

# Law, Therapy, Culture

**Peter Brooks\***

Is a cultural study of the law possible? Of course it is: Law is part of culture, and its discourse and social rituals can be studied in the manner of any other social practice. Cultural studies need to include the law, since law is a prime site in the creation of social enactments and rituals. As Guyora Binder and Robert Weisberg recently have claimed, “law is both the means by which we continuously refashion society and one of the media in which we represent and critique what we have fashioned.”<sup>1</sup> But questions remain: What will be the status of this cultural study of the law? Will there be any reciprocal relation of cultural study to legal study? If Paul Kahn worries that cultural critique of the law tends to be recuperated to a reformist project within the law, I think there is equal cause to fear that study of the law as cultural discourse and project will stand outside the law—and outside legal education and training—as something, no doubt full of interest for itself, that nonetheless impinges very little on the law.<sup>2</sup> Thus far, there is little indication that the movement generally known as “law and literature” has made any difference to the practice of the law. While it may provide law students with some interesting truffles in their education, it remains marginal, an exotic specialty of the academy rather than anything the litigator or the opinion-writer has to think about.

There are good reasons for this. The law is resolutely hermetic, by which I do not mean simply that its procedures and its language are arcane and effectively policed against intrusions from the vulgar and the language of daily life—though they are that. I mean that it is premised on the understanding that it can get on with its task only by a gesture of exclusion, which is at once a gesture of formalization: As Ferdinand de Saussure constituted modern linguistics by excluding anything other than the internal relations of the system, language, so the law as system

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1. Guyora Binder & Robert Weisberg, Symposium, *The Critical Use of History: Cultural Criticism of the Law*, 49 STAN. L. REV. 1149, 1219 (1997).

2. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

excludes—must exclude—that which does not meet its internal criteria of the legal.<sup>3</sup> Furthermore, the gesture of exclusion is matched by one of domestication: What it takes from other discourses it tames and subdues, so that concepts, motives, words from the world outside become legal terms of art, obediently defined by their internal reference within the legal arena.

There would be many illustrations one could give of this simultaneous movement of exclusion and domestication. I have for some time been working on confessions, on the law's insistence on a standard of "voluntariness" for confessions, on the test that a confession be the product of a "free and rational will." In fact, study of the situations in which confessional speech is produced from criminal suspects suggests that the actors in question are often far from "free and rational" beings who "voluntarily" assume their confessional discourses.<sup>4</sup> Criminal suspects, warned of their rights and invited to make "knowing waivers" of them, appear in legal opinions as Enlightenment figures, with Dostoevsky nowhere in sight. The fictions of the actors in criminal procedure promoted by the law are remarkable. I shall return to this question, but first I want to consider another domain in which the law has at times displayed a remarkable hubris in excluding and domesticating a large, complex, and troubling body of human knowledge absolutely central to the decisions it must render. My treatment of a contentious and vexing issue here will have to be all too summary and unnuanced.

What I have in mind is the encounter of the law with psychotherapy in the so-called "recovered memory" cases. The question generally at issue in those cases is whether memories from deep in the past, usually from childhood, which have not come forward to speak their claim to redress for years or decades—and in fact often claim to have been blocked, repressed, foreclosed from memory during that time—can be allowed into adjudication, which often requires tolling the statute of limitations when the case involves a civil suit. How does the law deal with psychotherapeutic truth, which even in its pop versions implies a vast and murky lore of psychoanalysis, from Freud onward, and a number of narratives about how the past may be retrieved in the present? Psychoanalysis clearly challenges the law's basic construction of human

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3. My argument here has affinities with that advanced by Stanley Fish. See STANLEY FISH, *The Law Wishes To Have a Formal Existence*, in THERE'S NO SUCH THING AS FREE SPEECH 141, 156 (1994) (noting that "the law is continually creating and recreating itself out of the very materials and forces it is obliged, by its very desire to be law, to push away"). But see Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1061 (arguing that "[l]aw-and-literature scholarship has not questioned what the category 'law' consists of and has thus tended inadvertently to reinforce the notion of law as autonomous"). Baron's provocative challenge needs to be taken up in an argument about the practice of the law as social instrument.

