdell’s legal science was not the embodiment of modern legal thought but rather was the precondition for the latter’s emergence. To that end, Grey seeks to explain what made legal science scientific, and he focuses on the significance of “completeness, formality, and conceptual order . . . as the values of legality” in Langdell’s jurisprudential philosophy.<sup>40</sup>

An additional factor in explaining Langdell’s scientific leanings and the methods they led him to advocate is his own background in natural science. Langdell’s interest in botany is sometimes cited to explain his dedication to classification as a legal-scientific enterprise. His biographer, Bruce Kimball, notes that as a Harvard undergraduate in the late 1840s, Langdell took a natural history course focusing on botany and zoology. This course “provided the conceptual frame for Langdell’s taxonomic analogies between law and natural science.”<sup>41</sup> Langdell’s botany professor, Asa Gray, saw that “one needed taxonomy in order to recognize evolutionary change,” and as Kimball observes, Langdell “[f]ollow[ed] Gray’s understanding” and similarly emphasized the value of taxonomy in clarifying evolutionary data when he wrote that

[L]aw, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases . . . . [Therefore a casebook should] select, classify, and arrange all the cases which [have] contributed . . . to the growth, development, or establishment of . . . [the law’s] essential doctrines.<sup>42</sup>

---

38. LAPIANA, *supra* note 26, at 57-58, 78.

39. Thomas Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 1 (1983).

40. *Id.* at 6.

41. BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 26 (2009). For other discussions associating Langdell’s legal-scientific orientation with his botanical interests, see, for example, SUTHERLAND, *supra* note 35, at 175-76; WILLIAM W. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 90 (1998); and Hugh C. Macgill & R. Kent Newmyer, *Legal Education and Legal Thought, 1790-1920*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOL. II: THE LONG NINETEENTH CENTURY (1789-1920)* 36, 50 (Michael Grossberg & Christopher L. Tomlins eds., 2008).

42. *Id.* (quoting LANGDELL, *supra* note 34, at vi).

Langdell's training in taxonomy helps explain his efforts to understand the law as comprising a coherent, contained, definable set of essential doctrines.<sup>43</sup>

The evolutionary aspect of his scientific training, however, is also significant and has received less emphasis. In the discussion quoted above, Kimball hints at, but does not spell out, the scientific tenor of Langdell's determination to seek out the root causes of surface phenomena, and to identify the underlying principles that yield the visible data of the cases, allowing us to see modern law as a "growth" produced by a slow, evolutionary process. Stephen A. Siegel notes that Langdell's assertion about the small number of "fundamental legal doctrines"<sup>44</sup> finds a parallel in the research of Charles Lyell, a precursor of Darwin whose publications on geology in the 1830s showed that "Earth's diverse landscapes were the product of a relatively small number of geologic forces."<sup>45</sup> Lyell's very influential work<sup>46</sup> has been described by cultural historians as an important delineation of a procedure that gained significant explanatory power and prestige during the nineteenth century: the procedure of studying causes by starting with effects and tracing a backwards route to their origins.<sup>47</sup> The method might seem merely another example of the inductive operation that moves from specific examples to a universal proposition (as against the deductive application of general principles to a set of facts). However, in moving back and forth between example and theory, tentatively postulating the latter and

---

43. Langdell owed his appointment as dean to Charles W. Eliot, who became president of Harvard in 1869. Eliot, trained as a chemist, had a strong interest in pedagogical reform, and seems to have shared Langdell's ideas about legal education. Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329, 334-35 (1979). Eliot also reformed the Medical School, introducing "clinical and laboratory instruction . . . at the expense of the predominant lecture method of teaching medical subjects." *Id.* at 340; see also LAPIANA, *supra* note 26, at 177 n.19 (noting similar changes in legal and medical education at Harvard, under Eliot).

44. LANGDELL, *supra* note 34, at vi.

45. Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1520-21 (2001) (citation omitted); see also Landman, *supra* note 30, at 139 ("What Lyell did for Geology . . . and what Darwin did for Biology . . . Langdell did . . . for the common law.").

46. CHARLES LYELL, *PRINCIPLES OF GEOLOGY; BEING AN ATTEMPT TO EXPLAIN THE FORMER CHANGES OF THE EARTH'S SURFACE, BY REFERENCE TO CAUSES NOW IN OPERATION*, 3 vols. (London, J. Murray, 1830-33). The book sold well, going through twelve editions before Lyell's death in 1875 and many more afterwards. KEITH FRANCIS, *CHARLES DARWIN AND THE ORIGIN OF SPECIES* 106 (2007).

47. The most influential treatment of this procedure is Carlo Ginzberg, *Clues: Roots of an Evidentiary Paradigm*, in *CLUES, MYTHS, AND THE HISTORICAL METHOD* (1989). See also FRANCO MORETTI, *Clues*, in *SIGNS TAKEN FOR WONDERS: ESSAYS ON THE SOCIOLOGY OF LITERARY FORMS* 130 (1983) (taking up similar questions); Ginzberg, *Morelli, Freud and Sherlock Holmes: Clues and Scientific Method*, 9 HIST. WORKSHOP 5 (1980) (pursuing the same line of inquiry).

continuing to refine the hypothesis by reexamination of the data, this method is better seen as enacting a process that would be formalized by Charles Peirce as “abduction.”<sup>48</sup> Lyell’s interpretations of fossil evidence in *Principles of Geology* (1830-33) encouraged further scientific work along the same lines, and also “stimulate[d] . . . common reader[s] of popular science” to engage in similarly speculative retracings by “invent[ing] new arrays of events, and . . . construct[ing] new narratives corresponding to those arrays, in order to explain the sequences of different fossil species in the visible story of creation written in the layers of the earth’s crust.”<sup>49</sup>

This description of Lyell’s research helps to pinpoint a similarity between the particular kind of science being developed in the mid-nineteenth century and the operations that Langdell demanded of his students. Completeness, formality, and conceptual order loom large in Langdell’s scientific aims, but an additional feature of his pedagogical method involves its focus on cases. His approach treats cases as the equivalent of different fossil species representing the top layer of a system whose inner workings can be understood only after the student speculatively constructs narrative explanations that reach backwards and forwards in a search for the correct principle. The exercise is properly characterized in terms of narrative because the case is a narrative form. By requiring students to master legal reasoning by engaging with this medium, Langdell replaced a pedagogical method that had used narrative only incidentally (as illustrations of doctrines presented axiomatically) with a method that relied centrally on that form.<sup>50</sup> In the classroom, students produce more narrative as they are asked what rule their answer would generate, how that rule affects the case at hand, and what results would follow in hypothetical future cases.<sup>51</sup>

---

48. PHILOSOPHY OF SCIENCE: AN HISTORICAL ANTHOLOGY 10-11 (Timothy McGrew et al. eds., 2009). The literature on Peircean abduction and its relation to detective fiction on the one hand, and to legal reasoning on the other, is immense. The essays in UMBERTO ECO, *THE SIGN OF THREE: DUPIN, HOLMES, PEIRCE* (1988) provide a good introduction to the literary side of the discussion. For examples on the legal side, see LLOYD L. WEINREB, *LEGAL REASON: THE USE OF ANALOGY IN LEGAL ARGUMENT* 20-25 (2005); and Scott Brewer, *Traversing Holmes’s Path Toward a Jurisprudence of Logical Form*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 94, 109-20 (Steven J. Burton ed., 2000).

49. CHARLES J. RZEPKA, *DETECTIVE FICTION* 69 (2005).

50. Julie Stone Peters, *Review Essay*, 9 *CARDOZO STUD. L. & LIT.* 259, 265 (1997) (noting that “the celebrated ‘case method’ was first regularly taught in the 1870s” and speculating that its “introduction . . . [may have been] a symptom of a . . . desire for narrative”); Cass Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741, 771 (1993) (noting that “the case method operates in part through narratives.”).

51. Langdell evidently included such questions in his classroom discussions. A former student

The narrative form of the exercise helps to advance both Langdell's taxonomic aims and his reconstructive procedures. When delivered to students in the form of rules, axioms, or maxims, doctrinal propositions may be capable of taxonomic arrangement, as Langdell recommended, but the classificatory impulse is bound to be thwarted by the brevity of the materials. Some limited efforts could be undertaken—for example, rules in contract law could be arranged in sets relating to offer, acceptance, breach, etc.—but the fundamental principles that Langdell hoped to unearth are likely to be elusive. Rules, even when collected in groups, give us no access to their origins.<sup>52</sup> When derived from cases and examined narratively in the classroom, however, doctrinal propositions afford much greater scope for taxonomy. A narrative can have any number of steps between its beginning and end, and those steps may themselves provide more fodder for classification, as analogies and conceptual relations among them become apparent. The narrative approach thus provides a means of managing complexity, by allowing not only for the inspection of rules but also for the testing and rearrangement of the many threads that connect the deeper principles with their surface manifestations. By the same token, where rules alone would hardly support a reconstructive effort, an exploration of the rules through a narrative medium makes this enterprise much easier to contemplate. When presented in the form of axioms, rules tell us nothing about the reasoning process, or the history of alternative approaches, resulting in the current doctrine. On the other hand, when we navigate a concrete dispute and the legal arguments from which the rule emerges, it is much easier to trace its earlier lineaments reconstructively through the pattern of facts, precedents, refinements, and warring doctrines encountered along the way.

These benefits still accrue even if both activities—the taxonomic and reconstructive—are now seen as serving instrumental, policy-oriented

---

recalled that Langdell posed questions such as, “If A contracts with B to serve him one year at so much per month, and at the end of six months’ service [A] dies, will his representatives be entitled to recover against B for the six months’ service; and if so, how much and upon what principle?” Samuel F. Batchelder, *Christopher C. Langdell*, 18 GREEN BAG 437, 441 (1906) (internal quotation marks omitted).

52. This point had been noted long ago by Francis Bacon, who wrote in his preface to *Maxims of the Law* (1630) that whereas treatises on civil law present rules and maxims in the form of “short dark oracles” and “proverbs,” he preferred to accompany his maxims “with a clear and perspicuous exposition; breaking them into cases, . . . and sometimes showing the reasons above whereupon they depend.” 7 THE WORKS OF FRANCIS BACON 323 (James Spedding et al. eds., 1859). Bacon’s example, as many commentators have observed, was not widely followed. See, e.g., Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3 (1957).



goals rather than revealing eternal truths about the legal system. The outcome-oriented nature of this discussion teaches students that to be worth excavating, the tacit premises should not just promote a nuanced understanding of the dispute but should yield consequences that bear on its resolution. Few today would agree with Langdell's assumptions—and probably few of his contemporaries did<sup>53</sup>—but the form he proposed continues to find adherents. He aimed to teach students how to move from the surface of the text to an underlying explanation, and to identify and disregard the superficially different doctrinal manifestations in search of the truly basic principles that actually mattered. The value of the method does not depend on the objective existence of those principles.

The advocates of the case method endorsed it as a proto-Deweyan technique that aids the understanding and the memory because it trains students in learning by doing,<sup>54</sup> and requires them to overcome the “difficulties” and “struggle” of independent investigation.<sup>55</sup> But the case method also trains students in the kinds of routines and algorithms that embody elegance and that signal sophistication. The case method teaches students that answers to legal questions generally cannot be found on the surface, but must be discovered by sifting the visible evidence to find a meaning that is buried at a deeper level. The corollary of this lesson is that when a legal interpretation depends on probing under the surface of a case to bring out implicit meanings, that interpretation should be preferred to one that remains content with the surface meaning. By conducting the search, the interpreter models the technique of an expert and thereby certifies her analysis as the product of a legal professional. The aesthetic values associated with this mentality include orderliness, precision, thoroughness, and ingenuity. Just as the satisfying solution to a murder mystery is a nonobvious one that depends on attention to subtleties and psychological acuity about the characters' motives, the law student learns that doctrinal analysis is satisfying and persuasive when it undertakes a methodical examination of tacit assumptions and implications to arrive at an ingenious answer, one that could not be discerned without the penetrating analysis that has produced it.

---

53. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST/REALIST DIVIDE* 67-90 (2010).

54. LAPIANA, *supra* note 26, at 26.

55. William A. Keener, *Methods of Legal Education*, 1 *YALE L.J.* 143, 147 (1892). On the macho rhetoric invoked on behalf of the case method by its advocates, see STEVENS, *supra* note 14, at 54; and Angela Fernandez, *Spreading the Word: Litchfield Law School to the Harvard Case Method* 83-84 (2007) (unpublished J.S.D. dissertation) (on file with Yale Law School).

## II. RECONSTRUCTIVE DETECTIVES

The case method emerged and began to flourish during roughly the same period that witnessed the development of the modern detective story, which has retained essentially the same features that it acquired between the 1890s and the 1920s.<sup>56</sup> Before that time, detective stories were about crime, adventure, courage, and above all pursuit. They were not stories in which the problem was solved with the aid of clues that the reader was invited to analyze independently of the detective. Instead, the crimes were generally solved through intuition, coincidence, or providence.<sup>57</sup> As literary critic Charles Rzepka explains, the use of the clue marks “[t]he difference between *detection* and . . . *detective* [stories].”<sup>58</sup> By this Rzepka means that the presence of someone who calls himself a detective is no guarantee that he will do any detecting. To catch a thief, it may be sufficient to use a disguise, establish some contacts with the underworld, and intimidate a few witnesses. Stories in this mold might supply clues on occasion, but only to feed the narrative demands of the chase. Rather than secreting clues for the reader to retrieve, the author would announce their presence, pronounce on their meaning, and use them to guide the detective’s next move in searching for the criminal.<sup>59</sup>

Until the mid-1880s these stories were not even regarded as belonging to a distinct genre.<sup>60</sup> As applied to fiction, the term “detective” was first

---

56. Of course, the intervening years have also seen the development of the hard-boiled detective story and the postmodern detective story. But these forms continue to coexist with the classic detective story rather than displacing it, and detective fiction crafted along classical lines—in which there is a single, correct solution, capable of discovery through carefully planted clues—still accounts for a significant part of the work being produced in the genre.

