Still Photographs in the Flow of Time


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And I only am escaped alone to tell thee.

Job 1:15, quoted in the Epilogue to *Moby Dick* by Herman Melville

Death really *is* different.¹

Death commands our attention in a way that other human suffering and injury, however deeply it may move us or shock us, does not. If you doubt this, consider that if O.J. Simpson had been accused merely

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† The author would like to thank Brad Perkins.
¹ The epigram “death is different” has been used to describe the view that special considerations, not applicable when other punishments are at stake, apply in death penalty cases. *See*, e.g., *Simmons v. South Carolina*, 114 S. Ct. 2187, 2205 (1994) (Scalia, J., dissenting) (decrying “a whole new chapter in the ‘death-is-different’ jurisprudence which this Court is in the apparently continuous process of composing”); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (plurality opinion) (“Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”).
of beating or harassing his former wife, and not of killing her, his case would have received only a tiny fraction of the attention that it has attracted. This, tragically, is not conjecture: Simpson did beat and harass Nicole Brown Simpson, but, until she and Ronald Goldman were murdered, that fact barely made a dent on the public consciousness. Though there may be an element of truth in the trial lawyer’s quip that a murder case is essentially an assault case with one fewer witness, it is a distortion, for the magnitude of murder overwhelms the similarities.

The reason death is so compelling seems easy enough to understand. Death is universal, inevitable, and final. It reaches us all; we might manage to postpone our encounter with it, but not for very long, and when the encounter occurs, it means, by definition, the

3. Cf. JOHN O’HARA, APPOINTMENT IN SAMARRA, facing title page (1934) (quoting W. SOMERSET MAUGHAM, SHEPPI (1933), recounting legend of a man’s futile attempt, after chance encounter in Baghdad with Death, to flee to Samarra—where in fact they had their appointment).
very end of life. When death is sudden and violent, this last factor is especially salient because the borderline between life and death comes very sharply into view. Until the moment of stillness, there is life, sometimes vigorous life. The passage transfixes us.

Rarely is an image of the actual moment of death captured and preserved. When it is, as in the famous photographs of President John F. Kennedy's assassination or of the summary execution of a Viet Cong officer by a South Vietnamese police chief, it is haunting. Even photographs of the moment before sudden death have great power—whether death is totally unexpected (as in a photograph of Luis Donaldo Colosio campaigning for the presidency of Mexico just before his assassination), planned (as in a photograph of a man bound in an electric chair awaiting execution), or in doubt and anticipated with dread (as in the photograph of a South African white supremacist pleading for his life shortly before being shot to death by a black police officer in Mmbatho, South Africa). To some extent the photograph itself might tell us what is about to happen; to some extent we might need extrinsic information to understand the full story. In either case, forward-looking knowledge is the principal source of the photograph's power.

Luc Sante's Evidence stands on the other side of the borderline. It consists largely of photographs, taken by photographers for the New York City Police Department between 1914 and 1918, of people shortly after they suffered violent death. Most of the deaths were homicides, some were suicides, and a few may have been accidents.

Part of the power of these photographs, however much they may appeal to rather base voyeurism, lies in the their static quality—in the scenes themselves, the moments they capture. These photographs display mortal wounds with sometimes garish vividness, often with the bodies in nearly the exact position in which death occurred. In some cases, the magnitude of the assault is highly visible. Not only the scene that the photograph displays, but also the fact that the image has been preserved contributes to its power. As Sante writes,

5. See Tim Golden, The Case of the Murdered Candidate, N.Y. TIMES, Aug. 21, 1994, sec. 6 (Magazine), at 39, 40.
8. In the case of the Colosio shooting, photos taken immediately after the shooting make for a jarring contrast with those taken just moments earlier. See Golden, supra note 5, at 41.
10. For more details about the history of these photographs, see infra pp. 254-55.
11. See, e.g., SANTE, supra note 9, at plates 19, 37.
If photographs are supposed to freeze time, these crystallize what is already frozen, the aftermath of violence, like a voice-print of a scream. If photographs extend life, in memory and imagination, these extend death, not as a permanent condition the way tombstones do, but as a stage, an active moment of inactivity.\textsuperscript{12}

But, though the photographs themselves are static phenomena—images of dead bodies represented on paper—they also derive power from the dynamic process of which their creation was a part. Our focus tends to be backwards-looking in time from the moment the image was recorded, concentrating particularly on the events occurring immediately before the assault: How, by whom, and why was the mortal wound administered, suddenly transforming a person who presumably had the full range of ordinary human capacities, and the prospect of retaining them for years to come, into a corpse? For a full understanding, however, we must broaden the temporal focus of our inquiry to consider events both long before and long after the creation of the image. What course of events led the victim to be where she was, and with her life in the state it was, when she received the wound? How did the photograph come to be taken, and, by the time it was, what changes had already occurred in the scene since the time of death, or the time of the wound? And by what course of events has the photograph been preserved and eventually presented to us?

All these questions form part of a broader question: How is it that we now have these images before us? I will argue in this Essay that in an ordinary trial the fact finder must ask a similar broad question, and a similar set of narrower questions, about the evidence presented to her.\textsuperscript{13} The similarity is not surprising because the task of the fact finder is similar to that of a reader of Sante's book who is interested in the story behind one of the photographs: both are attempting to reconstruct a historical event or condition.\textsuperscript{14}

\textsuperscript{12} Id. at 60; cf. Vollmann, supra note 6, at 13 ("Thése images . . . keep a tiny facet of these people almost alive, almost dead, like a virus . . . .").