4. For further discussion of these issues, see PETER BROOKS, *TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE* (2000).

subjects as autonomous moral agents; if admitted within the law, it would subvert adjudication.<sup>5</sup> But in the recovered memory cases, the law is compelled to adjudicate (or to face its incapacity to adjudicate) in the messy arena of claims to psychological truth. What concerns me here is not the reality of “recovered memory” itself as a concept, and not the questions of policy about how to treat claims of past abuse, but rather what we observe in the law’s gestures when faced with concept and claim. These gestures, I believe, include at once an overt, announced exclusion and a more surreptitious inclusion in a domesticated form.

Take as a first example the opinion of the court in *Franklin v. Duncan*,<sup>6</sup> where the U.S. District Court for the Northern District of California overturned the conviction of George Franklin on a habeas appeal. Franklin had been found guilty by the trial court of murdering eight-year-old Susan Nason on the accusation of his daughter (and Susan Nason’s schoolmate), Eileen Franklin-Lipsker, brought twenty years later.<sup>7</sup> The court asserts that “reliance by the jury on ‘recovered memory’ testimony does not, in and of itself, violate the Constitution.”<sup>8</sup> In the court’s logic, “By definition, trials are based on memories of the past.”<sup>9</sup> The issue is the credibility of memories, which the jury must decide. “This case, then, may be described as a ‘recovered memory’ case, but in reality it is a ‘memory’ case like all the others.”<sup>10</sup> Franklin-Lipsker’s testimony—really the sole matter of the trial, since no other kind of evidence was available—simply needs to be tested “by the time-honored procedures of the adversary system.”<sup>11</sup> The court continues:

Admissibility of the memory is but the first step; it does not establish that the memory is worthy of belief. In this regard, mental health experts will undoubtedly, as they must, continue their debate on whether or not the “recovered memory” phenomenon exists, but they can never establish whether or not the asserted memory is true. That must be a function of the trial process.<sup>12</sup>

This seems common-sensical enough: Let the jury decide, as it always must, on the reality and credibility of the “memories” testified to at trial.

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5. For an extreme form of this subversion, see Freud’s argument that criminals commit crimes in order to satisfy a powerful, pre-existing, unconscious sense of guilt and a need for punishment. Guilt precedes crime, and the desire for punishment motivates the commission of crime. This neatly undoes the usual premises of criminal justice. See 14 SIGMUND FREUD, *Criminals from a Sense of Guilt*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 332 (James Strachey ed., 1957).

6. 884 F. Supp. 1435 (N.D. Cal. 1995).

7. *Id.* at 1438.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

But note that in order to rule in this manner, the court must assign the “mental health experts” debate (on whether the phenomenon to be adjudicated really exists) to a sphere outside the law, while reassuringly admitting into the courtroom a pussycat version of that tigerish phenomenon. Do not be misled by the heated debates of those mental health professionals. It is a memory case like any other. There was in *Franklin* considerable evidence that the memory was not in fact a memory at all in our usual sense of the term. Rather, the evidence suggested that it was a mental image fabricated through the reading of old newspaper reports of the murder and elevated to the status of memory through psychotherapy. (Indeed, George Franklin’s conviction was overturned in part because the trial judge had refused to allow introduction of this “public domain” evidence.) Can a memory be tested in court when it is not a memory? Furthermore, the trial court and the appeals court failed to examine both the process by which this “memory” of the murder returned, in psychotherapy, and the many discussions, from Freud onwards, about the nature of “psychic truth” or “narrative truth,” versus “historical truth” or “material truth.”

There is by now a large literature in cultural studies on memory, trauma, dissociation, and repression, tending to suggest that traumatic experience paradoxically cannot be reclaimed except by way of its loss from memory: It is not subject to narrative reconstruction. In regard to incest—most often the crime alleged in recovered memory cases—it is often hard to know the relations among memory, event, desire, and phantasy, and therefore hard to assign causal and narrative precedence. As Judith Butler states the point: “Is [incest] an event that *precedes* a memory? Is it a memory that retroactively posits an event? Is it a wish that takes the form of a memory?” Butler continues:

