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Once Upon a Time in Law: Myth, Metaphor, and Authority

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Since at least as long ago as 1983, when Robert Cover gave us *Nomos and Narrative*,\(^2\) and probably as early as James Boyd White’s *The Legal Imagination*,\(^3\) we have been on notice that the law has stories. I do not mean that clients have stories and that we talk about those client stories when we talk about law. I mean that cases, statutes, doctrines, and principles have stories of their own, stories that do their narrative work beneath the surface of routine law talk.

Discussions of law do not *sound* like stories, of course. They state an issue, cite authority, and purport to rely on a rule. But when we talk about legal authority, using the logic of formalism and its bedfellows of analogy and policy, we are actually swimming in a sea of narrative, oblivious to the water around us. The idea that narrative pervades the analysis of law may surprise us, but we should not be surprised at our own surprise. As the old Buddhist saying goes, we don’t know who discovered the ocean, but it probably wasn’t a fish.

Over the years, we have been given further notice, with Lash LaRue’s *Constitutional Law As Fiction*,\(^4\) Amsterdam and Bruner’s *Minding the Law*,\(^5\) and most recently, Steven Winter’s

\(^1\) Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I am especially grateful to.

\(^2\) Robert M. Cover, *Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. . . . In this normative world, law and narrative are inseparably related.”).


closely related *A Clearing in the Forest*\(^6\), but despite the work of these great minds, the law’s own stories are still seldom explored.

Much good work remains to be done to better understand the role of client stories in litigation. Worthy as that project is, though, this paper is about none of that.\(^7\) Instead, it examines written legal analysis with hardly a client’s fact in sight. There, in discussions of cases and statutes, are stories about the law itself – stories of birth and death, battle and betrayal, tricksters and champions. In fact, we may not be able to talk about cases or statutes without telling stories about them, stories leading straight to conclusions that become the law.\(^8\)

This article teases out several familiar myths hidden in discussions of legal authority. These myths are both true and false, world-shaping yet always incomplete. They offer effective tools of persuasion, but they can be dangerous too. Why? Because we so seldom question familiar narratives, and these myths practically run in our veins. We would be wise to learn to recognize and interrogate these stories, alert to their limitations and ready, when necessary, to seek other more accurate and complete stories for the law.

A word about the texts for this inquiry: Rhetorical analysis often examines judicial opinions, looking at how a judge influenced law’s development by the way the opinion was written.\(^9\) But if the analysis is limited to judicial opinions, it starts at least one step too late, missing a critical point of influence. To understand the rhetorical situation more fully, the

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\(^6\) **Steven L. Winter, A Clearing in the Forest** (2001).

\(^7\) I do not mean to imply that client stories and the stories of the law are unrelated; they should always be at least consistent with each other, and they are often quite closely related, as in the two briefs examined here.

\(^8\) See LaRue, supra note 4.

analysis should include the advocates’ briefs; in fact, it should start there. In keeping with that goal, the following pages will explore the birth and rescue stories in briefs from *Miranda v. Arizona* and *Bowers v. Hardwick*. First, though, a quick review of some basic concepts about myth and metaphor:

**Myth and Metaphor 101**

We have known for some time that stories are among the primary ways of making sense of the world, including the world of law. A story’s two most important components for doing this formative work are character and plot. At the very least, a story needs a protagonist, perhaps an antagonist, and action. Something important must be happening, some narrative movement from one place or state of affairs to another, taking place over a period of time.

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10 For example, it has been said that the *Miranda* opinion was “the moment when [Chief Justice Warren] invents what one might call the story of the closed room.” Peter Brooks, *Storytelling Without Fear? Confession in Law and Literature*, in LAW’S STORIES 114, 116 (Peter Brooks & Paul Gewirtz eds., 1996). But the credit for the invention of the “closed room story” as it was used in *Miranda* actually belongs to John Paul Frank, who wrote Ernesto Miranda’s brief and whose effective use of the closed room story Chief Justice Warren adopted. The closed room story, in fact, predates even Miranda’s case. For instance, in 1951, Justice Douglas wrote “What happens behind doors that are opened and closed at the sole discretion of the police is a black chapter in every country . . . .” *United States v. Carignan*, 342 U.S. 36, 46 (1951). In 1957, Justice Black wrote, “Behind closed doors [the defendant] can be coerced, tricked or confused by officers into making statements which may be untrue or [misleading]. While the witness is in the custody of the interrogators, as a practical matter, he is subject to their uncontrolled will.” *In re Groban’s Petition*, 352 U.S. 330, 341-42 (1957).