\textsuperscript{13} Depending on the case, that fact finder may be a jury or a judge sitting without a jury. I will concentrate on the somewhat richer situation in which there is a jury, which attempts to determine the facts in dispute subject to instructions on the law from the judge.

\textsuperscript{14} The task of a fact finder in adjudication is not exclusively one of historical reconstruction, of course. Sometimes the fact finder must try to predict the future—as when she must attempt to assess what a personal injury plaintiff's pain, lifestyle, and income will be over time in order to determine the size of the damage award. Sometimes she must make a conditional prediction, as when she assesses how much the personal injury plaintiff would have earned but for the injury. And, I believe, American adjudication gives even jurors a normative role, as when they determine whether or not a defendant's conduct should be deemed to have been an exercise of due care.
IC: THE INFINITE RANGE OF POSSIBILITIES

In trying to reconstruct all the significant events leading up to the taking of a photograph, the photograph itself is often helpful but never sufficient. Plate 38, for example, shows a seated, well-dressed man shot to death in what Sante deduces may have been a boarding house or a private drinking club; given the circumstances, Sante speculates plausibly, the victim was a gangster.15 In some cases, "[m]uch can be gleaned about the subject's life from [the] photograph, but little about his death."16 From the size and nature of the victim's apartment, from the manner in which it was kept, from the furniture, cookware, reading material, and wall hangings, and from his style of dress, we might learn, at least at a superficial level, about his economic status and his social aspirations, how he kept himself warm and fed. In other photographs, particularly those in which the victims died away from home, we might learn something about their deaths—gunshot or stabbing wounds can be both obvious and revealing—but relatively little about their lives. In all cases, extrinsic evidence (beginning with the caption of the photograph when there is one) is necessary to fill in the gaps in the story of the victim's death. Indeed, in at least one sad case—three young girls in apparent slumber, gassed by and with their mother shortly after the drowning death of their father—extrinsic evidence is necessary to know that death occurred at all.17 Sante has energetically sought extrinsic evidence to learn these stories. In some cases he has succeeded; in most, he leaves the cases largely unsolved, which, as he points out, they may have been in their own day.18

The principal difficulty in trying to solve these mysteries is a simple lack of information, which leaves open to speculation an infinitely wide and dense realm of story lines that could account for the scenes presented by the photographs. The following passage from Sante's text illustrates the problem: "We cannot know what trails led them to the bedrooms and vacant lots and barroom floors where they met death. . . . Was the man in plate 27 saving money toward a small farm in south Jersey when he stepped into a quarrel between the husband and wife next door?"19

Plate 27 (see page 251) depicts "a strong man, a laborer," slumped against a tenement wall, "shot or stabbed at a point probably between

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15. SANTE, supra note 9, at 77.
16. Id. at 79, referring to plate 47.
17. Id. at 71; see also id. at plate 13.
18. Id. at 83.
19. Id. at 86, 87.
the collarbone and the heart."20 Nothing in the photograph suggests that he was saving money, that he wanted to be a farmer, that he sought to live in New Jersey (either north or south), or that a neighboring couple was quarreling. On the other hand, nothing in the photograph disproves these possibilities.

I focus on this passage because it highlights that any of an infinite number of stories might account for a given event, such as the death of this man, and that to each of these possibilities we must ascribe a probability greater than zero. But the human mind cannot effectively process separately too many different stories—much less an infinite number. Therefore, we must group stories together. Sante could have presented a larger grouping of stories than he did. He could have asked simply, for example, how probable it was that the man was killed as the result of a quarrel between other people. Looking in the other direction, he could have presented an even narrower grouping, for even the hypothesis he poses represents a grouping of an infinite number of possibilities: How much had the victim saved? Just where was the farm? Why the quarrel? Whose side did the victim take, and how? Just when did the killer turn on him?

In the courtroom, too, the fact finder’s state of knowledge21 will be consistent with an infinite range of stories, some radically different from others.22 But the juror is not in quite the same position as the reader of Sante’s book. That the parties have litigated the case and the court has declined to resolve it short of fact-finding often means that the jury’s effective range of speculation need not be as broad, or ultimately as unsatisfactory, as vague musings about the man in plate 27 and how he had come to find himself dead against a tenement wall. Unlike the reader of Sante’s book, a juror cannot simply assign probabilities to various groupings of story lines. Rather, she has to make a decision; that is the essence of her job. Acting in accordance with her understanding of the substantive law, she must determine which story lines support one party and which support the other. Further, she must decide whether the aggregate probability of the stories supporting the plaintiff or prosecutor is great enough to support that party’s burden of persuasion.23

20. Id. at 75.
21. I refer to the fact finder’s state of knowledge because it is more inclusive than the body of evidence before the fact finder; the state of knowledge includes information the fact finder brings from the outside world and also refers to the absence of evidence that has not been presented.
22. I have developed this approach in Richard D. Friedman, Infinite Strands, Infinitesimally Thin: Storytelling, Bayesianism, Hearsay, and Other Evidence, 14 Cardozo L. Rev. 79 (1992).
23. I am speaking in general terms; in some cases, of course, a defendant may bear the burden of persuasion on some issues.
Police Evidence Photos: Municipal Archives, Department of Records and Information Services, City of New York.
In some instances, the parties may present the jury with two or more competing groups of stories, each group consisting of stories within a narrowly limited range and supported by enough evidence to make it at least close to plausible. This is not always the way the jury receives the case, however. A criminal defendant may argue to the jury, in effect,

I don’t have to explain to you how the murder happened, or who did it. You can see that there is a very large number of possibilities consistent with my innocence—that there are millions of people in this city alone who could have committed the murder. I don’t have to support one or even a few of these alternative possibilities with evidence, or even persuade you that any one of these possibilities is plausible. If you believe that in the aggregate these possibilities have a more than minuscule probability, you must find me not guilty.