57. MORETTI, *Clues*, *supra* note 47, at 130; RZEPKA, *supra* note 49, at 10 (“The . . . ‘puzzle element’ [involves] the presentation of the mystery as an ongoing problem for the reader to solve, and its power to engage the reader’s own reasoning abilities. . . . [T]he ‘puzzle element’ is conspicuous by its absence during most of this period [i.e., the mid to late nineteenth century].”).

58. RZEPKA, *supra* note 49, at 30. For fuller elaboration of the distinction, see *id.* ch. 4 (“From Detectives to Detection”).

59. For an early example, see RICHMOND: OR, SCENES IN THE LIFE OF A BOW STREET OFFICER (London: Colburn, 1827). In one scene, the hero observes that a missing child cannot have been “stolen by the gipsies,” as the child’s parents assume, because “here was the pony left with a saddle and bridle worth more than the boy’s whole suit”—a point that the detective immediately “urge[s] with some eagerness . . . on the agitated mother.” 2 *id.* 7-8. For further discussion of the novel, which Rzepka calls “the first novel in English to feature a professional detective protagonist throughout,” see RZEPKA, *supra* note 49, at 67.

60. R.F. STEWART, . . . AND ALWAYS A DETECTIVE: CHAPTERS ON THE HISTORY OF DETECTIVE FICTION 27-30 (1980). Stewart identifies an anonymous article, *Detective Fiction*, SATURDAY REV. POL., LIT., SCIENCE AND ART, (London) Dec. 4, 1886, as the first instance of generic pigeonholing. *Id.* at 27; see also MARTIN A. KAYMAN, FROM BOW STREET TO BAKER STREET 105-06 (citing Stewart); *id.* at 109-110, 129-31 (noting that terms such as “detective literature,” “detective novel,” and “detectivism” were used from the 1850s to the 1880s to describe action-based stories in which

used, in the mid-nineteenth century, for stories of cops and robbers, not for a particular narrative form that cagily doles out the details according to a formula designed to test the reader's wits.<sup>61</sup> Even the Sherlock Holmes stories, often regarded as pathbreaking contributions to the genre of detective fiction, rarely offer up clues for the reader's analysis, and have often been criticized for denying the reader the opportunity to compete with Holmes in solving the crime. The clues in Doyle's stories are often described after the fact,<sup>62</sup> to justify Holmes's deductions instead of allowing the reader to use them, and the meanings that he assigns tend to rest on shaky foundations. Thus in 1902, the *Green Bag*—"an entertaining magazine for lawyers"—could devote an entire article to criticism of the detective's fallacious reasoning.<sup>63</sup> The recognition that clues could figure not simply as details that revealed the detective's acuity, but also as tools for securing the reader's engagement and for advancing the story's plot, took some time to permeate the genre.

It was the generation of mystery writers after Doyle who fully grasped the clue's potential and developed a genre that has continuing appeal.<sup>64</sup>

---

detectives unraveled secrets without specializing in any particular procedures for analyzing evidence); *id.* at 133-34 (noting that ANNA KATHERINE GREEN, *THE LEAVENWORTH CASE* (1878) "resemble[s] a modern 'detective novel,'" but that Green shortly afterwards published *XYZ: A DETECTIVE STORY* (1883), featuring a "detective . . . [who] is little more than a self-assumed spy, motivated by a 'curiosity' which is in no way intellectual"; who uses "procedures [which] are the standard illegalities and coincidences"; and who "exhibits little control over the narrative."). Kayman concludes that this "first pre-Holmesian 'Detective Story' is, despite the superficial intellectual vocabulary, still an entire genre away from Edgar Allen Poe." KAYMAN, *supra*, at 135. At the end of the 1880s, the *Albany Law Journal* could mock "the omnipotence of 'the detective' in the 'detective' novel" because he did no detecting but simply prompted criminals to confess on sight:

He not only arrests people right and left on suspicion, without warrant and without proof of the commission of any crime, but on his appearance everybody pants to confess and unburden himself of all the secrets of his prison-house. He just comes in and says, "I am detective so-and-so," whereupon the person addressed hurriedly proceeds to disclose his personal history and doings in the most confiding manner.

[Anon.], *Current Topics*, 39 ALB. L.J. 425, 426 (1889).

61. KAYMAN, *supra* note 60, at 105-106 ("The first literary application of the epithet 'detective' . . . occurs in 1850 with Dickens' "'Detective' Anecdotes," one of a series of journalistic articles reporting the 'real' personalities and activities of the Detective Department. There is no suggestion here of using the detective and his activities to generate a new fictional hero or form.") (italics in original).

62. Franco Moretti, *The Slaughterhouse of Literature*, 61 MOD. LANGUAGE Q. 207, 212-14 (2000). Early commentators noticed the point, but did not necessarily condemn it as a fault. Thus, for example, the author of an interview with Doyle commended the stories for attaching meaning to "the little things we regard as nothings" and for allowing Holmes to recognize their significance "from the first" while nevertheless "ingeniously contriv[ing] to hold his secret until we [get] to the very last line in the story." Harry How, *A Day with Dr. Conan Doyle*, 4 STRAND MAG. 182, 182-83 (1892).

63. J.B. Mackenzie, *Sherlock Holmes' Plots and Strategy*, 14 THE GREEN BAG: AN ENTERTAINING MAG. FOR LAW. 407 (1902).

64. Moretti, *supra* note 62, at 222. Kayman notes that typical features of mid-nineteenth-century

Shortly after the turn of the century—some thirty years after Langdell introduced the case method, and during the period when other schools were flocking to adopt it—the clue was well on its way to becoming a standard feature of detective fiction. In discussions of mystery-writing published over the following decades, the proper use of the clue was one of the primary considerations. In 1906, a reviewer explained that “[i]n an ideal detective story all the clues to the true solution ought to be there from the first, but so overlaid as to pass unnoticed.”<sup>65</sup> By 1910 a commentator on the genre could warn readers that in the typical detective novel, “the long chain of initial clues will lead to nothing,” and “the most important clue” would not surface “until about page 180.”<sup>66</sup> In one of the earliest efforts to review the genre comprehensively, published in 1913, Carolyn Wells explained that the clue and the deductive method are inextricably linked: “Deduction . . . is the *motif* of most of the detective stories of to-day. It is an unusually perspicacious analytic deduction from inconspicuous clues that we call ratiocination, or more familiarly, the detective instinct.”<sup>67</sup> The mystery writer’s task, Wells added, is “to provide clues that lead to something, and that pique the reader into endeavoring to find out for himself what it is.”<sup>68</sup> By the 1920s, the same points could be found in numerous discussions of the genre by such leading practitioners as R. Austin Freeman, Willard Huntington Wright (“S.S. Van Dine”), Ronald A. Knox, and Dorothy Sayers.<sup>69</sup>

Pursing a related theme, these commentators also insisted that to justify the reader’s immersion in the clue-scrutinizing enterprise, the author must

---

detective fiction include “disguise, infiltration, false confidences and trust, entrapment, intimidation of witnesses, illegal search, and spying on private correspondence or conversations from which [the detective] obtains key information or virtual confessions.” KAYMAN, *supra* note 60, at 119. Conspicuously absent from the list is analysis of evidence.

65. Cecil Chesterton, *Art and the Detective*, 251 LIVING AGE 505, 506 (1906). Chesterton also complained that when writers “explain the problem at the last moment, . . . by introducing new circumstances at which [the reader] could not possibly have guessed, . . . he has been cheated into attempting to solve a puzzle which, as it turns out, was for him quite insoluble.” *Id.* Chesterton thus may have been the first to raise this now-familiar complaint about “fair play.” He was the brother of G.K. Chesterton, author of the Father Brown mysteries.

66. I.C. Cummings, *Inside Views of Fiction: II—Detective Stories*, 30 BOOKMAN 499 (1910).

67. CAROLYN WELLS, THE TECHNIQUE OF THE MYSTERY STORY 165 (1913). Wells was herself the author of several mysteries whose titles (*The Clue* (1909), *A Chain of Evidence* (1912)) emphasize these same issues.

68. *Id.* at 362.

69. R. Austin Freeman, *The Art of the Detective Story* (1924), in THE ART OF THE MYSTERY STORY 7 (Howard Haycraft ed., 1946); Ronald A. Knox, *A Detective Story Decalogue* (1929), in THE ART OF THE MYSTERY STORY, *supra*, at 194; Dorothy Sayers, *The Omnibus of Crime* (1929), in THE ART OF THE MYSTERY STORY, *supra*, at 71; Willard Huntington Wright, *Twenty Rules for Writing Detective Stories* (1928), in THE ART OF THE MYSTERY STORY, *supra*, at 189.

observe the rules of “fair play”—that is, must provide enough clues to let the reader work out the solution, and must not withhold vital information known only to the detective. Some of the rules are puzzling (e.g., “No Chinamen must figure in the story”<sup>70</sup>); others seem puzzling but have been explained by narrative theorists (e.g., “There must be no love interest”<sup>71</sup>); but most are readily explicable as a means of giving the reader an “equal opportunity with the detective for solving the mystery.”<sup>72</sup> Thus, for example, “[t]he problem . . . must be solved by strictly naturalistic means”; “[t]he culprit must be determined by logical deductions”; and “[t]he detective must not light on any clues which are not instantly produced for . . . the reader.”<sup>73</sup> As critics noted early on, the process of writing a detective story mirrors the backwards-reasoning process of the detective, in the sense that the writer begins with a solution and then plants the evidence that leads there.<sup>74</sup> (This point emerges, in fact, in one of the first interviews with Doyle, published in 1892,<sup>75</sup> and it bears a striking similarity to the legal realist view about the backwards-oriented slant of the opinion-writing process, in which the justifications are supplied only after the judge has fixed on the conclusion.)<sup>76</sup> In calling

70. Knox, *supra* note 69, at 195.

71. Wright, *supra* note 69, at 189. For an explanation of this rule, see LISA ZUNSHINE, WHY WE READ FICTION: THEORY OF MIND AND THE NOVEL 141-52 (2006).

72. Wright, *supra* note 69, at 189.

73. *Id.*; Knox, *supra* note 69, at 196 (italics reversed).

74. See, e.g., *A Detective's Vade Mecum*, 270 LIVING AGE 629, 629 (1911) (anonymous review of G. AINSWORTH MITCHELL, SCIENCE AND THE CRIMINAL) (“The detective story is . . . written backwards, and the author [has] carefully laid his clues along the track of the crime, [making it] easy . . . for the detective, who is in on the secret, to pick them up as he goes along.”); Book Review, *Many Mysteries*, 64 INDEP. (New York) 1035, 1036 (1908) (“It may be said of the detective story that it is not written; it is constructed, often backward, from conclusion to the point of departure”). See also Brooks, *supra* note 2, at 87 (discussing “the ‘retrospective prophecy’ of the narrative put together from tracks and traces into a coherent plot that gains meaning from its end,” and concluding that “‘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”).

75. Among the “interesting facts” that the interviewer mentions having learned is that “Dr. Doyle invariably conceives the end of his story first, and writes up to it. He gets the climax, and his art lies in the ingenious way in which he conceals it from his readers.” How, *supra* note 62, at 187.

76. Thus, for example, Max Radin described judges as “working their judgment backward, from a desirable conclusion to one or another of a stock of logical premises.” Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357, 359 (1925). See also JEROME FRANK, LAW AND THE MODERN MIND 101 (1930) (“[S]ince the judge is a human being and since no human being in his normal thinking processes arrives at decisions . . . by the route of . . . syllogistic reasoning, it is fair to assume that the judge . . . will not acquire [an] artificial . . . method of reasoning. Judicial judgments, like other judgments, . . . are worked out backward from conclusions tentatively formulated.”); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 287 (1929) (quoting FRANK, *supra*, at 101). For more on earlier articulations of this view, see TAMANAHA, *supra* note 53, at 82.

attention to the habit of plotting backwards, critics sometimes meant to contest the “fairness” of a process in which the detective has been fed the answers,<sup>77</sup> but for those who emphasized the craft of writing, the central point was that the author might accidentally violate the rules of fair play by failing to give the reader sufficient access to the solution<sup>78</sup> (just as a judge, having already chosen the outcome according to the legal realist critique, might patch up an unpersuasive rationale and issue a ruling that seems merely to express the judge’s own values<sup>79</sup>). The planting of clues, then, must be careful, thorough, and attentive to the reader’s needs.

The dedication to cataloguing the rules of “fair play” reaffirms the genre’s commitment to what the rule-makers called the “rational and scientific” procedures now seen as facilitating its true aims.<sup>80</sup> Whereas reconstructive analysis has received only limited attention among historians of legal education, historians of the detective story have thoroughly explored the role of the reconstructive sciences in the genre’s intellectual genealogy, and Lyell is an important figure in that account. Rzepka, for example, treats the impulse to “invent new arrays of events,” prompted by Lyell’s research,<sup>81</sup> as a cognitive analogue and precursor to the detective story’s emphasis on rewarding the same habits in its reader, who is also engaged in tracing effects back to causes by treating clues as “opportunities to invent imaginative, backward-looking arrays.”<sup>82</sup> Similarly, Lawrence Frank devotes a significant amount of space to Lyell

---

77. See, e.g., *A Detective’s Vade Mecum*, *supra* note 74. Julian Hawthorne expressly defended mystery writers against the “charge . . . that . . . [the mystery writer] is not sincere [because] he makes his mysteries backward, and knows the answer to his riddle before he states its terms.” Julian Hawthorne, *Riddle Stories*, in *THE MOST INTERESTING STORIES OF ALL NATIONS: AMERICAN RIDDLE STORIES* 1, 6 (Julian Hawthorne ed., 1909). This practice, according to Hawthorne, “is not unfair” because “the very object, ostensibly, of the riddle story is to prompt you to sharpen your wits,” and to make the reader “the real detective in the case.” *Id.*

78. See, e.g., WELLS, *supra* note 67, at 6 (“[The reader] wants to learn [the] answer as corroborative proof of his own solution, and not as a revelation.”).