13 Jerome Bruner, *The Narrative Construction of Reality*, 18 Critical Inquiry 1, 4 (1991). For an excellent sampling of both recent and ancient writing on the subject, see Richard K. Sherwin, *supra* note 9 at 681-695 (1994). Narrative is intricately related and even foundational to more formal reasoning using rules, analogies, and policies. When we are presented with a new normative legal question, we imagine the prototypical story in which it would arise. From that narrative platform, we construct the rules and standards to make that story and future similar stories end the way we think they should. Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Legal Studies Forum 7 (1996).

14 A narrative “needs a cast of human-like characters, beings capable of willing their own actions, forming intentions, holding beliefs, having feelings. It also needs a plot with a beginning, a middle, and an end, in which particular characters are involved in particular events.” AMSTERDAM & BRUNER, *supra* note 5 (emphasis omitted); see also LAINUE, *supra* note 4, at 133 (relying on Kenneth Burke’s well-known pentad: the actor, the act, the scene, the instrument, and the goal).
One classic plot structure begins with a struggle toward a specific goal. Right from the opening scene, the world (or at least the protagonist’s world) needs fixing or lacks something important. For instance, the opening scene may find the protagonist far from home, facing a long journey. Homer’s epic poem, the *Odyssey*, is a prototypical example of a journey story. As the story begins, Troy has just fallen, and the warrior Odysseus is standing on the distant shore, ready to return home. The story describes his struggles and adventures as he undertakes the ten-year journey back to Ithaca and to his family there.\(^{15}\)

In other stories using this plot structure, the task is to make the world right somehow. The situation could call for creating an important new tool or idea. The existing problem could be in the protagonist’s own life or in the lives of others. For instance, the opening scene of the Steven Spielberg film *Amistad* finds Cinque in the hold of a slave ship, using his bloody fingers to pry out a nail from a wooden plank. The movie tells the story of his struggle for freedom, with assistance along the way from a former slave, a New England lawyer, and John Quincy Adams, the former President.\(^{16}\)

The structural characteristic common to these stories is that, from the beginning, there is something to be done. The story begins in incompleteness, distress, or disarray, and the goal is completion or the ordering life as it should be. As the story progresses, a reader will be watching


\(^{16}\) *Amistad* (DreamWorks 1997). Other modern film examples include the 1993 film *Philadelphia*, the story of a lawyer’s efforts to apply antidiscrimination laws for the protection of employees with HIV/AIDS, *Philadelphia* (TriStar Pictures 1993); and the film *Norma Rae*, the story of a cotton mill worker who successfully unionized the mill where she worked, *Norma Rae* (20\(^{th}\) Century Fox 1979). Stories can include both journeys and other kinds of struggles, as does *Amistad’s* telling both of Cinque’s struggle for freedom and his journey back to his home in Africa.
and rooting for the protagonist throughout her efforts to reach her destination or complete her project.

In another common plot structure, the key characteristic of the story’s opening scene is its normality and stability. The world is not incomplete; rather life is more or less as it should be. This initial stable world enters a stage of disequilibrium, however. Amsterdam and Bruner speak, for instance, of a “steady state” followed by “trouble.” The steady state is, by definition, legitimate -- the legitimate ordinary. In narrative terms, whatever disrupts a steady state is bad. The story describes the struggle to resolve the disequilibrium and return to some version of legitimate stability – either to the original steady state (restoration) or to some other good and stable place (transformation). In Murder on the Orient Express, Hercule Poirot boards the train in Istanbul. The train proceeds normally along the scheduled journey until the second night, when a murder occurs. Poirot undertakes to solve the murder. In the end, rough justice is done, and the lives of Poirot and the passengers proceed as we are meant to think they should.

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17 Amsterdam & Bruner, supra note 5, at 113.
18 Id.
19 A steady state/trouble/resolution structure is inherently conservative, making the unstated assumption that life is generally pretty much as it should be. But when the protagonist is in trouble from the very beginning, the story is inherently calling for change, with an implicit assumption that things need fixing. The power of these assumptions lies in their implication rather than direct assertion. Without meeting any kind of a burden of proof, they become the way we see the situation.
20 Id. This basic plot structure can admit of variation without losing its mode of operation. For instance, one variation begins with the stability of the protagonist’s adequate but ultimately unfulfilled life. Then comes something wonderful, and suddenly, his ordinary life becomes extraordinary. Just as the protagonist has become attached to this new life, however, he loses it and must return to the unfulfilled life he was living when the story began. The goal is the restoration of the good life so briefly enjoyed. Examples of this variation are ubiquitous. Nearly every modern romantic comedy follows this pattern. Boy (whose life is OK but not great) gets girl; boy loses girl; boy gets girl back.
21 As we are meant to think they should, though perhaps not as the law would have dictated. Agatha Christie, Murder on the Orient Express (Berkley Books 1934). A film example is the film Patriot Games, which portrays Jack Ryan peacefully in London with his family when they witness a terrorist attack. Ryan intervenes to kill the terrorist, but the terrorist’s brother vows revenge. Ryan and his family are attacked several times until finally, Ryan kills the attackers. Patriot Games (Paramount Pictures 1992).
Client stories easily lend themselves to such plot structures. For instance, in *Bowers v. Hardwick*, Michael Hardwick was safely at home (the steady state). The police entered his home, and he was arrested under Georgia’s sodomy law (the trouble). By enforcing a right to privacy, the Court can return Bowers to the safety and sanctity of his home (the restoration).