It might be thought that this argument exposes a fatal problem with a probabilistic approach to fact-finding, or, alternatively, a defect in our concept of the adjudicative system. The argument suggests that, if such an approach is taken, the prosecutor cannot prove guilt beyond a reasonable doubt unless he disproves an infinite range of possibilities. That might appear to be an impossible burden—and yet it must be true, if proof beyond a reasonable doubt is a realistic possibility, that sometimes the prosecutor does satisfy that standard.

In fact, the problem is illusory. The corollary of the proposition that there is an infinite range of possibilities is that the probability of most is infinitesimally small. Evidence supporting one group of possibilities—such as DNA consistency between the accused’s blood and blood found at the scene of the murder—may radically increase the probability of the truth of one group of story lines as compared to all others. (I admit I am thinking of the O.J. Simpson case here, but just about any DNA identification case will do.) The prosecutor need not attempt to disprove each individual story line, or each small group of story lines, one at a time. Particularly powerful evidence might tend to disprove a great number of exculpatory stories all at once. DNA evidence, for example, will tend to disprove most “I was not there” stories.

The juror’s job, of course, is not simply to examine just one piece of evidence but rather an entire body of evidence, and to evaluate it together with the basic knowledge of the world that she brings into the courtroom. The juror must attempt to reconstruct a portion of the stream of time. Each piece of information that she knows, or that she thinks she knows, must be along that stream. But these known points on the stream form a channel that still leaves an infinite range
of possible variations. Some of those variations flow through each of
the points necessary to make out the claim against the accused, while
others do not. Deciding which is the more probable set of variations,
and by how much, is sometimes a daunting task.

III. CREATION AND SELECTION OF EVIDENCE

When we think about a photograph, we are used to the ideas of
light and filter—light creating the information received by the film
and a filter selecting some of that information for passage to the film.
But the creation and selection of information is not limited to the
moment the photograph is taken. The stories accounting for the
images that Sante presents, I will show, are the product of perpetrator
and victim; of caregiver, investigator, and cameraman; of archivist,
workman, and author; and of natural forces, time, and luck. Similarly,
the stories that account for a fact finder’s state of knowledge—includ-
ing what evidence has been created and what has not, and what has
been presented to her and what has not—must result not only from
the events at issue but also from the conduct of the participants
(before and after those events), the lawyers, and the court, among
others.

A photographic image of a murder scene results most obviously
from the conduct of the perpetrator, and also the victim in placing
himself where the perpetrator could strike. But the image does not
necessarily reflect the scene at the time the victim received the
wound, or even at the time he died. The problem is not primarily
the well-known capacity of photography to distort the image of a scene,24
nor even the possible indeterminacy of the concept of “undistorted
image.”25 The more common problem is that, between the time of the
assault and the time of the photograph, the scene itself might have
been altered in a material way—perhaps by the perpetrator, perhaps
by the victim or those who tried to help him, and perhaps (in a police
counterpart to the uncertainty principle of physics26) by those who

24. See, e.g., 1 CHARLES C. SCOTT, PHOTOGRAPHIC EVIDENCE 184-85, 188-89, 310-12 (2d
25. See SANTE, supra note 9, at 80-81, which explains an apparent discrepancy between two
photographs of the same scene—one showing cards near the victim’s foot, the other not—as the
result of “the distortion of space effected by the lens.” But which is the proper lens? If two
angles, or two sets of light, produce different images, which one, if either, should be deemed
undistorted? Cf. 1 SCOTT, supra note 24, at 181 (“Photographs taken from either of [two]
extremes of height will not appear quite natural to a witness familiar with the scene pictured for
he will be used to the way it looks from his eye level. Therefore, the general rule is that in
photographing traffic accident scenes the camera should be at or near average adult eye
level—between five and six feet from the ground.”).
26. According to the uncertainty principle, the measurement of a phenomenon tends to alter
it. See STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME 54-55 (1988); PAUL A. TIPLER,
were attempting to investigate and record the crime.\textsuperscript{27} For example, the victim in plate 49 was apparently moved to a bed while still alive but photographed only after he died:\textsuperscript{28} "His shoes and hat were hastily pulled off and his clothes opened to get at the wound. Curiously, the pants and undergarments were pulled up for the photograph so as to hide the wound . . . ."\textsuperscript{29}

In other cases, less mysteriously, the police or doctors apparently moved clothes after the fact to expose, rather than to cover up. The victim in plate 29 lies on a bar room floor, his jacket, vest, shirt and undershirt pulled wide open, evidently by the police, to reveal a bullet wound in his chest. But who pulled his pockets out, the police or a pickpocket?\textsuperscript{30} And if it was the latter, was the theft part of the original crime or later opportunism?