79. For example, Jerome Frank states:

Talks with candid judges have begun to disclose that, whatever is said in opinions, the judge often arrives at his decision before he tries to explain it. . . . [H]e often makes up his mind that Jones should win the lawsuit, not Smith. . . . After the judge has so decided, then the judge writes his ‘opinion.’ . . . The judge’s opinion makes it appear as if the decision were a result solely of playing the game of law-in-discourse. . . . [But this explanation] omits many of the factors which induced the judge to decide the case. Those factors (even to the extent that the judge is aware of them) are excluded from the opinion. . . . Opinions, then, disclose but little of how judges come to their conclusions. The opinions are often *ex post facto*; they are *censored expositions*.

Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 645, 653 (1932) (citation omitted).

80. Wright, *supra* note 69, at 191.

81. RZEPKA, *supra* note 49.

82. *Id.* at 27.

and his colleagues when arguing that nineteenth-century fictional detectives were “as concerned with epistemological and narratological issues as any practitioner of an historical discipline who set out to reconstruct the history of the universe, the changes in the earth’s surface over time, or those species that had become extinct.”<sup>83</sup> In a similar account that connects the reconstructive method of the “historical or palaeontological sciences” with the epistemological mode of the criminal trial, Lindsay Farmer observes that “the reconstruction of the detective proceed[s] by reasoning about possible motives as a means of linking the diverse clues together; the traces acquire meaning through being organised into a narrative account which prioritises the place of motive.”<sup>84</sup> The correspondence between the methods of reconstructive scientists and those on display in the detective story has been generally accepted, among literary critics and historians of ideas, as an illustration of how conceptual models can undergo cultural diffusion.<sup>85</sup> Rzepka’s observation that Lyell’s writings had a wide readership among non-scientists carries significant explanatory force in this context, suggesting that the reconstructive method was absorbed into everyday thinking, so that readers might develop a taste for its intellectual pleasures that could be satisfied by works of fiction, as well as by scientific writings.<sup>86</sup>

The idea that detective stories might offer readers a mental workout, developing habits of thought that could be applied to other problems, served as a common endorsement of their value. The *Green Bag* observed in 1894 that “[d]etective stories have always been great favorites among the legal profession” because they “keep the guessing faculty in exercise.”<sup>87</sup> George Jean Nathan, writing in 1909 about the distinctive reading habits that characterize various professions, found that “lawyers as a class liked detective stories best,” noting that “[t]here is something about a detective story that possesses a keener fascination for . . . lawyers

---

83. LAWRENCE FRANK, *VICTORIAN DETECTIVE FICTION AND THE NATURE OF EVIDENCE: THE SCIENTIFIC INVESTIGATIONS OF POE, DICKENS AND DOYLE* 25 (2003).

84. Lindsay Farmer, *Arthur and Oscar (and Sherlock): The Reconstructive Trial and the “Hermeneutics of Suspicion,”* 5 INT’L COMMENT. ON EVID. Article 4, at 7 (2007).

85. See GILLIAN BEER, *FORGING THE MISSING LINK: INTERDISCIPLINARY STORIES* 8 (1991); STEPHEN KERN, *A CULTURAL HISTORY OF CAUSALITY: SCIENCE, MURDER NOVELS, AND SYSTEMS OF THOUGHT* 6 (2004); GEORGE LEVINE, *DARWIN AND THE NOVELISTS: PATTERNS OF SCIENCE IN VICTORIAN FICTION* 1 (1991).

86. Similarly, Christopher Pittard notes that when it began publication in the 1890s, “the *Strand* rapidly became appreciated for two particular genres. One was popular science writing; the other was crime and detective fiction.” Christopher Pittard, *From Sensation to the Strand*, in *A COMPANION TO CRIME FICTION* 105 (Charles J. Rzepka & Lee Horsley eds., 2010).

87. Irving Browne, *Detective Stories*, 6 *GREEN BAG* 433, 433 (1894).

than any other kind of story.”<sup>88</sup> R. Austin Freeman, a pioneer in the development of the forensic detective story, offered one of the definitive accounts of the intellectual pleasures of detective fiction when he remarked in 1924 that the “connoisseurs [of the detective story,] who read it with close and critical attention, are to be found among men of the definitely intellectual class: theologians, scholars, lawyers, and to a less extent, perhaps, doctors and men of science.”<sup>89</sup> What these professions share, Freeman added, is a penchant for

find[ing] . . . pleasure in intricate arguments, in dialectical contests, in which the matter to be proved is usually of less consideration than the method of proving it. The pleasure is yielded by the argument itself and tends to be proportionate to the intricacy of the proof. . . . [T]he satisfaction yielded by an argument is dependent upon a strict conformity with logical methods, upon freedom from fallacies of reasoning, and especially upon freedom from any ambiguities as to the data.<sup>90</sup>

Albert S. Osborn, perhaps the leading American student of forensic evidence in the early twentieth century, recommended “the reading of good detective stories” as a method of “stimulating the faculties of observation, [and] for the study of methods by which correct inferences are drawn from the most obscure facts.”<sup>91</sup> The detective story, according

---

88. George Jean Nathan, *Business Men's Novels*, 30 THE BOOKMAN 132, 134 (1909) (internal quotation marks omitted); see also Grace Isabel Colbron, *The Reading Zones of the United States*, 36 THE BOOKMAN 148, 148 (1912) (“Detective stories seem to make their strongest appeal to the retired lawyer and that individual familiar to the theatrical manager as the ‘tired business man.’ Now this Tired Business Man and the Re-Tired Lawyer abound mostly in cities and residential suburbs around the large cities. Such localities, therefore, offer a steady market for stories of crime and detection.”); Charles Phelps Cushing, *Who Writes These Mystery Yarns?: The Great Detective Solves Another Puzzle*, 118 INDEPENDENT 382, 383 (1927) (discussing doctors and lawyers as mystery writers and noting that “[n]early every writer of the lot qualifies to do expert diagnosis and analysis because his mind was trained for such work in the profession he once followed or continues to follow.”).

89. Freeman, *The Art of the Detective Story*, *supra* note 69, at 11.

90. *Id.* at 11-12. Freeman dwells at length on the “intellectual satisfaction[s]” of detective stories, observing that they “deman[d] the power of logical analysis and subtle and acute reasoning” and offer “an exhibition of mental gymnastics in which [the reader] is invited to take part.” *Id.* at 11. Freeman’s own novels were similarly praised on the ground that “a teacher might be tempted to use them as problems in applied logic.” John Adams, *Mr. R. Austin Freeman*, 44 THE BOOKMAN 6, 7 (1913).

91. ALBERT S. OSBORN, THE PROBLEM OF PROOF: ESPECIALLY AS EXEMPLIFIED IN DISPUTED DOCUMENT TRIALS 423-24 (1922). This point was singled out for praise in a review by Frank J. Loesch in the *Illinois Law Review*. See 17 ILL. L. REV. 628, 629 (1922-23); see also Charles C. Butler, *Laying Foundation for a Legal Career*, 7 A.B.A. J. 539, 539 (1921) (“Whatever may be said in jest about Holmes, Dupin and Lecoq, they do emphasize the importance of close observation and attention to details. In a law suit, something that may be overlooked entirely by the inattentive, or that to the careless observer may appear to be too trifling to merit consideration, may prove at the trial to be an important and perhaps even the determining factor in the case.”).



to these commentators, was the perfect form of recreational reading for lawyers, apt to entertain while also cultivating analytical skills.<sup>92</sup>

Comparing Langdell's pedagogical innovations with the tactics that mystery writers were beginning to explore, we may say that what law students learn through the case method is how to read legal clues, and how to recognize various elements of the opinion *as* clues that can serve an instrumental function.<sup>93</sup> If the clue is the significant detail that does not come into visibility until an expert recognizes and interprets it, the case method is a procedure for training students to become experts in this fashion, fixing on the facts that will take on legal significance. That these skills resemble those of the detective finds striking confirmation in a recent study of the reading strategies exhibited by successful law students. A study by Leah Christenson of high-achieving and low-achieving first-year students showed that the first group, while reading an opinion for the first time, "talked back to the text, made predictions, hypothesized about meaning, and connected to purpose."<sup>94</sup> These students' explanations for engaging dynamically with the text showed that they sought to "account for the author's purpose, context and effect on the audience."<sup>95</sup> The low-achieving students, by contrast, moved through the opinion in a more linear fashion without attending to its functions or goals. These students used strategies such as "paraphrasing, rereading, . . . underlining text, and making margin notes," but tended to focus on minutiae instead of the big picture, and to push ahead when confused instead of trying to resolve their

---

92. Thus Eugene Wambaugh, author of *THE STUDY OF CASES: A COURSE OF INSTRUCTION IN READING AND STATING REPORTED CASES* (Boston, Little, Brown, and Company 1891), could include a number of detective stories in his article *Light Reading for Law Students*, 2 *LAW BULL. ST. UNIV. IOWA* 28 (1893); see also Browne, *supra* note 87, at 433 (recommending detective stories to "the lawyer on vacation").

93. Though Langdell and his case-method cohorts did not characterize their approach as a form of training in the observation of legal clues, even this terminology would eventually find a place in legal analysis. *Allen-West Comm'n Co. v. Grumbles*, 129 F. 287, 294-95 (8th Cir. 1904) ("The clew to the labyrinth of decisions upon this subject is the reason of the rule which makes delivery of the thing . . . indispensable to the validity of the gift."); *Trust Co. of Ga. v. State*, 35 S.E. 323, 327 (Ga. 1900) ("This decision . . . gives the clew by which apparent conflict of authorities on this subject may be reconciled"). Similarly, Hohfeld treated legal analysis as a search guided by clues: "[W]hat clue do we find, in ordinary legal discourse, toward limiting the word ['right'] to a definite and appropriate meaning? That clue lies in the correlative 'duty.'" Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions*, 23 *YALE L.J.* 16, 31 (1913).

94. Leah M. Christenson, *Legal Reading and Success in Law School: An Empirical Survey*, 30 *SEATTLE U. L. REV.* 603, 609 (2007) (citing Laurel C. Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 *IOWA L. REV.* 139, 159-60 (1997)).

95. *Id.* (quoting Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 *READING RES. Q.* 154, 161 (1995)).

confusion. The low-achieving students did poorly because they tried to make do with “accessible and familiar . . . reading strategies [that they had] used earlier in their academic careers.”<sup>96</sup> The questions posed by the high-achieving students find a perfect match in a recent description of the kind of attention that detective fiction demands from its readers: “[T]here is always the question whether we have understood a given situation, event, action or statement correctly” and “whether we have correctly recognized what information is salient.”<sup>97</sup> The reader must “contextualize any particular event or action as a (potential) part of . . . an action of large scale.”<sup>98</sup>

If case-method teaching aims in part to keep students focused on the relation between specific doctrinal details and the large-scale questions about what purposes the doctrine serves, this goal might also be understood as a way of instructing students about what counts as a red herring. In detective fiction, this device is a *sine qua non*: there would be no engaging problem, no multiplicity of arrays for readers to project, no opportunity to match wits with the detective, if all the clues pointed in the same direction or pointed nowhere. The genre requires an excess of plausible suspects and some misleading clues if the reader is to enjoy the challenge.<sup>99</sup> Red herrings in this sense have no place in legal judgments. When judges are accused of including misleading information in their opinions, the details in question have been selected because they support the judge’s reasoning, not because they might prevent the reader from predicting the outcome. Thus if the analogy has any application here, it is only because, as Christensen’s study shows, someone who is learning how to read a judgment can find it hard to separate the important details from the irrelevant ones, the ratio from the dicta. As noted earlier, the premium in the law school classroom is not on producing ever-more

---

96. *Id.*

97. Deborah Knight & George McKnight, *The Case of the Disappearing Enigma*, 21 PHIL. & LIT. 123, 124 (1997).

98. *Id.*

99. Surprisingly, this requirement rarely appeared on the lists of “rules” for writing detective fiction that were being produced in the 1920s. In lavishing their attention on “fair play,” the rule-makers evidently assumed that writers could be trusted, without any need for encouragement, to do whatever they could to bamboozle the reader. R. Austin Freeman is typical in this regard, insisting that the incriminating clues “should be produced as inconspicuously as possible, but clearly and without ambiguity in regard to their essentials.” Freeman, *supra* note 69, at 14. He notes only in passing that in some detective fiction, there is “a succession of false clues,” with “the fixing of suspicion first on one character, then on another, . . . and so on.” *Id.* Similarly, I.C. Cummings’s assertion that no valuable clue will emerge until more than halfway through the novel, *see* text accompanying note 66, suggests that an abundance of false clues would inevitably prevail.

nuanced explanations of the court's reasoning but on ferreting out concepts that can provide the backbone for a proper understanding of the doctrine. The process of learning this skill is one that many first-year law students find brutalizing. When students defend the farmer who did not bargain in advance for a liquidated damages clause, they are now told that the coal company need not pay to restore his strip-mined land to its previous state because such a requirement, rather than generating a rule that could help future parties to guide their conduct, instead has the effect of discouraging strip-mining altogether.<sup>100</sup> Subtleties that illuminate the parties' motives while failing to provide such guidance are dismissed as observations that lead nowhere. Students thus learn that only certain kinds of details, and the conclusions they support, produce legal narratives worth telling, and that stories failing to satisfy those requirements are deemed unnarratable.