But the law has such stories too. Just like any other story, the law’s story will need characters and a plot and perhaps a prop here and there, and metaphor can help provide them. As Lakoff and Johnson have demonstrated, we think about abstract ideas in metaphors. So when we think about a legal theory or a statute or the holding of a case, we think about it metaphorically, as if it were a sentient being or a concrete thing. Lakoff and Johnson would doubt that we can think about a legal theory or a case holding in any other way. Ideas are grounded in concrete physical experience and cannot otherwise exist. This understanding of metaphor reveals something important about the law’s stories: Characters can be entities, like courts or legislatures or prosecutors’ offices. They might even be abstract concepts, like a principle or a policy, a statute or a case holding. So there might be characters in a legal

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23 After Hardwick’s arrest, Attorney General Michael Bowers had decided not to proceed with prosecution, but Hardwick remained vulnerable to prosecution on the original charge and to further police invasions of his home. *Bowers*, 478 U.S. at 187-88.
24 The study of metaphor is at least as old as Aristotle and spans at least the disciplines of philosophy, linguistics, literary criticism, law, cognitive psychology, and rhetoric. Here we will rely on the more modern work in linguistics and cognitive studies.
25 For instance, ideas are people: They can give birth to other ideas, die, be resurrected. Ideas are plants: They can be planted, bloom, come to fruition, produce offshoots, be fertile or barren. Ideas are products: We can produce them, refine them, churn them out at a rapid rate. Ideas are commodities: We can package them, buy and sell them, value them, offer them in the intellectual marketplace. Ideas are resources: We can run out of them, waste them, pool them, invest them. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 47-48 (1980).
28 Normally, a character must be capable of will, emotion, and intention. Amsterdam & Bruner *supra* note 5, at 113. There is at least one exception to this principle, however, as we shall see when we discuss the Respondent’s Brief in *Bowers v. Hardwick*. *See supra* text accompanying note 101.
discussion after all, and those characters might be doing something – something that might amount to a plot.29

One other concept – myth -- will help with both characters and plot. The term “myth” has been used in a variety of ways with a variety of definitions. Here I use it to mean particularly an archetype or other master story.30 Myths or archetypes may be simply cultural, soaked up by living in a particular place and time, or they may be encoded at birth. For this article’s purposes, their origin and possible universality matter little.31 Either way, by the time we are old enough to think about law, myths have become part of us, and they are ready to orchestrate our understanding of the world, including the world of law.

Myths provide ready templates for both characters and plots.32 Myths and narrative archetypes such as birth, death, re-birth, journey or sacrifice provide templates for plots. They establish a particular view, a narrative perspective on the events of a story, creating the context in which ideas or events will be interpreted.33 Each of us carries the blueprints of these archetypal situations, and when events trigger those archetypes, we create at least the rough outlines of a particular mythological story through which we view those events. In other words, we mentally create an archetypal plot line. Myth provides a ready stock of characters as well, for example,

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29 “Once we can identify our experiences as entities or substances, we can refer to them, categorize them, group them, and quantify them . . . .” LAKOFF & JOHNSON, supra note 25, at 25. I would add that we can tell stories about them as well.
30 Archetype and myth have been studied particularly in literary criticism, see NORTHROP FRYE, ANATOMY OF CRITICISM (Princeton Univ. Press 1957); in depth psychology, see CARL JUNG, THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS, Collected Works, 9 (2 ed.), Princeton, NJ: Bollingen (published 1981); and in anthropology, see JAMES G. FRAZER, THE GOLDEN BOUGH (3d ed. 1936).
31 The difference would matter much more if the reader and the writer did not share a common cultural heritage.
32 Master stories and metaphors both function as embedded knowledge structures. Linda L. Berger, How Embedded Knowledge Structures Affect Judicial Decision Making: An Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes, 18 S. Cal. Interdisc. L.J. 259 (2009). Myths and other master stories provide a ready stock of symbols as well, such as Snow White’s poison apple. Miranda’s Interrogation Room 2, for instance, may function as such a symbol.
33 To say that a story or a character is mythological is, of course, to say nothing about whether it is true or false.
champions, children, tricksters, mentors, kings, mothers, demons, and sages. These templates too are ready, at the slightest invitation, to cast both people and things in particular archetypal roles.³⁴