Inssofar as incest takes traumatic form, it can be precisely that which is not recoverable as a remembered or narratable event, at which point the claim on historical veracity is not secured through establishing the event-structure of incest. On the contrary, when and where incest is *not* figurable as an event, that is where its very unfigurability testifies to its traumatic character. This would, of course, be “testimony” difficult to prove in a court of law, which labors under standards that determine the empirical status of an event. Trauma, on the contrary, takes its toll on empiricism as well.<sup>13</sup>

Nearly all psychoanalytically-derived “truth” takes a toll on empiricism, which is why it must be radically excluded by the law—which nonetheless then deals in psychoanalytic concepts when they have been sufficiently

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13. Judith Butler, *Quandaries of the Incest Taboo, in WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE* 39, 40-41 (Peter Brooks & Alex Woloch eds., 2000).

domesticated to appear to be empirically debatable propositions.

None of the recovered memory cases that I have looked at delves very deeply into how the memories are recovered in the psychotherapeutic process. *Tyson v. Tyson*,<sup>14</sup> in which the Supreme Court of Washington ruled against tolling the statute of limitations to allow Nancy Tyson to bring charges of childhood sexual abuse against her father—a case whose opinion and dissent are both frequently cited—touches on the question. The dissent lost the battle but won the war, since Washington, and then some thirty other states, legislatively tolled the statute of limitations in such cases. The dissenting opinion argues that a “triggering event” often is necessary “to arouse a plaintiff’s suspicions regarding a defendant’s potential liability.”<sup>15</sup> It then cites as precedent an insurance case, where the insured plaintiff was unaware during the entire statutory period that his insurance policy had been wrongfully cancelled—until his boat sank and he lost his fishing gear, and tried to recover. “Similarly,” the dissent continues, a “triggering event, such as psychotherapy, is often necessary to help bring these survivors to an awareness of their abusers’ potential liability.”<sup>16</sup> To anyone familiar with the return of memory and the status of memory in psychotherapy, the fishing-gear insurance cancellation precedent seems a fairly hopeless domestication of a complex and problematic process, its designation as a “triggering event” the introduction of a naïve empiricism.<sup>17</sup>

Since the law must speak with authority—must make a decision—it claims authority where it is doubtful that any exists. It excludes the indecisive complexities produced by the outside authorities, and simultaneously creates through a kind of legal *bricolage* its own tamed, usable version of those complexities. In *Johnson v. Johnson*,<sup>18</sup> for instance, a federal district court in Illinois standardized a distinction between “Type 1 Plaintiffs” and “Type 2 Plaintiffs”: Type 1 have more or less continuous memories of abuse, though they are not aware of its effects until they become adults, an awareness usually triggered by psychotherapy; Type 2 have a complete loss of memory of abuse until something—often therapy—triggers its return. Type 2 plaintiffs are far more likely to prevail in court than Type 1, because they can make a better case that statutes of limitations should be tolled for them. One can see the logic of this solution. But it is a logic exclusively within the law—within

14. 727 P.2d 226 (Wash. 1986).

15. *Id.* at 236 (Pearson, J., dissenting).

16. *Id.*

17. The literature on repression, resistance, and the retrieval of memory in psychoanalysis is of course immense. For an interesting account, see 23 SIGMUND FREUD, *Constructions in Analysis*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 257 (James Strachey ed. 1964); see also DONALD SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH* (1982).

18. 701 F. Supp. 1363 (N.D. Ill. 1988).

the logic of the statute of limitations and its rationale—which appears to have little to do with the relative claims of the two kinds of memory—and their relative claims to truth—in the world outside the law.

Using a version of Richard Posner's argument against moral philosophy, one could say that psychoanalysis decides nothing, and therefore the law should stick with a rough-and-ready pragmatism that excludes theory.<sup>19</sup> This much, one could say, is merely inevitable if the law is going to get on with its job. One cannot expect judges to cite Judith Butler. More problematic is the somewhat debonair manner in which the law then co-opts what it has excluded in domesticated versions that reinterpret the excluded theories in ways that may make one uneasy. I note, for instance, that in a much-discussed New Hampshire case, *State v. Walters*, the court decided it would admit lay testimony on the claim of recovered memories (recovered, in this case, in dreams, prompted by psychotherapy), while excluding expert testimony "because experts have not offered any data either supporting or refuting any theory of how or whether a 'lost' memory might be recovered."<sup>20</sup> Again, the court's logic is clear enough, but it is a clarity that works by way of exclusion and domestication: Let us have no confusing expert testimony from a field fraught with controversy, but rely only the common sense of lay testimony.