The view of legal analysis as detection was not a new innovation produced by the case method; rather, the case method developed and extended a view that had already been articulated but whose manifestations in Anglo-American legal thought had been limited and intermittent up to the later nineteenth century.<sup>101</sup> The language of deduction and induction had long played a role in legal opinions and commentaries on legal education,<sup>102</sup> but the case method refined this understanding of legal analysis and produced lawyers for whom these procedures would become second nature. When Justice Story observed in 1842 that legal decisions are not themselves laws but "are, at most, only evidence of what the laws are,"<sup>103</sup> he was echoing a view that had been put forth in earlier centuries by Coke, Hale, and Blackstone—but Story's point, like theirs, was that because such decisions are not laws, they are

---

100. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1960). For discussions of students' sympathetic reactions to the plaintiffs' plight, see, for example, ROBIN WEST, *CARING FOR JUSTICE* 53-54 (1997); Judith L. Maute, *Peevyhouse v. Garland Coal Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341, 1427 (1995); and David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 569-70 (2001).

101. See, e.g., Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 499-500 (1996); Paul H. Kocher, *Francis Bacon on the Science of Jurisprudence*, 18 J. HIST. IDEAS 3 (1957); Schweber, *Before Langdell*, *supra* note 36, at 611.

102. See, e.g., Daniel R. Coquillette, "The Purer Fountains": *Bacon and Legal Education*, in FRANCIS BACON AND THE REFIGURING OF EARLY MODERN THOUGHT 145, 158 (Julie Robin Solomon & Catherine Gimelli Martin eds., 2005); Charles Barzun, *Common Sense and Legal Science*, 90 VA. L. REV. 1051, 1073-88 (2004).

103. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842).

not binding and therefore may be set aside when deemed erroneous.<sup>104</sup> They were “only evidence” in the same sense that circumstantial evidence may be suggestive but not incontrovertible.

By the early twentieth century, however, this statement could become a motto justifying the view that decisions must be examined to discover the underlying principles on which they rely. Roscoe Pound, writing in 1903, discussed the growth of the “scientific movement” in legal education and recommended the study of cases instead of treatises because “law is to be learned better by studying the authorities in which it is expressed than by reading about them,” and so even “[i]f, as is sometimes said, the cases are only evidence of the law, nevertheless they are the best evidence.”<sup>105</sup> Pound might seem to be saying that cases are closer to the source, or are more informative than treatises, but in explaining *why* law is learned better this way, he adds that law professors must “teach . . . principles that lie deeper” than the lessons available through “dogmatic instruction in the law.”<sup>106</sup> This explanation suggests that in serving as evidence, cases lead us to fundamental principles that would not otherwise be available. Dogmatic instruction would miss them by adhering to the explicitly stated doctrine, skating along the surface rather than plumbing the depths. On this view, cases are the best evidence because when probed carefully, they can tell us more than a summation or description would convey. The view of the early common lawyers may have been amenable to the detective

---

104. Story’s concern in *Swift* was to demonstrate that in diversity cases, the federal courts may develop a common law based on fundamental legal principles, without attending to common-law decisions of state courts; hence the state court decisions were to be regarded as “only evidence” of those principles and not as binding law. Coke wrote that “our Booke Cases are the best proofes what the Law is.” EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* bk. 3, § 420, at 254 (1628). Hale observed that “[j]udicial] Decisions are less than a Law, yet they are a greater Evidence thereof, than the Opinion of any private Persons.” MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 68 (1713). In the same passage, Hale explained that “the Decisions of Courts of Justice . . . do not properly make a Law so called” and are binding only “as to the particular Case in Question, till revers’d by Error or Attaint.” *Id.* Blackstone similarly remarked that “judicial decisions are the most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law,” and he added that while “it is an established rule to abide by former precedents,” the rule “admits of exception, where the former determination is most evidently contrary to reason, much more if it be contrary to the divine law.” 2 WILLIAM BLACKSTONE, *COMMENTARIES* 69-70; *see also id.* at 71, 72.

105. ROSCOE POUND, *THE EVOLUTION OF LEGAL EDUCATION* 13 (1903); *see also* Theodore Albert Schroeder, *Due Process of Law and Constructive Crimes*, 42 AM. L. REV. 369, 373 (1908) (quoting Story’s observation in *Swift v. Tyson*, *supra* note 103, after remarking that “[j]ust as the laws of mathematics are not created by the mathematicians, nor the physical laws by the physicists, who discover or make formal statements of them, . . . so the laws—the real laws—of a state are never products of judicial cerebration. All laws are presuppositions which make our thinking about them, and statement of them, possible.”).

106. POUND, *supra* note 105, at 14-15.

approach, but the case method actively promoted it.

On occasion even jurists have acknowledged—if only jokingly—the relationship between the detective story and the structure of the legal opinion. In 1989, Justice White rejected a proposed draft opinion in *Patterson v. McLean Credit Union*<sup>107</sup> because the procedural solution trotted out at the end was “as unsatisfying as the conclusion of a bad mystery novel.”<sup>108</sup> White mockingly complained that the draft violated the readers’ expectations: “[W]e learn on the last page that the victim has been done in by a suspect heretofore unknown, for reasons previously unrevealed.”<sup>109</sup> This description, however sardonic, emphasizes that the rules of “fair play” in detective fiction and opinion-writing alike require that the clues establishing a foundation for the outcome must be planted early, that the reader must have the opportunity to observe and consider them, and that they must be sufficient to account for the solution without resort to additional information that has been strategically withheld.

Fictional detectives have also figured more explicitly in judicial decisions, and their own theories have thereby been assimilated into the principles of legal reasoning. Less than fifteen years after the *Strand Magazine* began publishing the Sherlock Holmes stories serially in 1891,<sup>110</sup> Doyle’s detective made his first appearance in a legal opinion and was soon being invoked regularly by judges as an emblem of ratiocinative prowess.<sup>111</sup> More recently, the legal obsession with sleuths

---

107. 491 U.S. 164 (1989).

108. Joan Biskupic, *Racial Harassment Case Marked End of Liberal Bent on Civil Rights*, BUFFALO NEWS, June 1, 1993, at A6.

109. *Id.* In a related context, John Leubsdorf notes that decisions in criminal cases sometimes model the narration of facts on the detective story. John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 458 (“A judge deciding to uphold a conviction will tell a detective story, as seen from the point of view of the detective who ultimately succeeds in tracking down proof of guilt.”); *see also* *Arvida Corp. v. A.J. Indus.*, 370 So. 2d 809, 812 (Fla. Dist. Ct. App. 1979) (Baker, J., concurring) (characterizing a case involving defective merchandise as a “whodunit” and concluding with the rhetorical question, “isn’t it nice to have a mystery story that not only comes to the right conclusion but the one that was expected?”).

110. The first Holmes story was the novel-length *A Study in Scarlet*, published in *Beeton’s Christmas Annual* in November 1887, but it was only after Doyle started publishing the Sherlock Holmes stories in the *Strand* that the detective became popular.

111. Putting aside an intellectual property dispute over the name “Sherlock Holmes” in Illinois state court in 1902-03, the first opinion to refer to the detective is *People v. Buckley*, 87 N.Y.S. 191 (N.Y. App. Div. 1904) (comparing the code used by the defendant to “the cipher solved by Sherlock Holmes . . . [in] ‘The Dancing Men’”). The first U.S. decision to refer to Holmes’s deductive abilities is *State v. Claybaugh*, 122 S.W. 319, 321 (Mo. Ct. App. 1909) (describing a party’s effort to recapture his stolen turkeys as exhibiting “a sort of Sherlock Holmes process of deduction”). The earliest reference to Sherlock Holmes in a British decision appears in *Pells & Son v. Port of London Auth.*, [1920] 2 Ll. L. Rep. 327 (“[O]ne of the gentlemen concerned . . . dealt with it rather on the lines of Sherlock Holmes’ methods, for by scraping paint off the side of the bracket he found it was like that

and their puzzle-solving abilities has found expression in doctrinal analysis. Several courts have taken up Sherlock Holmes's axiom that "when you have eliminated the impossible, whatever remains, however improbable, must be the truth."<sup>112</sup> Holmes's observation about the "curious incident of the dog in the night-time" emerged as a canon of statutory construction in the 1980s,<sup>113</sup> having already been cited frequently for its propositional logic during the preceding thirty years.<sup>114</sup>

---

on the mark."). The earliest Canadian reference appears in *Moyer v. Moyer*, [1940] O.W.N. 113, 113 (Ont.) ("[A]n ordinary detective put on a divorce case would probably obtain results in about six months. A Sherlock Holmes might probably secure his evidence in three.").

112. The axiom has found more favor in the United States than in Canada. Judge Southin rejected "this well-known but unjudicial dictum" in *McPhee v. British Columbia (Ministry of Transp.)* [2005], 38 B.C.L.R. 4th 328 para. 20 (B.C.). For U.S. decisions endorsing the proposition, see, for example, *Bammerlin v. Navistar Intern. Transp. Corp.*, 30 F.3d 898, 902 (7th Cir. 1994) (Easterbrook, J.); *Walgreen Co. v. N.L.R.B.*, 509 F.2d 1014, 1021 (7th Cir. 1975) (Pell, J., dissenting); *Pafford ex rel. Pafford v. Sec'y of Dept. of HHS*, 64 Fed. Cl. 19, 21 (Fed. Cl. 2005); and *Williams v. State*, 437 A.2d 665, 667 n.1 (Md. App. 1981).

113. This interpretive touchstone seems to have been proposed first by Chief Justice Rehnquist in dissent, in *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980), provoking a rebuttal in Justice Stewart's opinion for the Court. Within a decade, what had been rejected as "strange" was a matter of orthodoxy. See *Church of Scientology of California v. I.R.S.*, 484 U.S. 9, 17-18 (1987) (Rehnquist, C.J.) ("[T]his is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."); *Harrison*, 446 U.S. at 596, 602 (Rehnquist, C.J., dissenting) ("Congress' additions to [the statute under review are] no less curious than was the incident in the Silver Blaze of the dog that did nothing in the nighttime"; "I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."); *id.* at 592 (Stewart, J.) ("[I]t would be a strange canon of statutory construction that would require Congress to state . . . that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."). This line of thought was anticipated by Judge Tamm in a 1975 opinion. See *Palmore v. Superior Court of District of Columbia*, 515 F.2d 1294, 1311 & n.44 (D.C. Cir. 1975) (en banc) ("We find the congressional silence, when contrasted with the extended constitutional debates over other proposals, both 'curious' and significant.") (citing ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE COMPLETE SHERLOCK HOLMES* 347 (1930)). The canon continues to meet with opposition. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("Apart from the questionable wisdom of assuming that dogs will bark when something important is happening . . . Statutes are the law though sleeping dogs lie."). On the canon more generally, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 220-21, 325 (1994). See also *Com. v. Marshall*, 81 Mass. 202, 205 (1860) (asserting that the watchdog's failure to bark did not prove that barn fire was not caused by arson, because "persons desiring to keep themselves concealed, or to go where they would be sure not to be noticed by the dog, might reach [the barn] without difficulty in boats across the water near to which it was situate. Under such circumstances, certainly the quiet and silence of the dog was utterly without significance").

114. *Burgess v. M/V Tamano*, 564 F.2d 964, 977 (1st Cir. 1977) ("[P]laintiffs [have not] responded . . . to the silence of the Pilots themselves, who are faced not with a hypothetical, but the hard reality of a vital mark about which they did not complain. We are here reminded of Sherlock Holmes' dog in the nighttime, the significance of which was that he did not bark."); In re *Nissen* 146 F.Supp. 361, 362-63 (D. Mass. 1956) ("I was impressed by the absence of judicial expression of what the word ['training'] meant. . . . [I]t seems to have been overlooked altogether. I am reminded of Sherlock Holmes' observation of the significance of the dog's activity in the nighttime—viz., that it did nothing."); *People v. Blakeslee*, 82 Cal. Rptr. 839, 844 (Cal. App. 1969) ("The absence of

The forensic parable of the non-barking dog and the critique of the opinion that ends like a “bad mystery” are symptoms of a much larger set of assumptions, techniques, and goals that the detective story shares with the case method. Implicit in White’s joke is the recognition that the detective story is a popular cultural form—an aesthetic form—that accustoms readers to a particular structure for the positing, analysis, and resolution of problems. Whether or not they are aware of it, readers who have come to find that mode of problem-solving satisfying are likely to apply the same expectations to problems in other contexts, and to judge the effectiveness of the solution according to the same aesthetic criteria.