Sometimes the fact that investigators decided \textit{not} to alter the crime scene between one time and another is particularly significant in accounting for the image that was recorded. Note Sante's comment on the photograph of a man dead on his apartment floor, perhaps of poison: "Once again, the undressing is undoubtedly the work of police or doctors, but if the victim had been white the responsible parties would unquestionably have tucked his penis back into his pants."\textsuperscript{31}

Not only the precise nature of the images, but also the very existence of the photographs, was a product of decision making. Certainly, there was ample reason to photograph a murder scene. The photograph might have helped in the investigation of the crime,\textsuperscript{32} and depending on the circumstances—most notably the degree to which investigators had altered the scene—might even have been admissible into evidence at trial.\textsuperscript{33} But it is not clear that all

\textsuperscript{27} Sante, supra note 9, at 94.
\textsuperscript{28} Id. at 80; see also id. at 68, referring to plate 8 and others.
\textsuperscript{29} Id. at 80.
\textsuperscript{30} See id. at 75.
\textsuperscript{31} Id. at 71, referring to plate 14.
\textsuperscript{32} Id. at 97 ("[The photographs] probably served as markers for reference, tools for training novice homicide detectives, minor props accessory to the work of fingerprint analysis, questioning of suspects, and milking of informers that would dredge up the answers if the answers were there to be dredged.").
\textsuperscript{33} Sante, drawing on the work of Charles C. Scott, for fifty years the "man who wrote the book" on photographic evidence, offers some possible grounds of admissibility:
scenes of sudden death, including those not obviously homicides, were photographed,\textsuperscript{34} nor is it clear what the basis for selection might have been.

Sante's claim that the photographs "represent a cross section of what murder and its locales looked like at the time,"\textsuperscript{35} therefore appears dubious. That no photographs of rich victims are in the archive from which this selection was drawn probably reflects only the fact that the rich were less likely than others to become victims. But neither, as Sante points out, are any photographs of dead babies included, and yet we may infer that, then as now, infanticide was hardly unknown. Perhaps homicide was less likely to be reported to the police when the victim was a baby, and especially unlikely to be reported while the baby was in the place where the fatal assault occurred; perhaps the existence of a crime was not always evident, and the police were less disposed to recognize it. Similarly, it seems probable that homicide victims of the underclass are underrepresented in these photographs; perhaps the police were less likely to treat them as being worth serious investigation. And correspondingly, with respect to those few photographs that do not show dead people, or evidence of homicide, it is sometimes quite unclear why the police felt the need to record the scene. Plate 33, for example, shows a pregnant dog dead on the floor of what appears to be a subway station;\textsuperscript{36} perhaps this was a slow night for the police photographers.\textsuperscript{37}

The taking of the photograph is not the end of the story. How do these images happen to survive to the present day, and with what changes? Sante culled the pictures presented in \textit{Evidence} from a collection of 1400 photographic plates, part of a much larger archive that was kept without any attention in the old New York City police headquarters.\textsuperscript{38} When the City was completing the sale of the building around 1983,

workers removed roomfuls of files from its innards, and those files were dumped into the East River.... The city's archivists

\textsuperscript{34} Sante does say that the police "did not photograph every crime scene." \textit{id.} at 84.
\textsuperscript{35} \textit{id.}
\textsuperscript{36} \textit{See id.} at 76.
\textsuperscript{37} \textit{See id.} at 99 ("Among these photographs are some representations of the void, an undefined lack of mass temporarily situated near a lot or a park or a road.").
\textsuperscript{38} Sante says the photographs were "neglected," \textit{id.} at xi, but it is hard to be critical; these photographs were workaday documents, not cultural treasures.
were informed too late, but . . . they got there in time to find a small room under a staircase that had been overlooked by the workers. It contained filing cabinets that held those 1400 plates.39

Thus, there was initially nothing particularly noteworthy about these particular photographs, or (for this purpose) the years 1914 to 1918. These photographs are extraordinary eight decades later in that they happened to be the ones that survived, because they are the relatively rare ones that were overlooked in the housecleaning. Some had been damaged ruinously,40 some just enough to create distortion,41 and others survived perfectly intact. I am reminded that, though I have heard a fair number of rather diverse stories of survivors of the Nazi Holocaust, I have never heard one that was not extraordinary or did not involve a great deal of luck. The reason, of course, is simple: Those whose stories were not extraordinary, and lucky as well, did not survive to tell them.

There is yet a substantial gap between the survival of 1400 plates and the publication of this book. Sante learned about the archive while researching an earlier book about New York’s underside, Low Life.42 Evidence presents only fifty-five of the photographs. Sante reports that his culling “was entirely aesthetic,” and that “while not, I think, favoring any one kind of tableau, I omitted the pictures I could not stomach, such as those involving advanced decomposition.”43 Some of the pictures that made the final cut suggest that Sante’s stomach is not all that weak; in any event, his aesthetic guidelines are unclear, particularly without some fuller sense of the pictures he omitted.

Thus, the collection of images Sante presents to us emerges from a continuous process of creation and selection of evidence, involving human decisions, natural forces, and luck. As a result, a full understanding of the collection requires us to absorb not only the images themselves, which are the primary evidence, but evidence about that evidence—what might be called meta-evidence.44