I am aware that in choosing the example of recovered memory litigation I am treading a minefield. I do not want to be construed as claiming either that childhood sexual abuse is not a terrible reality, or that there should be no recourse for it at law—though one at times feels with these cases that the only solution would be Montaigne's proposal in the case of the alleged impostor, Martin Guerre: Send the litigants away, with orders to reappear before the court one hundred years later.<sup>21</sup> Rather, this example may indicate that law tends to resolve the natural doubt and distress in the face of so explosive and uncertain a concept as "recovered memory" by pulling up the drawbridge and retreating into an Axel's castle of self-referential certainty. This tendency may be particularly marked when the law has to deal with complex issues of human agency, motivation, and behavior in actors brought within the sphere of criminal procedure, since the need to assign guilt and punishment makes short shrift of all that we know—from the great novelists as well as from psychoanalysis—about these murky depths. If the law has been able to absorb certain principles of economics, for instance, its reaction to more problematic and unsettling forms of

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19. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

20. DANIEL P. BROWN ET AL., *MEMORY, TRAUMA TREATMENT, AND THE LAW* 605 (1998) (quoting *State v. Walters*, Nos. 93-S-2111-2112 (Superior Court, Hillsborough, S.D.N.H., 1995) (rev'd 698 A.2d 1244 (N.H. 1997))).

21. See MICHEL DE MONTAIGNE, *Des Boyteux*, in *ESSAIS*, bk. 3, essay 11, at 1156 (Albert Thibaudet ed., 1961).

cultural knowledge is instinctively protective, self-defensive.

Let me now return to the issue of confessions in the law. I want to suggest how a psychologically subtle situation is handled by a “common-sense” analysis that obscures more than it clarifies, in opinions that seem to beg for literary and cultural analysis while their rhetoric seems blinded to this possibility. *Oregon v. Elstad*<sup>22</sup> is one of those cases in which the Supreme Court retrenched the protections afforded by *Miranda v. Arizona*<sup>23</sup> and admitted as “voluntary” certain confessions that had not been preceded by proper “warnings.” Police arrived at the home where eighteen-year-old Michael Elstad, suspected in the burglary of a neighbor’s house, lived with his parents. While Officer McAllister took Mrs. Elstad into the kitchen, where he explained that he had a warrant for her son’s arrest, Officer Burke began to question Michael Elstad, who admitted that he was at the burglary scene. Transported to the Sheriff’s headquarters an hour later, Elstad was given his Miranda warnings and made a full statement of his involvement in the burglary. At trial, Elstad’s attorney moved to suppress both his initial admission and his signed confession, on the grounds that the original, unwarned admission “let the cat out of the bag” and tainted the subsequent confession as “fruit of the poisonous tree.” The judge excluded Elstad’s earlier unwarned statement, but allowed the subsequent confession since any “taint” had been dissipated prior to the written confession.<sup>24</sup> Elstad was convicted. The Oregon Court of Appeals reversed the decision, arguing that the initial unwarned statement had “coercive impact” because “in a defendant’s mind it has sealed his fate” and that the “cat was sufficiently out of the bag to exert a coercive impact on [respondent’s] later admissions.”<sup>25</sup> The Supreme Court then reversed the appellate court’s decision and reinstated Elstad’s conviction in a 6-3 decision, with a majority opinion written by Justice O’Connor, and dissents by Justice Brennan (joined by Justice Marshall) and Justice Stevens.<sup>26</sup>

“The arguments advanced in favor of suppression of respondent’s written confession,” writes O’Connor, “rely heavily on metaphor.”<sup>27</sup> The “tainted fruit of the poisonous tree” metaphor comes from a Fourth Amendment case, *Wong Sun v. United States*,<sup>28</sup> and has had a long life in debates about whether illegally seized evidence can ever be used at trial, or must be excluded because the method by which it was obtained

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22. 470 U.S. 298 (1985).

23. 384 U.S. 436 (1966).

24. 470 U.S. at 302.

25. *State v. Elstad*, 658 P.2d 552, 555 (Or. App. 1983), *quoted in* 470 U.S. at 303.