### III. LAWYERING UP DETECTIVE FICTION

Having shown how legal decisions may borrow explicitly from detective fiction, not only jocularly but also in the service of doctrinal arguments, I now propose to reverse the terms and to ask what role lawyers have played in detective stories—and more specifically, as detectives in these stories. This focus serves to limit what would otherwise be an impossibly wide inquiry, and also advances the argument by shifting to some fictional manifestations of the links we have been considering. The use of the lawyer as an expert whose skills are suited to the needs of detection has figured in the genre almost from the beginning, as the frequent use of lawyer-detectives attests. An exploration of lawyers as detectives allows us to identify five points of connection that help to explain the congruences in their fictional roles. First, writers often exploit this connection simply because lawyers are specialists in the challenges that the genre poses to its readers. Several of the other reasons for this practice follow readily from the discussion above. Second, the lawyer’s case and the detective’s case share a narrative form structured by the movement from the specification of a problem to its resolution. Third, besides the shared concerns of detective writers and criminal lawyers—and more basically a common adversarial structure in detective fiction

---

evidence, like Sherlock Holmes’ curious incident of the dog in the nighttime which did not bark, may have as great an impact on the substantiality of a case as any which is produced, for the absence of evidence which would normally be forthcoming can undermine the solidity of the proof relied on to support a finding of guilt.”); *Whitehurst v. Bauer*, 359 N.E.2d 1176, 1177 (Ill. App. 1977) (“the silent horn (like the Sherlock Holmes dog who failed to bark in the night) might raise . . . an inference of speed or failure to keep a proper lookout”); *Bendetson v. Coolidge*, 390 N.E.2d 1124, 1126 (Mass. App. 1979) (“[L]ike the dog in the Sherlock Holmes story who did not bark, the papers are significant for what they did not say.”); *Walker v. Johnston*, 236 S.W.2d 534, 542 (Tex. Civ. App. 1951) (“Defendants’ failure to produce evidence reminds one of the ‘curious incident of the dog in the night time.’”).

and legal disputes—we see an express assertion in detective fiction about its concern with logical rigor, again pursued increasingly through the narrative form, in the sense that the genre became more closely identified with a plot structured entirely around the presentation and resolution of a mystery. Finally, the fictional examples also bring out two new implications, involving the kind of expertise that the detective displays and the game-playing mentality these stories facilitate.

The use of lawyers in detective fiction dates back to the genre's origins. Anna Katharine Green's *The Leavenworth Case* (1878), often described as the first American mystery novel, conscripts an attorney into the role of detective, as the book hints in its subtitle, *A Lawyer's Story*.<sup>115</sup> The figure of the lawyer-detective flourished on both sides of the Atlantic during the genre's early years and found perhaps its fullest embodiment in Perry Mason, whose adventures in print spanned the middle third of the twentieth century.<sup>116</sup> In 1987, the genre entered a new phase when Scott Turow published the legal thriller *Presumed Innocent*.<sup>117</sup> The last few years have witnessed yet another variation on this theme as a series of law professors have begun publishing mysteries.<sup>118</sup>

Early British contributions to the genre of "detective fiction" in the sense of stories about detection, but without clues, include two series of stories serialized in *Chambers's Edinburgh Journal* as *The Experiences of a Barrister* (1849-1850) and *The Confessions of an Attorney* (1850-52)<sup>119</sup> (both later published together under the title *The Lawyer Detective*);<sup>120</sup> a

115. ANNA KATHARINE GREEN, *THE LEAVENWORTH CASE: A LAWYER'S STORY* (New York, G.P. Putnam's Sons 1878). For more on the status of *The Leavenworth Case* as the first American detective novel, see *infra* note 127.

116. Anita Sokolsky, *The Case of the Juridical Junkie: Perry Mason and the Dilemma of Confession*, 2 *YALE J.L. & HUMAN.* 189 (1990).

117. SCOTT TUROW, *PRESUMED INNOCENT* (1987).

118. See, e.g., LORI ANDREWS, *SEQUENCE* (2006); JAMES BOYLE, *THE SHAKESPEARE CHRONICLES* (2006); ALAFAIR BURKE, *CLOSE CASE* (2005); JED RUBENFELD, *THE INTERPRETATION OF MURDER* (2006); MARIANNE WESSON, *CHILLING EFFECT* (2005).

119. The stories were published anonymously but when published in book form in 1852 were attributed to Samuel Warren. There is some dispute about the attribution. Heather Worthington, in the most intensive study of the stories to date, concludes that "it [is] unlikely that Samuel Warren was their author," but adds that Warren's earlier "criminographic writing was paradigmatic for the later populist legal anecdotes [retailed in the stories]." HEATHER WORTHINGTON, *THE RISE OF THE DETECTIVE IN EARLY NINETEENTH-CENTURY POPULAR FICTION* 74 (2005). For a useful overview on Warren's fiction and these two series of tales, see *id.* at 46-102, 105-06. For other discussions, see Bege K. Bowers, *Samuel Warren*, in *BRITISH REFORM WRITERS, 1832-1914*, at 334-38 (Gary Kelly & Edd Applegate eds., 1998); and C.R.B. Dunlop, *Samuel Warren: A Victorian Law and Literature Practitioner*, 12 *CARDOZO STUD. L. & LIT.* 265 (2000). On Warren's contribution to the genre of the medical case history, see Meegan Kennedy, *The Ghost in the Clinic: Gothic Medicine and Curious Fiction in Samuel Warren's Diary of a Late Physician*, 32 *VICTORIAN LIT. & CULTURE* 327 (2004).

120. *THE LAWYER-DETECTIVE, OR, TWENTY-TWO CELEBRATED CRIMINAL CASES UNRAVELED*



number of stories by Wilkie Collins, including *A Stolen Letter* (1854), which features the crafty young lawyer Mr. Boxsious as detective; *A Plot in Private Life* (1858), in which the attorney Mr. Dark is the sleuth; *The Biter Bit* (1858), in which a young lawyer's clerk, Matthew Sharpin, proves anything but sharp and completely bungles the investigation; and a novella, *My Lady's Money* (1878), in which a disbarred attorney named Old Sharon solves the mystery as much through luck as his own effort.<sup>121</sup> Other Victorian examples include William Russell's *Leaves from the Diary of a Law Clerk* (1857) and Mary Elizabeth Braddon's *Lady Audley's Secret* (1862), in which Robert Audley begins as a languid, lackadaisical aristocrat and through his work as a detective is transformed into a successful barrister who, when last seen, has "distinguished himself in the great breach of promise case of *Hobbs v. Nobbs*."<sup>122</sup> The New Zealand-born writer Fergus Hume produced "the first best-selling crime fiction mystery novel in English"<sup>123</sup> with *The Mystery of a Hansom Cab* (1886), in which the crime is solved by Mr. Calton, "one of the leading lawyers of the city." The "clue-puzzle" story, once it took hold, also had a place for the lawyer-detective, as may be seen in Arthur Morrison's stories in the *Strand Magazine* about Martin Hewitt (1894-1903),<sup>124</sup> R. Austin Freeman's stories about John Thorndyke (1909-42), Baroness Orczy's Patrick Mulligan in *Skin O' My Tooth* (1928), and Cyril Hare's

---

(Loyd 1887).

121. *A Stolen Letter* (published in Dickens's *Household Words* in 1854; collected in Collins's *After Dark and Other Stories*, 1856) recalls Poe's *The Purloined Letter* in many respects, except that in Collins's story, the letter is concealed under the floor and its hiding place must be discovered. For more on Collins, see Robert P. Ashley, *Wilkie Collins and the Detective Story*, 6 *NINETEENTH-CENTURY FICTION* 47 (1951).

122. For a critical discussion of this transformation, see Vicki A. Pallo, *From Do-Nothing to Detective: The Transformation of Robert Audley in Lady Audley's Secret*, 39 *J. POPULAR CULTURE* 466 (2006).

123. STEPHEN KNIGHT, *CRIME FICTION, 1800-2000: DETECTION, DEATH, DIVERSITY* 52 (2004). Hume's thriller was first published in Melbourne in 1886; it was the 1887 London edition that achieved best-sellerdom. *Id.*

124. ARTHUR MORRISON, *ADVENTURES OF MARTIN HEWITT. THIRD SERIES* (1896); *THE CHRONICLES OF MARTIN HEWITT, INVESTIGATOR* (1895); *THE RED TRIANGLE, BEING SOME FURTHER CHRONICLES OF MARTIN HEWITT, INVESTIGATOR* (1903); *MARTIN HEWITT, INVESTIGATOR* (1894). Knight observes that "Morrison made his detective start as a young law clerk, rather like one of the humble investigators of the 1850s stories, but his success led him to set up as a private detective, working entirely on his own." KNIGHT, *supra* note 123, at 74. Doyle's Sherlock Holmes stories were also appearing in the *Strand Magazine* at the same time, and there can be little doubt that Morrison took his inspiration from Doyle, though Hewitt is described as having a very different personality and appearance. "As Bleiler remarks, 'Hewitt is obviously based on Sherlock Holmes via the identity of opposites' . . . . Hewitt is plump, pleasant, low-key, and co-operates readily with the police." *Id.* (quoting E.F. Bleiler, *Introduction to ARTHUR MORRISON, TALES OF MEAN STREETS*, at xiii (1976) (1895)).

novels featuring Francis Pettigrew (1942-58).<sup>125</sup>

On the American side, Metta Fuller Victor included a lawyer-detective in *The Dead Letter* (1866)<sup>126</sup> a dozen years before Green's *The Leavenworth Case*, though Fuller's use of psychic powers as a tool in solving the mystery has led some scholars to question the book's status as a detective story.<sup>127</sup> Green's novel was a popular and critical success,<sup>128</sup> and it so fascinated British constitutional lawyer A.V. Dicey that he went out of his way to meet her after a visit to Harvard in 1898.<sup>129</sup> Green went on to become a prolific mystery-writer, and included another lawyer in *Hand and Ring* (1883)—this time as culprit.<sup>130</sup> Following Green's success, the American lawyer-detective became a familiar figure from Harry Rockwood's *Abner Ferret, the Lawyer Detective* (1883), Melville Davisson Post's three collections of Randolph Mason stories (1896-1907), Harvey Scribner's *My Mysterious Clients* (1900), Frederick Hill's *The Case and Exceptions: Stories of Counsel and Clients* (1900), Burton Stevenson's *The Holladay Case* (1903), Richard Marsh's *A Case of*

125. The novels featuring Pettigrew as a lawyer-detective began with CYRIL HARE, *TRAGEDY AT LAW* (1942) and ended with HARE, *HE SHOULD HAVE DIED HEREAFTER* (1957).

126. METTA FULLER VICTOR, *THE DEAD LETTER* (1866). Victor's second mystery novel, *THE FIGURE EIGHT* (1869), features a doctor as detective.

127. See CATHERINE ROSS NICKERSON, *THE WEB OF INIQUITY: EARLY DETECTIVE FICTION BY AMERICAN WOMEN* 29 (1998) ("as far as anyone can be certain about 'firsts' in American publishing, *The Dead Letter*, published in book form in 1866, is the first American detective novel."); Jennifer Murphy McCollum, "A Quietus and a Kiss": Anna Katharine Green and the Criminal Romance 8-11 (2000) (unpublished Ph.D. dissertation) (on file with UNC-Greensboro) (discussing the controversy and noting that some of the detection in *The Dead Letter* is "impure" because Victor uses "psychic abilit[ies] . . . [as] sleuthing skills") (citing WILLIAM L. DEANDREA, *ENCYCLOPEDIA MYSTERIOSA* 300 (1994)); see also Catherine Ross Nickerson, *Introduction to METTA FULLER VICTOR, THE DEAD LETTER & THE FIGURE EIGHT* 1, 3 (Duke Univ. Press, 2003) ("[Victor] takes the apparatus of the detective story Poe set forth in the 'tales of ratiocination' of the 1840s . . . and expands it into a full-length novelistic form.")

128. PATRICIA D. MAIDA, *MOTHER OF DETECTIVE FICTION: THE LIFE AND WORKS OF ANNA KATHARINE GREEN* 4 (1989).

129. See ALBERT VENN DICEY, *MEMORIALS OF ALBERT VENN DICEY* 146 (1925) (describing how, in 1898, after giving a series of lectures at Harvard, Dicey "called upon Mrs. Rolphs [sic] (Anna Katherine Green), whose story, *The Leavenworth Case*, had appealed so strongly to his interest in detective stories that he was determined not to visit America without seeing her. . . . The incident was the beginning of a friendship, and Mrs. Rolphs dedicated a novel to him."). The book that Green dedicated to Dicey is *Agatha Webb*. Green also maintained a correspondence with Oliver Wendell Holmes. See Letter from Oliver Wendell Holmes to Anna Katherine Green Rolphs (on file with the Harvard Law School Library, Oliver Wendell Holmes Papers, 49-19). See also Paul Woolf, *When Arthur Met Anna: Arthur Conan Doyle and Anna Katharine Green*, 8 *SYMBIOSIS* 177 (2004) (discussing Green and A.C. Doyle).

130. Green was the daughter of a criminal defense attorney and she occasionally offered her own views on prominent cases. See Anna Katharine Green, *A Fictionist Faces Facts*, *FALL RIVER DAILY HERALD*, August 22, 1892, at 4 (cited in Cara W. Robertson, *Representing Miss Lizzie*, 8 *YALE J.L. & HUMAN.* 351, 352 n.8) (arguing that Lizzie Borden was not guilty of killing her parents); see also Anna Katharine Green, *Why Human Beings Are Interested in Crime*, 87 *AMERICAN MAG.* 38 (1919).

*Identity* (1908), Henry Kitchell Webster's *The Whispering Man* (1908), Jean Webster's *The Four-Pools Mystery* (1908), Carolyn Wells's *The Clue* (1909), Richard Noyes Hart's *The Bellamy Trial* (1927), and J. Lane Linklater's *Hugo Oakes, Lawyer-Detective* (1930-34)—not to mention Erle Stanley Gardner's Perry Mason stories (1933-68),<sup>131</sup> which, along with the television series they spawned, have given Mason a prominence in the corpus of legal opinions that rivals that of Sherlock Holmes.<sup>132</sup>

The advent of the lawyer-detective in the late nineteenth century is particularly notable given that it occurs (at least on the American side) after the end of what Robert Ferguson has described as the “configuration of law and letters that dominated American literary aspirations from the Revolution until the fourth decade of the nineteenth century” and the beginning of a period of “collective, specialized inquiry.”<sup>133</sup> The

---

131. See David Ray Papke, *Lawyer Fiction in the Saturday Evening Post: Ephriam Tutt, Perry Mason and Middle-Class Expectations*, 13 CARDOZO STUD. L. & LIT. 207 (2001); Anita Sokolsky, *The Case of the Juridical Junkie: Perry Mason and the Dilemma of Confession*, 2 YALE J.L. & HUMAN. 189 (1991). Other early examples include: LE JEMLYS [pseud.], *LAWYER MANTON OF CHICAGO: A DETECTIVE STORY OF THRILLING INTEREST* (Chicago, Eagle Publishing Co., 1888); EDWARD JENKINS, *A WEEK OF PASSION, OR THE DILEMMA OF MR. GEORGE BARTON THE YOUNGER* (London, Remington & Co., 1884); ROBERT MCCURDY, *THE UPAS TREE* (1913); MELVIN SEVERY, *THE MYSTERY OF JUNE 13TH* (1905); BURTON E. STEVENSON, *THAT AFFAIR AT ELIZABETH* (1907); MARK TWAIN, *PUDD'NHEAD WILSON* (New York, Harper & Brothers, 1890); and WILL WINCH, *THE LAWYER DETECTIVE* (New York, Munro's Publishing House, 1890). For useful overviews, see Friedman & Rosen-Zvi, *supra* note 3; Marlyn Robinson, *Collins to Gresham: A Brief History of the Legal Thriller*, 22 LEGAL STUD. F. 21 (1998).