39. Id. at xi.
40. Id. at x.
41. See id. at 65, referring to plate 1 and others (“The elliptoid ring that resembles glare and in some of the other pictures might actually be mistaken for a chalk circle is merely the effect of moisture on the emulsion of the glass negative.”).
42. Id. at ix-x.
43. Id. at 85.
44. Christopher Mueller uses the term “meta-evidence” with a somewhat different, more limited meaning. Christopher B. Mueller, Meta-Evidence: Do We Need It?, 25 LOY. L.A. L. REV. 819, 819 (1992). He uses the term to describe evidence that casts light on the probative value of a recurrent type of evidence.
A similar process of creation and selection accounts for the evidence that is presented, and not presented, to a juror. Again, a full understanding of the juror's state of knowledge requires a great deal of meta-evidence. The process of creation and selection begins even before the events that are in dispute in the litigation. The various actors, going about the affairs that eventually end up in dispute, create evidence without necessarily being aware that they are doing so. At other times they may very purposely and self-consciously create evidence, or prevent the creation of evidence, in advance. For example, an air courier that provides envelopes for its customers may be intentionally creating evidence when it establishes a policy that customers must put their documents into the envelopes themselves: If a customer claims that the courier neglected to insert a particular document in an envelope, the company can introduce evidence of its routine business practice. A murderer who takes the precaution of wearing gloves before handling the fatal knife is preventing the creation of fingerprint evidence. And if the murderer fails to wear gloves but does take care to wipe his fingerprints off the knife, he is filtering out evidence. Plainly, information about how fingerprints might have come to be absent from the knife at the time of trial—a form of meta-evidence—will be useful to the fact finder.

As a dispute gels and proceeds to litigation, the parties, and now their attorneys as well, continue to have a great deal of leeway in shaping the evidence presented to the jury; a model of litigation in which all the significant evidence is created by the events themselves, and will inevitably be discovered and presented by the side that it favors, is woefully inadequate because it fails to reflect the creative and selective effects of the litigants' conduct. Indeed, one of the hallmarks of the common law tradition is its heavy reliance on litigants, rather than a neutral inquisitor, to create and select evidence to be presented to the fact finder. Compared to a system that relies principally on a neutral inquisitor, the common law system generally encourages—and perhaps at times overencourages—the creation and

45. See FED. R. EVID. 406. Rule 406 provides:
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. There is an odd aspect of the wording of this Rule. Evidence is relevant to a proposition if it tends to make that proposition more or less probable, see FED. R. EVID. 401; relevance cannot be prescribed by rule. But Rule 406 can be taken to mean that evidence of habit or routine practice shall be admitted if the evidence has sufficient probative value with respect to a material proposition and there is no strong factor weighing against admissibility, and that the general rule against admissibility of propensity evidence, expressed in FED. R. EVID. 404, shall not weigh against evidence of a practice that is deemed to be habitual or routine.
presentation of probative evidence. In some circumstances, however, the same reliance on the adversaries may lead to underproduction of evidence. Consider these basic examples of how the resources available to the litigants, and procedures of the court, may influence what comes into evidence:

1. Economic ability and incentives plainly have a great impact on the quantity and type of evidence a party will present. For example, "repeat players" will tend to invest far more in the creation, discovery, and presentation of evidence in a given litigation than will "one-shot" players; the result may be an imbalance in the evidence presented in court that the underlying facts do not warrant.46

2. Suppose that a given issue is crucial to the litigation and demands expertise to understand, and that among the population of experts on the issue, opinion is lopsided 999 to 1 in one direction. The expert evidence presented to the jury will not reflect this disparity,47 because such evidence has a rapidly decreasing marginal value: the minority side will exert every effort to get at least one expert on the issue, and the majority side will stop well short of 999, even if the court does not impose such limits.

3. The evidence that is presented may be the residue of much effort that was otherwise fruitless. A party may consult many potential witnesses, both lay and expert, before finding one who will testify as she hopes; she will not happily tell the jurors about the failures.

4. In some cases, one party has substantially better access than does the other to an item of evidence. The item may be a document in the possession of one party that has escaped discovery by the other party. Or it may be the testimony of a potential witness who is closely identified with one party and whose testimony the other party could not feasibly secure—perhaps because the witness could invoke a privilege or is beyond the court's jurisdiction. In such a case, valuable evidence may be unavailable to the fact-finding process: If the party with superior access to the evidence knows that the evidence is harmful to her cause, she will have no incentive to present the evidence, and the party with inferior access may lack the ability to do so.


Suppose the population of experts consists of 1,000 persons, 999 of whom hold view A and one who holds view not-A. If fact-finders hear from two experts, professing different views, they will hear a "balanced" presentation and may not know how distorted their picture of the state of knowledge is.

Id.
Along with the parties, their attorneys, and other interested persons, the court plays a critical role in shaping the evidence; indeed, the court acts as arbiter in determining what the jury will consider. In some circumstances, the court exerts an expansionary function, insisting on production of evidence deemed better in some manner than the evidence the parties would have introduced on their own initiative.\(^\text{48}\) More obviously, the court shapes the evidence presented to the jury by acting as a final filter through which the evidence must pass. That filter does not operate symmetrically. Consider first the effect of general rules and practices. Even a randomly operating exclusionary rule (as the doctrines of hearsay and confrontation might sometimes appear to the justifiably perplexed) would tend to favor the accused against the prosecution, because the prosecution, the party bearing the burden of proof, usually has the most to lose from exclusion. Similarly, an attempt to be evenhanded in limiting the presentation of expert evidence may actually exacerbate distortions.\(^\text{49}\) Moreover, many rules are not symmetrical but rather have a substantive orientation. For instance, the rules on character evidence\(^\text{50}\) explicitly give an accused options that other parties do not have, but the rape shield laws\(^\text{51}\) principally are meant to exclude evidence that the accused would offer.