26. 470 U.S. at 298.

27. *Id.* at 303.

28. 371 U.S. 471 (1963).

permanently taints it as evidence.<sup>29</sup> O'Connor argues that when there is a sufficient break between an illegally obtained confession and a legally obtained one, the second confession is judged "sufficiently an act of free will to purge the primary taint."<sup>30</sup> Her response to the "taint" metaphor is to find language in which the taint is judged to be purged by an act of free will (which may simply compound the metaphorical problem).

The "cat is out of the bag" metaphor comes from *United States v. Bayer*—a case from long before *Miranda*—where Justice Jackson stated,

[After] an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first.<sup>31</sup>

In *Elstad*, O'Connor finds that the Oregon Court of Appeals has "identified a subtle form of lingering compulsion" (like a poison lingering in one's bloodstream?) in the "psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate"<sup>32</sup> (the open bag now equals the sealed fate). In her view, "endowing the psychological effects of voluntary unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions."<sup>33</sup> She continues: "This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver."<sup>34</sup> O'Connor assumes that *Elstad*'s original unwarned admission was voluntary—though *Miranda* doctrine would presume it was not—and then suggests that the link between the earlier and the later confession is merely a matter of psychology, a guilty secret that will out. As such, it is a matter the Court refuses to address. O'Connor goes on: "[T]he causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak."<sup>35</sup> Having so disposed of the darker reaches of psychological motivation, she implicitly

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29. Although O'Connor cites to *Wong Sun*, the "taint" and "fruit of the poisonous tree" language appears to originate in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

30. 371 U.S. at 487-88.

31. *United States v. Bayer*, 331 U.S. 532, 540 (1947).

32. 470 U.S. at 311.

33. *Id.*

34. *Id.* at 312.

35. *Id.* at 314.

reestablishes the law's traditional language of the will: "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings."<sup>36</sup> In other words, the suspect's volition is still intact, his will is not overborne—he still can choose to put that cat back in the bag. If he does speak to the police, this must indicate that he has freely chosen to waive his rights to counsel and to silence, and therefore his confession is free and knowing.

"Taken out of context, each of these metaphors can be misleading,"<sup>37</sup> O'Connor writes of the "tainted fruit" and "cat out of the bag." Yet the metaphors of *Elstad*, as my quotations should suggest, keep proliferating. Replying in a footnote to Brennan's fierce dissent in the case, O'Connor rebuts the relevance of the many cases he cites against her conclusion:

Finally, many of the decisions Justice Brennan claims require that the "taint" be "dissipated" simply recite the stock "cat" and "tree" metaphors but go on to find the second confession voluntary without identifying any break in the stream of events beyond the simple administration of a careful and thorough warning.<sup>38</sup>

Unpacking the metaphors of this sentence would be an ungrateful enterprise: They range from dissipating taints through stock cats and trees (where "stock" is perhaps a metaphor of metaphor, or a metaphor reduced to cliché), to streams broken by the administration of warnings. The metaphors of *Elstad* proliferate no doubt precisely because it *is* difficult to tell exactly what motivates a suspect to speak. And the Court's admixture of legal doctrine and "common-sense" psychology applied to motivation seems to produce an imagistic texture of dubious clarity.

Brennan in dissent accuses the Court of "marble-palace psychoanalysis," which "demonstrates a startling unawareness of the realities of police interrogation."<sup>39</sup> Turning to the question of motivation, he cites Justice Cardozo: "The springs of conduct are subtle and varied . . . . One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others."<sup>40</sup> This sounds to me like a clock spring (or the spring of some wind-up object, such as an automaton), but a moment later Brennan cites a standard interrogation manual on the importance of securing the initial admission from a suspect:

For some psychological reason which does not have to concern us at

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36. *Id.* at 318.

37. *Id.* at 304.

38. *Id.* at 314.

39. *Id.* at 324 (Brennan, J., dissenting).