132. While Perry Mason has not given rise to a doctrinal principle (such as the canon of the non-barking dog), he is arguably the forerunner of the “CSI effect,” which, according to some prosecutors, has influenced jurors’ expectations about how trials proceed. See, e.g., *State v. McKeough*, 300 A.2d 755, 761 (Me. 1973) (“[Reasonable doubt] is not a doubt you go searching for or looking for. This is not Perry Mason. Perhaps some of you have seen defendants stand right up and say ‘I did it’, or ‘I didn’t do it’. Forget about that, that is for entertainment purposes, that doesn’t occur.”); *State v. Skjonsby*, 319 N.W.2d 764, 787 (N.D. 1982) (“[W]hat you see on television isn’t exactly the way it occurs, . . . this isn’t like a Perry Mason television [show] . . . [S]omeone . . . will not get up and say, ‘I did it.’”); cf. *Walker v. People*, 458 P.2d 238, 244 (Colo. 1969) (“[T]he Post retained Erle Stanley Gardner, the creator of the fictional Perry Mason, to assist the authorities in resolving the crime. From then on it was labeled ‘The Case of the Shanghied Coed.’ Gardner’s purpose, as revealed in a Post article, was as follows: ‘. . . I am to try to present to readers of the Denver Post the situation as it might appear to the eyes of Perry Mason, the fictional lawyer detective who has solved so many cases in my books. We are not employed to solve the case but to give the authorities any assistance within our power.’”). On the CSI effect, see Tom Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050 (2006).

133. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 5, 286 (1983). The same cannot be said for British writers. John Sutherland, in a statistical survey of 878 Victorian novelists (566 men and 312 women), finds that one in five of the men was a lawyer at some point, “and in the vast majority of cases a failed barrister. ‘Called to the Bar but never practised’ is thus the commonest prelude to a career in writing novels. And if one adds lawyer fathers (or, for women, lawyer husbands) the coincidence of training in law with the Victorian novel is even more pronounced.” JOHN SUTHERLAND, *The Victorian Novelists: Who Were They?*, in *VICTORIAN FICTION: WRITERS, PUBLISHERS, READERS* 159, 170 (2d ed. 2006). Sutherland offers various practical reasons for the

specialization to which Ferguson refers was part of a move towards greater professionalization among lawyers, a move that also helps to explain why they would have found the detective a particularly appealing literary figure. The detective, too, was associated with professionalization—of the police,<sup>134</sup> and also of the forensic scientists whose tools and techniques served as particularly powerful symbols of precision, objectivity, and expertise.<sup>135</sup> Sherlock Holmes, for example, is first seen in a “chemical laboratory” filled with “retorts, test-tubes, and little Bunsen lamps,” and in his first lines he reports the discovery of “a re-agent which is precipitated by hæmoglobin and nothing else.”<sup>136</sup> Landgell, as we have already seen, regarded the laboratory as the archetypical home of the scientific virtues.

Given the form and focus of detective fiction and its association with the scientific and rational study of crime, its appeal for members of the legal profession was overdetermined. First and most obviously, lawyers and writers of detective fiction converge over a common set of concerns—crime, violence, deceit, and conflict. Though mystery stories are not invariably about crimes, there can be no mystery without an event that remains opaque as to its cause, and many crimes (especially murder) conveniently fit that bill.<sup>137</sup> Doyle took pains in several of the Sherlock

---

linkage and concludes by speculating that “there is probably an affinity between the mentalities of jurisprudence and Victorian fiction, shaped as both were by the study of individual cases and the canons of (poetic) justice.” *Id.* at 171.

134. See, e.g., Haia Shpayer-Makov, *Journalists and Police Detectives in Victorian and Edwardian England: An Uneasy Reciprocal Relationship*, 42 J. SOCIAL HIST. 963 (2009).

135. See RONALD R. THOMAS, *DETECTIVE FICTION AND THE RISE OF FORENSIC SCIENCE* (1999). For related discussions, see LAWRENCE FRANK, *VICTORIAN DETECTIVE FICTION AND THE NATURE OF EVIDENCE: THE SCIENTIFIC INVESTIGATIONS OF POE, DICKENS, AND DOYLE* (2003); Joy Palmer, *Tracing Bodies: Gender, Genre, and Forensic Detective Fiction*, 18 S. CENT. REV. 54 (2001); Joseph Pugliese, “Super Visum Corporis”: *Visuality, Race, Narrativity and the Body of Forensic Pathology*, 14 LAW & LIT. 367 (2002); Mark Essig, *Science and Sensation: Poison Murder and Forensic Medicine in Nineteenth-Century America* (2000) (unpublished Ph.D. dissertation) (on file with Cornell University).

136. ARTHUR CONAN DOYLE, *A STUDY IN SCARLET*, in 3 THE NEW ANNOTATED SHERLOCK HOLMES 20 (Leslie S. Klinger ed., 2005) (1887). For further discussion of this passage in relation to the positivism of nineteenth-century forensic science, see D. Michael Risinger, *Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edalji Case*, 4 INT’L COMMENT. ON EVIDENCE 3 (2006). On the nineteenth-century history of the problem that Holmes purports to solve, see TAL GOLAN, *LAWS OF MAN AND LAWS OF NATURE* 144-75 (2004). Though Luminol and phenolphthalein are now widely used to detect blood, they cannot distinguish between human and animal blood and they also react to iron-based substances, rust, and horseradish. See Lisa Geffrides & Katie Welch, *Forensic Biology: Serology and DNA*, in THE FORENSIC LABORATORY HANDBOOK: PROCEDURE AND PRACTICE 15, 24-25 (Ashraf Mozayani & Carla Niziglia eds., 2d ed. 2011).

137. For a discussion of the murder mystery as a touchstone reflecting social beliefs about causality, see KERN, *supra* note 85.

Holmes stories to point out that a mystery does not require a crime,<sup>138</sup> but after Holmes's resurrection in 1903,<sup>139</sup> the stories focused increasingly on murder, as did the whole genre by the 1920s.<sup>140</sup> The adversarial structure, in any case, is a constant in the detective story, insofar as the mystery usually turns on a conflict between concrete parties—a conflict requiring at least one of the parties to share her secrets with a professional who will resolve the problem for her, often by standing in her place just as an attorney would represent his client in court.<sup>141</sup> Holmes himself appears to recognize his lawyer-like role on occasion, as in *The Mazarin Stone*, when he confers with a thug and invites the thug's henchman to join them: "After all, his interests should be represented."<sup>142</sup>

In part, the conflation of lawyering and detecting merely signals the mystery writer's recognition that the lawyer's needs often coincide with the occasion for crime-solving, and that lawyer and detective may perform overlapping functions in the same process.<sup>143</sup> This mutual interest in exonerating the innocent, for example, readily explains the lawyer's double duty in many of the stories, where the dual role serves no other purpose than to streamline the plot and to simplify the cast of characters. The frequency of lawyer-detectives in the years before 1890 testifies to that need. This mutuality of interest also explains many of the decisions referring to Sherlock Holmes, Perry Mason, and detectives generally in the course of describing crimes, criminals, and their capture. The speed with which the American courts started to mention Sherlock Holmes, noted earlier, highlights that point.<sup>144</sup> That the lawyer and detective are often concerned with the same actors and conduct, then, provides one explanation for the popularity of the lawyer-detective.

---

138. In *The Blue Carbuncle*, for example, Holmes observes that "of the last six cases which I have added to my notes, three have been entirely free of any legal crime." 1 DOYLE, *supra* note 136, at 198.

139. *The Adventure of the Empty House*, in 2 *id.* 781

140. Moretti, *Clues*, *supra* note 47, at 136; Stephen Knight, *The Golden Age*, in THE CAMBRIDGE COMPANION TO CRIME FICTION 77 (Martin Priestman ed., 2004).

141. For example, in *The Adventure of the Speckled Band*, Holmes and Watson occupy Helen Stoner's bedroom to assess the danger that threatens her life. 1 DOYLE, *supra* note 136, at 247.

142. Similarly, in *The Boscombe Valley Mystery*, Holmes says, "I understand that it was your daughter who required my presence here, and I am acting in her interests." 1 *id.* at 129. In *The Adventure of Charles Augustus Milverton*, the blackmailer who gives his name to the story's title treats Holmes as if he were a lawyer, telling Holmes that "it is only in your client's interests that I protested." 2 *id.* at 1011.

143. For some recent publications attesting to this convergence, see THE LAWYER AS DETECTIVE: EFFECTIVE AND ETHICAL INFORMAL DISCOVERY (2005); and THE LAWYER AS DETECTIVE II: NON-TRADITIONAL DISCOVERY IN THE INFORMATION AGE (2005).

144. See *supra* note 111.

Yet in many stories, that conflation of roles does more: it capitalizes on the lawyer's ability to frame and solve problems, and thus suggests, in keeping with the analogies discussed above, that lawyer and detective rely on a similar analytical toolkit. Both figures share an interest in reasoning from a set of facts that must be admitted or excluded from consideration on the ground of relevancy, according to an elaborate set of rules. That attribute was noticed as early as the 1840s, when commentators on Poe's pioneering efforts with the clue-puzzle form remarked on its bravura display of legal skills. One reviewer concluded that the investigations of C. Auguste Dupin, Poe's detective, seem to reflect "the actual observation of some experienced criminal lawyer, the chain of evidence is so wonderfully maintained through so many intricacies, and the connexion of cause and effect so irresistibly demonstrated."<sup>145</sup> Another affirmed that "[n]o lawyer or judge has ever equaled Poe in the power he manifests of sifting evidence—of balancing probabilities—of finding the *multum* of a large legal case in the *parvum* of some minute and well-nigh invisible point . . . . It is as though Chatterton had become a Bow-street officer."<sup>146</sup>

Like casebooks for law students, writers of detective fiction often claimed to be concerned with teaching their readers how to reason. The Sherlock Holmes stories, for example, often include a remark about the "instructive" or "educational" features of the case that Watson has chosen to describe.<sup>147</sup> The pedagogical aspect generally surfaces again at the

---

145. Matthew Pearl, *Introduction to EDGAR ALLAN POE, THE MURDERS IN THE RUE MORGE: THE DUPIN TALES*, at x (2006) (quoting Review, *Prose Romantics*, PENNSYLVANIA *INQUIRER*, July 26, 1843, at 2); see also *id.* at x-xi (quoting letter of Philip Pendleton Cooke to Poe, Aug. 4, 1846, stating that "a prosecuting attorney in the neighborhood here declares [the Dupin stories] are miraculous").

146. [Anon.], *Edgar Poe*, LITTELL'S LIVING AGE 166, 170 (Apr. 2, 1854). As these comments suggest, Poe's stories claim to present the kind of intellectual challenge that would later be seen as one of the primary virtues of the detective story. It is not clear why others did not capitalize more quickly on the possibilities that his stories displayed. Panek explains the delay on the grounds that the crime fiction of Poe's day centered on "sentiment and morality" (which Poe's stories did not); that Poe was interested in "the psychology of perception and . . . of the game player," and "not the psychology of the criminal or the victim or the avenger or (as in most nineteenth-century crime fiction) the psychology of those who suffer from crime"; and that "none of Poe's Dupin stories has anything to do with points of law." PANEK, *supra* note 18, at 9. Instead of following Poe's example, Panek notes, writers of detective fiction in the mid-nineteenth century offered stories that emphasized the sentiment associated with crime and those touched by crime," and "the mundane, pre-modern procedures of the police and the detective." *Id.* at 10. Those tendencies "took the American detective story off the path marked by Poe." *Id.* Thus Poe might be seen as playing much the same role in the history of the detective story that Byles played in the history of the case method. See *supra* note 30. Both figures advocated a narrative approach to reasoning and analysis at a time when the institutional or generic conditions for implementing this approach were unfavorable.

147. E.g., *The Adventure of the Three Students*, in 2 DOYLE, *supra* note 136, at 1064 ("[I]t was during this time that the small but instructive adventure which I am about to relate befell us."); *The Adventure of the Red Circle*, in 2 *id.* at 1284 ("Education never ends, Watson. It is a series of lessons

stories' close, when Holmes recapitulates his reasoning process for those too slow to match it. Thus one critic notes that

[m]any conversations between Holmes and Watson are reminiscent of a Socratic dialogue in which the student does not know how to proceed correctly without the continuous help and suggestions of the master, and has a tendency to put forth wrong opinions each time that he works by himself. We get to know, if only partially, the right principles applied by Holmes just because of Watson's mistakes.<sup>148</sup>

The analytical techniques modeled in Holmes' explanations typically display the same strategies of induction, deduction, and abduction promoted by the case method. In both instances we see a dedication to rigorous logical analysis, performed according to an orderly narrative procedure that spells out its premises and conclusions.<sup>149</sup> That shared commitment to a logical method provides a second explanation for the overlap between detectives and lawyers.