Furthermore, the role of the court is not simply to apply cut-and-dried evidentiary rules. For a variety of reasons, the rules of evidence are, for the most part, remarkably open textured, leaving trial courts with a great range of discretion.\(^\text{52}\) Most notable, perhaps is Federal

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48. See Dale A. Nance, The Best Evidence Principle, 73 IOWA L. REV. 227 (1988). Nance’s article is probably the most important modern work advocating an increased role in evidence theory for the “best evidence” principle. Nance argues that many evidentiary rules “are more plausibly attributable to the epistemic concerns of a tribunal encountering the adversarial presentation of evidence than to judicial concerns about the irrational behavior of weak-minded lay jurors.” Id. at 229. He particularly emphasizes the “expansionary aspect” of the principle, by which it “operates to expand the total evidentiary package beyond what a party’s self-interested tactical or economic considerations might incline that party to produce and present in court.” This expansionary aspect, Nance contends, “is manifested by a wide variety of rules and doctrines of evidentiary law, . . . as well as the rules of discovery. Moreover, it accounts for the law’s general trend toward eliminating or relaxing rules that allow an opponent to block the admission of relevant evidence.” Id. at 272.

49. See SAKS & VAN DUIZEND, supra note 47, at 75 (noting that courts generally allow only one or two experts per side per issue, thus potentially significantly distorting evidence presented to jury).


51. See, e.g., FED. R. EVID. 412.

52. Appellate courts reverse for evidentiary error only with great reluctance. This is in part because some evidentiary errors at trial are so likely, given both the number of evidentiary decisions that have to be made in a typical trial and the time constraints under which they must be made. Most evidentiary precedents are not reported, for the very reason that trial judges rule
Rule of Evidence 403, which allows a judge to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."\(^{53}\) And, as most trial lawyers would affirm, many evidentiary decisions reflect the substantive orientation of the individual trial judge.

In sum, the events in dispute are not alone in determining the evidence that will be presented to the jury. A full understanding of the material presented to the jury requires an awareness not only of what the evidence presented to the juror is, but also how that evidence came to be created and then presented at trial, and also how it happened that other evidence was not created or presented. To what extent, then, should we actually allow the jury to receive such meta-evidence? I will mention just a few aspects of this complex question.

In general, of course, we do not want the jury to learn about evidence that the court has excluded, much less the reasons for its exclusion. Such a practice would essentially defeat the idea of exclusion. (Imagine the judge's instruction: "Ladies and gentlemen of the jury, I thought you might like to know that I was compelled to exclude, on grounds of hearsay, an interesting statement describing the scene . . . .") And for that matter, we usually do not want to tell the jury the reasons for the admissibility of evidence. ("I admitted this statement by Jack because I concluded that it had great probative value and that it was made by Jack in furtherance of a conspiracy with the defendant, which happens to be the conspiracy of which the defendant now stands accused. But don't let my conclusions affect your judgment.")

On the other hand, we generally do want the jury to know how evidence was created, for that is essential to their task of determining what course of events led them to their current state of knowledge. Thus, the issue of authentication—whether an item of physical evidence is what its proponent claims it to be\(^{54}\)—is for the jury rather than the court to determine. Often, too, it is important that the jury determine why a given item of evidence was not created. If

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54. See Fed. R. Evid. 901(a). This Rule, somewhat overly stringently in my view, requires the proponent to introduce evidence sufficient to support a finding that the evidence is what the proponent claims it to be. See Richard D. Friedman, Conditional Probative Value, Mich. L. Rev. (forthcoming).
there are no fingerprints on the knife used in a murder, the prosecution would of course be allowed to prove that the defendant was wearing gloves; that is all part of the story of how the evidence came to its present state. Indeed, if it appears that an item of evidence not presented is under the control of one party (or would have been had it existed), the court may allow explicit argument (or, in a particularly strong case, even give an instruction) encouraging the jury to draw an inference adverse to that party from the fact that the evidence is missing.55

IV. THE DECISION TO PRESENT

I have suggested that both the juror and the reader of Sante’s book must think about the overall process by which they reach their state of knowledge. I have emphasized the creation and selection of individual items of evidence. But another fundamental part of this overall process is the decision to present information, to jurors or to readers, at all.

In the litigation context, that decision is made because the plaintiff or the prosecutor regards the matter as worth pursuing in the first instance, because both parties regard litigation as preferable to settlement on terms that appear to be available, and because the court believes the case cannot be resolved properly without adjudicating material factual questions. Thus, the function of the fact finder within the legal system is, in a sense, quite narrow. We do not ask the fact finder to resolve all the questions presented to it regarding how the evidence has reached its actual state. Indeed, when the fact finder is a jury, we do not ask for any articulation at all. Rather, the jury must decide whether one group of stories (those which include all the elements of the claim) is sufficiently more probable on the state of the evidence presented than another group of stories (which lack at least one of those elements) to warrant relief for the claimant.