40. *Id.* at 327 (Brennan, J., dissenting) (quoting *Harrison v. United States*, 392 U.S. 219, 224-25 (1968) (quoting *Di Cicco v. Schweizer*, 221 N.Y. 431, 438 (1917))).

this point “the dam finally breaks as a result of the first leak” with regards to the tough subject. . . . Any structure is only as strong as its weakest component, and total collapse can be anticipated when the weakest part begins to sag.<sup>41</sup>

Here we are in a watery world (were those springs really wellsprings?), which is again evoked in the next paragraph, which quotes another interrogation manual to the effect that the first admission is the “breakthrough” and the “beachhead.”<sup>42</sup> Later, Brennan objects that O’Connor’s approach is “completely at odds with established dissipation analysis,” which sounds vaguely like a chemical procedure. He claims that “today’s opinion marks an evisceration of the established fruit of the poisonous tree doctrine.”<sup>43</sup> The process of evisceration of the doctrine seems, by taint, to take place on established fruit and on the poisonous tree where it hangs in a curiously vivid image.<sup>44</sup>

The metaphorical layering and figurative incoherence of the Court’s language undermine its confident assertions about Elstad’s agency. The importance of the issue joined in this case does not produce a correspondingly authoritative rhetoric. Rather, the question of what prompts a confession elicits a confused, imagistic language in which an everyday psychology traversed by legal dogma yields unconvincing and dubiously analytic pronouncements. It is indeed difficult to tell what motivates anyone to confess, and in the end the Court’s split over Michael Elstad’s confession has little to do with legal interpretation, and much more to do with ideology, primitive psychology, and differing senses of how we want those accused of crime to behave. The metaphors of the case expose the Court’s uncertainties about how we describe the motives and uses of confessional discourse—a discourse that rarely seems to be wholly “voluntary,” but seems instead a product of abjection, dependency, and attempted propitiation.

41. *Id.* at 328 (Brennan, J., dissenting) (quoting A. AUBRY & R. CAPUTO, *CRIMINAL INTERROGATION* 291 (3d ed. 1980)).

42. *Id.* (quoting R. ROYAL & S. SCHUTT, *THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE* 143 (1976)).

43. *Id.* at 346 (Brennan, J., dissenting).

44. Somewhere in the background of the “tainted fruit of the poisonous tree” arguments lurks a Miltonic echo:

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

JOHN MILTON, *PARADISE LOST*, bk. 1, lines 1-3 (Northrop Frye ed., Holt, Rinehart & Winston 1960) (1667). In *Paradise Lost*, the fruit is poisonous in its effects because the tree is forbidden, not because the tree is poisonous. The “exclusionary rule” derived from the Fourth Amendment may claim, by analogy, that the “fruits” of an illegal search are poisonous because the search was forbidden. But the rhetoric of the Court tends to make the tree itself poisonous, thus setting up a slightly skewed—or tainted?—original metaphor from which it then derives its other metaphorical strings.

Solemnly debating the meanings and implications of cats out of the bag and tainted psychological fruit, the Court calls on metaphors found in other Court opinions—which themselves derive from a kind of homespun, aphoristic, popular psychology—and treats them as though they were good currency in the analysis of the suspect’s lived experience, and thus helpful in determining whether or not his rights have been violated. The Court does not ask whether these metaphors are in fact of much use in determining psychological motivation. One might think it would seek help from professional literature on the subject, in search of a more coherent picture of human motivation. But the Court relies instead on “common sense” and its own peculiar vernacular because to do otherwise would be dangerously to breach the enclosure of the law, to let it be infiltrated by an unsettling (and perhaps equally inconclusive) language from another domain. Whatever the doctrinal wisdom of the *Elstad* decision, the Court’s opinions appear to offer a fairly stunning performance in rhetorical self-blinding.

Those who would place legal discourse in dialogue with other cultural discourses need, I think, to be aware of the law’s capacity both to exclude and to admit a tamed and domesticated version of the disputed theory clamoring outside its castle walls. The problem of the “voluntary” confession in general, and the recovered memory cases in particular, may offer an allegory of the problem I tried to define at the outset of these remarks: the imperviousness of the law to its recontextualization within cultural studies. Yes, a cultural study of the law is possible. And it may be useful and illuminating. But given what the law, as a practice and an exercise of the power to adjudicate, is and needs to do, will cultural studies—or *can* it—make any difference to the law? Whether it *should* make a difference is open to debate, but that may be a debate that only takes place in academic conferences.



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