Further, as this account has been emphasizing, the analysis in both instances is displayed in a narrative form. Like the reader of the detective story, the law student is taught to reason through exposure to a form structured by the positing and resolution of a problem. Relatedly, it was during the second half of the nineteenth century that stories and novels involving legal problems began to use those problems as the guiding force for the structure of the narrative. Up until the mid-nineteenth century, British and American novels frequently included such legal issues as

---

with the greatest for the last. This is an instructive case."); and *A Study in Scarlet* in 3 *id.* at 196-97 ("There has been no better case within my recollection. Simple as it was, there were several most instructive points about it.").

148. Gian Paolo Caprettini, *Peirce, Holmes, Popper*, in *THE SIGN OF THREE: DUPIN, HOLMES, PEIRCE* 135, 151 (Umberto Eco & Thomas A. Sebeok eds., 1983). Doyle achieves a similar effect with Holmes's intake interviews with his clients, which often include an element of cross-examination. For more on the educational effects of detective stories, see, for example, PANEK, *supra* note 18, at 78 (noting that "the justification about teaching logic" was a common feature of early twentieth-century "scientific detective stor[ies]"); RZEPKA, *supra* note 49, at 127 (noting the implicit premise that "any reader, presumably, could learn the . . . 'methods' of observation and deduction and rise in the meritocracy of fictional detection"); WELLS, *supra* note 67, at 1 (praising the genre for its "value in training the mind to logical and correct modes of thinking; the practical application of which, in the everyday affairs of life, proves a valuable asset"); and Lila Marz Harper, *Clues in the Street: Sherlock Holmes, Martin Hewitt, and Mean Streets*, 42 *J. POPULAR CULTURE* 67, 74 (2009) (discussing the *Strand Magazine* in the 1890s and observing that "the detective story is not an anomaly in this periodical" but instead, like other articles in the magazine, "explores the danger its readers see in their world and gives a model of how to organize the street by being watchful and collecting clues" and showing "how to develop a methodical procedure based on clues").

149. That is the point of the critique in Mackenzie's article on the deficiencies of the plots and strategy in various Sherlock Holmes stories, *supra* note 63. See also Donald R. Richberg, *Sherlock Holmes, Witness—The Famous Detective Testifies*, 19 *GREEN BAG* 471 (1907) (a comic short story in which Holmes's deductions are all struck from the record as irrelevant or lacking any factual basis).

inheritance disputes, bigamy, and murder, but those issues figured simply as a plot element that did not affect where the story began and ended.<sup>150</sup> By the end of the nineteenth century, however, novels incorporating those issues were far more likely to organize the plot around the development and resolution of the dispute.<sup>151</sup> The view that legal problems were best understood in narrative terms was becoming much more prevalent in England and the United States and also found expression in practice manuals that increasingly emphasized the story-telling ability as a crucial skill for trial lawyers.<sup>152</sup>

Yet another feature connecting the lawyer and the detective involves the kind of expertise associated with these two figures in the late-nineteenth century. Both were experts who could look at seemingly commonplace details and find meanings that were invisible to other observers. Just as Holmes specializes in identifying the habits and occupations of his clients by looking at their hands or clothes, the lawyer who listens to a description of a negotiation between two parties or who observes an accident on a railway platform, can pick out the salient details that allow her to predict what a court would say about how to assess

---

150. For example, Henry Fielding's *Tom Jones* (1749), Jane Austen's *Pride and Prejudice* (1811), and Charles Dickens's *Bleak House* (1852) all raise questions about inheritance law, and have been studied through that lens by lawyers and literary critics, but even Dickens's novel, which presents a legal dispute as a central aspect of the plot, does not structure its plot according to the commencement and resolution of that dispute.

151. One way to observe this pattern is provided by John H. Wigmore, *List of 100 Legal Novels*, 2 U. ILL. L. REV. 574 (1907) (corrected reprint at 17 U. ILL. L. REV. 26 (1922)). Wigmore includes both novels that revolve around legal issues, such as those listed in *supra* note 150, and novels structured around the form of a case; however, once the latter became prominent, Wigmore included only those. Thus the legally-themed novels on Wigmore's list all date from the first half of the nineteenth century, while those from the later nineteenth century have plots that follow the structure of a legal dispute. For a related discussion of narrative structure, see JONATHAN GROSSMAN, *THE ART OF ALIBI* 167 (2002) (addressing "what it might mean—both historically and formally—to think of a trial that is depicted in a novel as a scene beside and through which the novel has positioned itself."). See also Lyn Pekett, *The Newgate Novel and Sensation Fiction, 1830-1868*, in *THE CAMBRIDGE COMPANION TO CRIME FICTION*, *supra* note 140, at 19, 34 ("Although the law court was the source of many sensation plots, sensation novels do not end in the courtroom or the prison."). William Godwin's *Things as They Are, or, The Adventures of Caleb Williams* (1794) is an early example of a novel that turns a mystery into an adversarial legal dispute and whose conclusion coincides with the end of a trial that resolves the mystery. For discussions of the novel, see GROSSMAN, *supra*, at 37-61; and Nicholas M. Williams, *The Subject of Detection: Legal Rhetoric and Subjectivity*, in *Caleb Williams*, 9 EIGHTEENTH-CENTURY STUD. 479 (1997).

152. See, e.g., JOSEPH WESLEY DONOVAN, *TRIAL PRACTICE AND TRIAL LAWYERS: A TREATISE ON TRIAL OF FACT BEFORE JURIES* 34-35 (St. Louis, Stevenson 1883); HENRY HARDWICKE, *THE ART OF WINNING CASES, OR, MODERN ADVOCACY: A PRACTICAL TREATISE ON PREPARATION FOR TRIAL, AND THE CONDUCT OF CASES IN COURT* 75 (New York, Banks 1894); [RICHARD HARRIS], *HINTS ON ADVOCACY, INTENDED FOR PRACTICE IN ANY OF THE COURTS . . . REVISED AND ADAPTED BY AN AMERICAN LAWYER* 12-13, 32 (St. Louis, Stevenson 1880); ALEXANDER H. ROBBINS, *A TREATISE ON AMERICAN ADVOCACY* 60 (St. Louis, Central Law Journal Co. 1913).



liability.

But the kind of expertise that the lawyer and detective share goes beyond seeing meaning that is invisible to untrained eyes. Both figures are experts at garnering support for their views on the basis of details that no one else had observed at all—details that did not even exist in anyone else’s view of the case.<sup>153</sup> Having developed a theory of the case, the lawyer knows what facts she will need to establish to validate the theory—whom she will need to interview, what records she will need to examine.<sup>154</sup> Holmes, similarly, frequently astonishes his competitors on the police force by knowing exactly where to search for the facts he needs—facts that the police never thought to look for in the place. Thus in *Silver Blaze*, when Holmes finds a discarded match, we are treated to the following exchange:

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

[Holmes]: ‘It was invisible, buried in the mud. I only saw it because I was looking for it.’

[The inspector]: ‘What? You expected to find it?’”<sup>155</sup>

The ability to rewrite the factual record has the potential to reshape the world, to introduce a new perspective that reorganizes the details bearing on innocence and guilt, so that non-experts, tasked with evaluating the plausibility of the revised story, may find themselves compelled to agree with this new explanation.<sup>156</sup> The professional’s ability not only to notice details that are meaningless to others, but also to bring facts into being, provides a fourth reason for the overlap we have been considering.

Finally, while the lawyer and the detective are both professionals, they nevertheless approach their task as if it were a game—a specialized,

---

153. The importance of creating a record was emphasized in numerous practice manuals published in the late nineteenth and early twentieth centuries. See the sources cited in Robert A. Mead, *‘Suggestions of Substantial Value’: A Selected, Annotated Bibliography of American Trial Practice Guides*, 51 U. KAN. L. REV. 543 (2003).

154. As Michael Tigar observes, “Facts are mutable because we never see them in litigation. We see instead their remnants, traces, evidences, fossils—their shadows on the courthouse wall.” TIGAR, *supra* note 7, at 161 (quoting Michael E. Tigar, *Habeas Corpus and the Penalty of Death*, 90 COLUM. L. REV. 255, 256 (1990) (reviewing JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (1988))).

155. *Silver Blaze*, in 1 DOYLE, *supra* note 136, at 404. Similarly, in *The Red-Headed League*, after Holmes and Watson have visited their client’s assistant, Watson asks his friend, “What did you see?” and is told, “What I expected to see.” *The Red-Headed League*, in 1 DOYLE, *supra* note 136, at 60.

156. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1993).

serious, and demanding game with potentially devastating consequences, but still a game.<sup>157</sup> Entailed in the commitment to “artificial reason,” with its implication of rigorous thinking within a narrow compass, is the ability to bracket certain considerations, emotions, and attitudes that drive the thinking of laypersons.<sup>158</sup> The idea that one might find enjoyment in that exercise of discipline is evident in Austin Freeman’s observation that for lawyers reading detective fiction, “[t]he pleasure is yielded by the argument itself and tends to be proportionate to the intricacy of the proof. . . . [T]he satisfaction yielded by an argument is dependent upon a strict conformity with logical methods.”<sup>159</sup> Freeman’s view coincides with that of James C. Carter in his endorsement of the case method in a speech at Harvard in 1886: “This method of studying law, by going to the sources, is no royal road, no primrose path. . . . [But] I know . . . of no greater intellectual gratification that those which follow from the solution in this way of the problems of the law.”<sup>160</sup>

Of course, legal advocacy depends on a combination of emotion and logic, but the predominance of logic in the mixture helps to explain why lawyers are sometimes regarded with horror.<sup>161</sup> The detective as cold-blooded logic machine is also a common feature in mystery stories—a feature that was quickly isolated as one of the sleuth’s most characteristic traits, as Jacques Futrelle, for example, emphasized when in 1907 he invented a detective named Professor Augustus S.F.X. Van Dusen, also known as “the Thinking Machine.”<sup>162</sup> One of the most striking developments in the detective fiction of the 1890s and early 1900s was the speed with which writers began to create detectives who never

---

157. On litigation as a game, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 104 (“The game analogy rationalizes the contradictions between substance and procedure. The game is a social phenomenon in which the satisfactory quality of the outcome depends almost entirely on the proper implementation of procedures. People usually feel that when the rules are followed the outcome of a game is just, precisely because the rules have been followed.”) As this passage shows, Simon considers litigation as a game of chance, not a game of skill.

158. While the observation is a familiar one, a particularly thoughtful discussion may be found in ALAN HYDE, *BODIES OF LAW* 19 (1997).

159. Freeman, *The Art of the Detective Story*, *supra* note 69.

160. Quoted in Keener, *The Methods of Legal Education*, *supra* note 55, at 147.

161. For a useful discussion of characterizations of lawyers during the period of professionalization in the later nineteenth century, see Anne McGillivray, *He Would Have Made a Wonderful Solicitor: Law, Modernity, and Professionalism in Bram Stoker’s Dracula*, in *LAWYERS AND VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS* 225 (W. Wesley Pue & David Sugarman eds., 2003).

162. JACQUES FUTRELLE, *THE THINKING MACHINE* (1907). Doyle reflects the same view in *The Sign of Four*, when Watson calls Holmes “an automaton—a calculating machine,” and adds, “There is something positively inhuman in [him].” 3 DOYLE, *supra* note 136, at 235.

ventured out to hunt for physical clues at all, but simply waited patiently for the client to recite the details and then announced the solution.<sup>163</sup> The shift from the action-oriented detective fiction of the mid-nineteenth century could hardly be more pronounced: now that the genre has moved indoors and turned to its attention to logic, the measure of the detective's talent seems to turn on his distance from the physical details whose only use is to confirm his theories.

Perhaps it was that impulse, too, which prompted Melville Davisson Post to make Randolph Mason a composite of the professional detective and the professional lawyer. To complete the image, Post endows Mason with an encyclopedic knowledge of the common law and statutory law of every state in the United States, so that when confronted with any question, he can suggest a solution without needing to consult the law books.<sup>164</sup> In Post's first collection, Mason offers these solutions to help wrongdoers benefit from legal loopholes. There could perhaps be no better illustration of the ideology of zealous advocacy, but when Post chose to exalt the lawyer's professionalism in this manner, he was widely criticized both for teaching criminals how to evade the law and, more fundamentally, for portraying a lawyer so addicted to intellectual stimulants that he was willing to indulge that habit even if it meant acting against the public good.<sup>165</sup> Post's experiment thus recalls the English debate over the Newgate Novel in the 1830s and '40s—a debate in which novels offering sympathetic portrayals of thieves and murderers were attacked for making vice attractive.<sup>166</sup> That debate ended with the defeat of the Newgate Novel, and in his later collections Post similarly abandoned his plan of using Mason's talents to aid the vicious, instead portraying Mason's clients as hapless victims.<sup>167</sup> But despite this revision

---

163. In addition to Futrelle, *supra* note 162, see, for example, M.P. SHIEL, *PRINCE ZALESKI* (London, John Lane 1895); and BARONESS ORCZY, *THE OLD MAN IN THE CORNER* (1909).

164. See, e.g., POST, *supra* note 18, at 79-81; 137-38.

165. See NORTON, *supra* note 15, at 72, 75.

166. GROSSMAN, *supra* note 151, at 138-43, 157-58; KEITH HOLLINGSWORTH, *THE NEWGATE NOVEL, 1830-1847* (1963). David Seipp, *Holmes's Path*, 77 *B.U.L. REV.* 515, 542-45 (1997), suggests that Mason may have provided a literary source for Oliver Wendell Holmes's view of law as a means of planning against the subterfuges of the "bad man." Insofar as the stories incite the reader to predict the legally acceptable ruse that will rationalize Mason's advice, they also enlist the reader on the lawyer's side, inviting imaginative identification with the "bad man's" mindset—precisely the response that had prompted widespread opposition to the Newgate Novels, which aligned the reader's perspective with that of the novels' criminal protagonists.