This perspective on the jury’s role, as a narrow function performed after a highly selective process that filters out most disputes, brings some interesting points into focus. Looking at the system externally, this perspective suggests why it is difficult to draw sound conclusions from studies of juror behavior: If jury verdicts in a class of cases tend to favor one side or the other, it is difficult to know to what extent this imbalance represents the distribution of actual behaviors in the world outside the courtroom, or the process by which cases are

55. See, e.g., United States v. Pitts, 918 F.2d 197, 199-200 (D.C. Cir. 1990) (explaining doctrine and holding instruction erroneous); People v. Walker, 500 N.Y.S.2d 704 (N.Y. App. Div. 1986) (holding that trial court committed reversible error by denying defendant ability to argue on basis of prosecution’s failure to present a witness).
selected for presentation to the jury, or juror orientation. Now, looking internally, consider how knowledge of the way in which the case was selected might affect a juror’s view of the facts in dispute. Perhaps most significantly, a juror in a criminal case is likely to recognize that the very fact that the case is before her means that the prosecutor has deemed it worthy to pursue and also perhaps that the court perceives it as having some merit. This knowledge is likely to lead the juror, at least subliminally, to assign a rather substantial probability, even before the presentation of any evidence, to the proposition that the accused is guilty. Such a probability assignment conflicts, it seems, with the presumption of innocence—which, whatever its precise meaning, must require that a very small probability be assigned initially to that proposition.

Like a juror, a reader may ask, “Why have they found this material worth presenting to me?” The reader’s “they” is the author and publishers, rather than the litigants and the court, and the “material” is the publication, rather than evidence. (A reader of this Essay may also ask this question. A fair inference is that the editors of this Journal sought not my aesthetic perspective, nor even my ruminations on life and death, but rather reflections on themes in the law and theory of evidence. Nevertheless, I shall plunge ahead.)

Sante, unlike a litigant and unlike many authors, appears to lack any strong interest in persuading a reader of any particular proposition. Moreover, a reader of Sante’s book need not make any decision based on it. For these reasons, we, as readers, are not confined in what we might hope to learn, or otherwise gain, from the book, and we might have greater confidence in what we do learn. But these same factors also raise the question of why Sante thought publication of Evidence worthwhile—or, to ask a closely related question, what he thought we might gain from it.

We learn some true-life mystery stories from the book, some solved and others not, but these particular long-forgotten cases do not hold great interest for us. We learn something about forensic photography and its history, but we did not need these photographs for that. More substantially, we learn something about people’s lives in New York in the World War I era. As Sante perceptively says,

What is most striking in these pictures to the present-day eye is the discrepancy between the respectable façades that people maintained and the horribly constrained conditions of their lives. Nearly all the male victims are dressed in collar and tie . . . . Dark three-piece suits predominate. In life they would all have worn hats. The women tolerated assemblages of underwear that would require hours of laborious laundering . . . . Their rooms, often tiny, are equally dressed, . . . sometimes [with] curtains,
flounces, runners, doilies. . . . There are ancestral portraits and knickknacks, pennants and framed prints. . . . The people who lived in tenements, who had to fit their beds around a stove and a table, were cramped but relatively autonomous, with control over their own heat and cooking.56

These features run strongly enough through the photographs that, even allowing for their slight number and their less-than-random creation, preservation, and selection, the photographs do present a composite picture of a style that was at least quite common among people of modest means. Gaining a better feel for what life was like in this era for New Yorkers, or at least for that subset of New Yorkers most likely to die violently and then have their pictures taken, is unquestionably beneficial. And photographs are undoubtedly well-suited for the task; a thousand-to-one word-to-picture ratio might be a vast, even infinite, understatement. Sante’s statement that the photographs create “a true record of the texture and grain of a lost New York, laid bare by the circumstances of murder”57 has some merit: This might be the most extensive photographic examination available of the interiors of New York tenements of the World War I era. But the New York of this bygone era is not really lost, and one could get a pretty good feel for it without all the dead bodies lying about.58 Moreover, the value of learning more about New York life does not mean that we really need to learn what violent New York death looked like—which is pretty much all that some of the photographs show. Indeed, if we take away the accoutrements of life, violent death in one time and place looks much like violent death in another.

But of course the benefits of this book need not be strictly informational. Sante is able to find the pictures “beautiful,” ap-

56. SANTE, supra note 9, at 85.
57. Id. at x.
58. We are not without records, including photographic records, of the residential and working life of tenement dwellers in New York and other major American cities around the turn of the century. The pioneering work was JACOB A. Riis, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1890). See PETER B. HALES, SILVER CITIES: THE PHOTOGRAPHY OF AMERICAN URBANIZATION, 1839-1915, at 179 (1984) (noting that “it was the photographs that provided the real revolutionary impact to that first publication of How the Other Half Lives”); id. at 257-58 (discussing changing styles of photographing slum interiors); see also 1 JAMES FORD, SLUMS AND HOUSING, WITH SPECIAL REFERENCE TO NEW YORK CITY 217-40 (1936) (showing pictures of New York tenements, including interiors, around the turn of the century); CHARLES WELLER, NEGLECTED NEIGHBORS: STORIES OF LIFE IN THE ALLEYS, TENANTS, AND SHANTIES OF THE NATIONAL CAPITAL (1909). The Lewis Hine Collection in the New York Public Library includes some excellent photographs of men and women at work. See NANCY VIRGINIA WHEELER, PHOTOGRAPHIC DOCUMENTS OF SOCIAL CONDITIONS BY LEWIS WICKES HINE (1977). The Lower East Side Tenement Museum at 90 Orchard Street in Manhattan is housed in a partially restored tenement and has a program of exhibits on the history of immigrant life on the Lower East Side.
parently "because their subjects, having exited life, are finally in a state of grace." 59 He appears not to be alone in his aesthetic judgment, 60 but neither is it one universally held; I suspect I am not alone in having difficulty finding anything of beauty in these pictures. (Apart from the pictures, the book is quite beautiful; it is finely presented, and Sante is a shimmering stylist.)