167. When Post began a new series of Randolph Mason stories, in *Pearson's Magazine* in 1907, the editors explained that the lawyer would now be "the champion of right instead of the tutor of criminals," a role that would assuredly be "more universally satisfactory to our readers." Nevins, *supra* note 18, at 189 (quoting 17 *PEARSON'S MAG.* 120 (1907)).

in the moral aim of Mason's efforts, there still remains a sense that the lawyer's interest lies in circumnavigating the doctrinal requirements, that law is a game conducted outside of the moral and emotional demands of everyday life.

While these five features help to explain why legal analysis and detection have so much territory in common in the late nineteenth and early twentieth centuries, it is evident that other forms of investigation may include those features as well—particularly in the medical area, where case histories were also on the rise.<sup>168</sup> Recent scholarship in medicine, as in law, has witnessed a “narrative turn,” in part because of the role of the case history.<sup>169</sup> Yet there are important differences that explain why case study might have particular significance in legal education and research. Arguably, medicine does not share the same game-playing mentality, and perhaps the doctor's expertise is more likely to manifest itself in observing facts that are invisible to untrained eyes, rather than seeking to create new facts. But insofar as these two distinctions have any force at all, it is because they follow from a more fundamental distinction: the doctor's position is not an inherently adversarial one. While cases of medical mysteries may occasionally involve a conflict between two physicians, more typically the conflict is cast as pitting the physician against the disease. What is distinctive about the developments we have been considering is that they all arise in the context of an adversarial struggle between two actors over interpretation or representation. In those instances, the narrative form that tracks the resolution of the dispute, and of the principles that resolve it, functions as a particularly effective vehicle for revisiting and reinterpreting the dispute.

---

168. See, e.g., IAN A. BURNEY, *BODIES OF EVIDENCE: MEDICINE AND THE POLITICS OF THE ENGLISH INQUEST, 1830-1926* (2000); CYNTHIA J. DAVIS, *BODILY AND NARRATIVE FORMS: THE INFLUENCE OF MEDICINE ON AMERICAN LITERATURE, 1845-1915* (2000); Walter B. Cannon, *The Case Method of Teaching Systematic Medicine*, 142 *BOSTON MED. & SURGICAL J.* 31 (1900). For other examples, see BARBARA CZARNIAWSKA, *WRITING MANAGEMENT: ORGANIZATION THEORY AS A LITERARY GENRE* 79 (1999) (“Management She Wrote: Organization Studies and Detective Stories”); William Breit & Kenneth G. Elzinga, *Economics as Detective Fiction*, 33 *J. ECON. EDUC.* 367 (2002).

169. See, e.g., *NARRATIVE RESEARCH IN HEALTH AND ILLNESS* (Brian Hurwitz et al. eds., 2004); *STORIES MATTER: THE ROLE OF NARRATIVE IN MEDICAL ETHICS* (Rita Charon & Martha Montello eds., 2002); Marie-Laure Ryan, *Toward a Definition of Narrative*, in *THE CAMBRIDGE COMPANION TO NARRATIVE* 22 (David Herman ed., 2007).

## CONCLUSION

Given the contrast between the habits cultivated by the case method and those cultivated through the lecture and memorization approach, it would be surprising if case-method pedagogy had no effect on legal analysis except to make students more adept at an earlier stage of their professional development. Numerous studies by linguists, cognitive scientists, and educational psychologists have shown that the tools with which we engage problems are essential to our perceptions of those problems and their possible solutions.<sup>170</sup> Thomas Grey has argued that while no one today shares the legal-scientific ideology that guided Langdell's thought, his "classical ordering . . . half-survive[s] in the backs of lawyers' minds and the front of the law school curriculum, where it can shape our thinking through its unspoken judgments."<sup>171</sup> Just as "categorical schemes have a power that is greatest when it is least noticed,"<sup>172</sup> the same may be said about the aesthetic forms that those schemes enact and the aesthetic values they promote. The puzzle-positing, evidence-amassing mentality of Langdell's pedagogy continues to influence our views about what legal analysis should achieve and how it should be conducted to produce that outcome. This section offers two ways of exploring that suggestion, drawing on the example of a casebook's adaptations of a particular judgment, and then considering a jurisprudential tendency that emerged around the end of the nineteenth century.

Unless presented as a part of a much larger-scale study than I undertake here, an example drawn from a casebook can claim only to be indicative, and not typical. Thus the following discussion of *MacPherson v. Buick Motor Co.*<sup>173</sup> is meant to illustrate what I hope will be recognizable as a familiar practice, even if it does not represent the only means of editing cases. *MacPherson* is widely read in Torts classes as a contribution to the developing law of negligence in the early twentieth century. In holding Buick liable for harm resulting from a defective wheel that Buick had not manufactured, used in a car that the plaintiff had purchased from a dealer, and not directly from Buick, then-Judge Cardozo eliminated the requirement that parties must be in privity if a vendor is to owe a duty of care to a purchaser. Cardozo attended Columbia Law School in the early

---

170. E.g., GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (2003).

171. Grey, *supra* note 39, at 50.

172. *Id.* at 49-50.

173. 111 N.E. 1050 (1916).

1890s, just as the case method was being introduced there. According to his biographer, Cardozo later “indicated that he had come to appreciate the educational value of the new method of instruction,” which he praised for eliminating the practice of “learn[ing] by rote out of a text book” and instead focusing on “the cases themselves” so that students might “analyz[e] the facts [and] dissec[t] the reasoning.”<sup>174</sup>

Cardozo’s opinion in *MacPherson* is short; the text (stripped of the headnotes) comprises sixteen paragraphs, occupying five pages in the *Northeastern Reporter*.<sup>175</sup> The first paragraph sets out the facts and ends by posing the question “whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser.”<sup>176</sup> The next one traces “[t]he foundations of this branch of the law,” noting that an early case allowed an end-purchaser to recover from a manufacture whose negligence “put human life in imminent danger,” because in that case, as Cardozo explains it, “the danger [was] to be foreseen, [and so] there [was] a duty to avoid the injury.”<sup>177</sup> Continuing the historical survey, Cardozo considers cases in which the plaintiff did not recover, and he distinguishes them on the ground that “the risk of injury was too remote.”<sup>178</sup> In the next step, he notes that the “early cases suggest a narrow construction of the rule” and that more recent ones “evinced a more liberal spirit” that has been more concerned with likely uses of the product than with privity.<sup>179</sup> Four more paragraphs review the recent jurisprudence, noting that in *Heaven v. Pender*, the “right to enforce . . . liability [was] not . . . confined to the immediate buyer.”<sup>180</sup> By slow and steady steps, Cardozo works forwards chronologically, explaining the facts of the cases and their reasoning in a way that points to a concern with the foreseeability of harm from products that are inherently dangerous, but without yet setting out that principle as the holding. Ideas about privity, inherently dangerous objects, and remoteness of harm emerge in a way that most professional lawyers would probably find entirely predictable, but the notable feature for present purposes is that these ideas slowly come into visibility through discussion of particular examples; Cardozo does not specify the relations

---

174. ANDREW L. KAUFMAN, *CARDOZO* 49 (1998) (quoting Cardozo, *Modern Trends in Law*).

175. 111 N.E. 1051-1055. There is also a dissent, by Chief Justice Bartlett, which I do not discuss here, and which is not usually included in casebooks.

176. *Id.* at 1051.

177. *Id.*

178. *Id.* at 1052.

179. *Id.*

180. *Id.*

among the concepts in advance so as to render the discussion merely illustrative. For those learning how to read judgments, Cardozo's opinion may help to cultivate the skill of using the details to anticipate the holding.

The holding appears in the middle of the opinion, in paragraphs eight through ten.<sup>181</sup> Cardozo begins the last of those paragraphs by observing that “[f]rom this survey of the decisions, . . . there thus emerges a definition of the duty of manufacture which enables us to measure this defendant's liability,”<sup>182</sup> and he proceeds to apply the holding to the facts at hand. In the remainder of the opinion—six more paragraphs—Cardozo acknowledges conflicting judgments from other jurisdictions,<sup>183</sup> notes the “unsettled” state of the law in England,<sup>184</sup> rejects ostensible anomalies,<sup>185</sup> and dismisses some possible arguments that the defendant might raise.<sup>186</sup> In its overall movement, then, the judgment begins with the suspense-oriented structure described earlier,<sup>187</sup> but does not end there. Cardozo starts with the facts, moves from the earlier cases to the most recent ones before setting out the holding, and then considers the state of affairs in other jurisdictions and fends off possible objections. Rather than serving as the endpoint, the holding appears halfway through, to be followed by meditations on related legal issues.

Compare the form of this judgment in a recent Foundation Press casebook, *Products Liability and Safety*.<sup>188</sup> The casebook reprints the entirety of the first paragraph and radically condenses the next six, retaining the language that distinguishes the “narrow construction” from the “more liberal spirit,” along with a few of the earlier cases and their facts, but wielding an editorial pen that streamlines the movement towards the holding.<sup>189</sup> The student need not comb the first half of the judgment for the relevant facts and the principles as distilled by Cardozo, because they have been pried out of their larger setting. One might say the clues have been isolated and placed in plain sight, rather being left to be discovered. They are still clues, in the sense that their meaning remains to

---

181. *Id.* at 1053.

182. *Id.*

183. *Id.* at 1053-54.

184. *Id.* at 1054.

185. *Id.* at 1054-55.

186. *Id.* at 1055.

187. *See supra* page 342.

188. DAVID G. OWEN, JOHN E. MONTGOMERY & MARY J. DAVIS, *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* (4th ed. 2004).

189. *Id.* at 50-51.

be discerned in a judgment that has not yet stated its operative principle, but the burden of determining which material is important has been assumed in advance by the editors. The narrative trajectory is similar to the one in the original judgment, with the difference that Cardozo's slow, methodical tempo has been sped up, and potentially distracting details (the possible red herrings noted earlier) have been cleared away. The editorial changes in the latter part of the judgment are even more notable. The material that follows the holding is reduced to three very short paragraphs, each heavily condensed and making up less than half a page in total.<sup>190</sup> The edited version retains almost nothing after the holding, which provides the end of the narrative arc in this version. My point is not to criticize the casebook for distorting Cardozo's language or pursuing some dubious agenda against unwitting law students, but simply to note that it does what casebooks often do. It would be seen as heretical if a literature textbook undertook this kind of editorial condensation, whereas a legal casebook is more likely to provoke criticism if it fails to streamline the text. In this instance, while the demand to locate the material details has been lessened, there is a much stronger sense of movement towards a principle that terminates the analysis. Repeated encounters with this form are likely to encourage a view of cases as narrative units with plots oriented around a doctrinal problem.

The case method encourages students to approach decisions as puzzles to be dismantled, probed, and solved. The strategies acquired through this method become habits and reflexes that the student brings to bear on new problems. Later nineteenth-century American legal thought offers some examples of a style of analysis that allows for the excavation of hidden principles, and this style came dramatically to the forefront in the twentieth century. In *Boyd v. United States*,<sup>191</sup> the Court held for the first time that the Fourth Amendment, previously taken at face value to protect citizens' "security," should instead be understood to protect privacy, a right now discernible as providing "the very essence of constitutional liberty and security" beneath the text's express language.<sup>192</sup> The Court's jurisprudence had long held that one might look to the structure of federalism to resolve constitutional questions, but this approach merely required an inquiry into the relations between federal and state law as necessary preconditions for the system in which the Constitution operates.

---

190. *Id.* at 52-53.

191. 116 U.S. 616 (1886).

192. *Id.* at 630.



It is another matter to assert that a particular constitutional provision has an “essence” that is discernible neither on the surface nor by resort to some logically prior legal or political structure, but which instead reflects a meaning that must be discovered by reaching beneath the text’s surface. This interpretive mode, rarely on display before the late nineteenth century, would soon become more prevalent. Around the turn of the century, *Allgeyer v. Louisiana*<sup>193</sup> and *Lochner v. New York*<sup>194</sup> reveal a Supreme Court capable of discovering a substantive right to freedom of contract buried in the procedural provisions of the Fourteenth Amendment, and while *Lochner*’s conclusions eventually would be repudiated, the judgment exemplifies an interpretive approach that would only gain more traction. The same mode of analysis is rendered even more explicit in *Griswold v. Connecticut*,<sup>195</sup> with its talk of “penumbras” and “emanations,” bespeaking a search for the underlying springs that give rise to the Constitution’s express guarantees.

The power of this analytical approach may help to explain why the case method continues to be so successful, more than a hundred years after its introduction, and after many years of criticism. For Langdell, the method’s power lay in its ability to unearth basic common-law principles that courts often glimpsed imperfectly, or even missed completely. In an age of legal positivism, the idea that essential principles are simply awaiting discovery no longer seems plausible, but ongoing research in linguistics, cognitive science, and psychology continues to show that we act on the basis on motives that we can barely articulate. In a legal system that places great emphasis on transparency, it is hardly surprising that lawyers would also be compelled by the idea that legal doctrines reflect unwitting assumptions that can be evaluated only if they are spelled out explicitly. The search for underlying concepts and justifications, even if originally motivated by a legal ideology that now finds little support, has been adapted to modern views of the law and will probably continue to serve as one of the basic strategies of legal pedagogy.

---

193. 165 U.S. 578 (1897).

194. 198 U.S. 45 (1905).

195. 381 U.S. 479 (1965).