Beautiful, no, but haunting, yes, most definitely. Sante’s declaration that “the pictures would not leave me alone” 61 is not hard to fathom. Nonetheless I find his contention that “their power is too strong to ignore; they demand confrontation as death demands it” 62 less persuasive, or at least inadequate to justify public exposure as a means of confrontation. Sante’s offer of this work “as a memorial to these dead . . . as well as to their now equally dead photographers” strikes me as somewhat hypocritical, especially in light of his acknowledgment of “the act of disrespect that is implicit in the act of looking at [the photographs].” 63 And as for Sante’s final words—“There is no place for us outside the frame, nothing to breathe, nowhere to stand. We cannot be the viewer of such a scene. We must have forgotten: We are the subject”—it seems to me he is trying too hard.

Perhaps I am being obtusely narrow-minded. Maybe Sante’s book has value principally for the same reason that I have been able to use it in this Essay, because each of the photographs is consistent with, and therefore suggests, a multitude of narrative possibilities; that is, the photographs are valuable not so much for what we learn from them as for what they fail to tell us, what we have to learn or speculate about on our own. Once again, I am skeptical, not about this function but about the need for these photographs to perform it. I think the function could be performed quite well by almost any photograph—or indeed other portrayal—of an interesting scene in a process that the still image leaves far from certain. 65 Indeed, such portrayals may have greater interest if the events of greatest interest

59. SANTE, supra note 9, at 98.
60. A back cover blur for the book claims that some of the images are “poetic,” and that “all are possessed of a strange and spectral beauty.” See also Vollmann, supra note 6, calling HARM’S WAY, supra note 6, a “beautiful book.”
61. SANTE, supra note 9, at xi.
62. Id. at xii.
63. Id.
64. Id. at 99.
65. Gerald Gardner’s Who’s in Charge Here?, a popular book of photographs, played very successfully on the need to fill in the background of a still photo. Gardner took news photographs, primarily of world leaders, and presented balloon captions suggesting his versions (some amusing, and all intended to be so) of what the characters might have been thinking or saying. GERALD GARDNER, WHO’S IN CHARGE HERE? (1962).
have not, as in Sante’s book, all occurred before the moment of the photograph.\(^6^6\)

Do not get me wrong. I fully subscribe to the wisdom of the founder of the college portrayed in the movie *Animal House*: “Knowledge is Good.”\(^6^7\) Being haunted, or being exposed to various emotions, is good, at least up to a point, as is being presented with interesting mysteries. But that does not mean that all these goods are worthwhile, in terms of time, trees, and sensitivities lost or compromised. Public and private archives throughout the world contain enormous amounts that are interesting, even compelling, and unpublished. One reading my wife's juvenile diaries (as I have done, surreptitiously) might find that what they lack in images of dead people, they more than make up in evocation of time, place, emotion, goofiness, and a stage of growing up; I doubt, though, that Sante would rush to publish them. Sante returned more than 1300 photographs to their place of rest; we are none the wiser, but I doubt we are much the poorer. I have a nagging thought that perhaps—I do not mean to make a stronger statement—he should have made the same decision for the remaining fifty-five.

V. CONCLUSION

A photograph lies flat on a page. It appears static. In a sense it is static, and that is a source of the interest it holds, whether as part of *Evidence*, the book, or of the evidence introduced at trial: Given that the photograph has survived sufficiently intact to yield a recognizable image, time and wear and tear have probably caused it to change remarkably little in any material way. And if a static view of the scene it represents has any interest—as it might, especially if the subject, such as a dead body, is essentially static—the photograph may remain a remarkably vivid, detailed, and accurate representation of reality. The photograph was created at one point in the flow of time, and it carries an image of that point to a later one.

\(^6^6\) The Thematic Apperception Test (TAT), commonly used in psychological studies, presents subjects with an image of a scene and asks them to explain what they believe has happened before the moment portrayed and what will happen after the moment portrayed. See, e.g., Charles A. Peterson, Administration of the Thematic Apperception Test: Contributions of Psychoanalytic Theory, 20 J. CONTEMP. PSYCHOTHERAPY 191 (1990). Have the man and woman in Picture 4 been having a fight, or is she perhaps trying to prevent him from getting into a fight with someone else? If they have been fighting, how will they resolve the problem? For a criticism of the use of the TAT, see Ross E. Kaiser & Ellen N. Prather, What is the TAT? A Review of Ten Years of Research, 55 J. PERSONALITY ASSESSMENT 800 (1990).

\(^6^7\) Socrates is attributed with having expressed a similar, but stronger and more debatable sentiment, “Knowledge is the one true good.” *DIogenes Laertius, Lives of Eminent Philosophers*, bk. II, sec. 25 (R.D. Hicks trans., 1980).
But when considering even such static evidence, we must think in dynamic terms. How and why did this come to be created, preserved, and presented to us? What changes, if any, were there between the moment of interest and the moment the evidence depicts? Why was other evidence not created, or created and not preserved, or created and preserved but not presented to us?

In this light, the task of fact-finding may appear immensely complicated. And I believe it is. Is it too complicated for humans with a mortal life span to perform? Not at all. Just as a physicist tries to understand the complexities of the world, a person analyzing evidentiary issues must try to expose, examine, and understand the complexities of fact-finding. And, just as most of us make it through the day without either bumping into too many objects or consulting the laws of physics, adjudicative fact finders are able to do reasonably well without consulting the theory of probability. Fact finders summarize, batch similar phenomena, and focus on highlights—just as when they look at a photograph they do not focus on individual photons. Rather, they tend to absorb the whole picture.