To summarize: If the law is to have a story, it needs at least characters and a plot. But because we think metaphorically, the story’s characters can include institutions or reified ideas, and these institutions or ideas may be doing things that can constitute a plot. Nor are we left adrift to create a plot or cast the characters. Instead, we are programmed with mythological plots and characters, and we are inclined to see both events and ideas as fitting into those archetypal stories. Finally, and perhaps most importantly, this process of story creation is usually unconscious, which makes its operations all the more significant. If we are not aware that we are inside a story, we cannot decide to step out of it long enough to ask whether there might be other possible stories and whether those other stories might make better sense of the situation.

*Miranda v. Arizona* as a Creation or Birth Story

With these basic concepts of myth and metaphor in mind, it is time to ask what kind of characters and plots the law can have. I suggest that there are at least six common myths about the law: creation or birth; rescue, slayer, journey, trickster, and betrayal. This article will consider two of these: birth and rescue.³⁵ First, the birth story told in the Petitioner’s Brief in *Miranda v. Arizona*.³⁶

³⁴ Archetypes can operate in the surface story that prompted the litigation as well. *See, e.g.*, Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s Journey*, 29 Seattle L. Rev. 767 (Summer 2006).

³⁵ This article is the first in a series. Future articles will examine each of these common legal myths as they have been used in landmark briefs filed in the United States Supreme Court. It is helpful to begin with birth and rescue,
Ernesto Miranda was brought to police headquarters and taken into Interrogation Room 2. The door was closed, and he was alone with two officers. Two hours later he came out, having signed a confession. At that point, a lawyer was appointed, but Miranda’s fate was already sealed. The author of the Petitioner’s Brief, John Paul Frank, tells Miranda’s story – this closed room story\(^\text{37}\) – in compelling terms. But Frank tells another story too -- a story about the governing law. It is the story of the growth and development of the right to counsel.\(^\text{38}\)

Appreciating Frank’s story calls for a comparison of its structure with an alternate structure of legal analysis. In that alternate structure, a writer would begin with the current governing law supported by a discussion of the most recent authorities. If the current law is favorable, the writer would add a policy discussion to support it. If not, the writer would argue for change using other authorities and policy discussions. But there is no plot, no action, nothing happening there. Not only is the discussion potentially boring, but it foregoes most of the influence of narrative to affect perception. The problem is particularly troubling if the writer wants to change current law because, in narrative terms, the writer has presented the current law as the steady state, the “legitimate ordinary.”\(^\text{39}\) The writer now must unseat her own implicit narrative admission that the current law is legitimate.

\(^{36}\) Brief For Petitioner, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 65-759), 1966 WL 100543. Because few readers will have access to the pagination of the original brief filed with the Court, citations to the brief will be made to the Westlaw document. Further, for ease of reading and better focus on the narrative moves, quotations from the briefs here will sometimes omit internal citations.

\(^{37}\) See supra text accompanying note 10.

\(^{38}\) See generally Sherwin, supra note 9. While the brief presented the issue as the right to counsel, the resulting opinion rested its result in significant part on the Fifth Amendment privilege against self-incrimination. Miranda, 384 U.S. at 439. As the brief states, however, “[t]hese are all different manifestations of the view expressed by Justice Douglas . . . “that any accused – whether rich or poor – has the right to consult a lawyer before talking with the police.”” Brief for the Petitioner, supra note 36, at 34-35.

\(^{39}\) See supra text accompanying notes 17-20.
Frank’s story, though, begins not by explaining the current status of the right to counsel, but with this sentence: “We deal here with growing law, and look to where we are going by considering where we have been.” Notice the narrative move in that first sentence. It takes us from the distant past straight to an imagined future. What is missing is the troublesome state of the current law, which did not preclude admission of Miranda’s confession. Rather than setting up current law as the legitimate steady state, the story treats current law, by omission and therefore by implication, as merely one of many interim stages in the ongoing growth of constitutional doctrine and thus not worthy of any particular importance. From the argument’s first sentence, we are in narrative motion.

After this panoramic introductory view, the brief begins the story of creating constitutional protections against pressured confessions. Starting with the 15th Century, we watch the doctrine grow, case by case by case. The narrative pace is steady. One after another come the cases the Court has decided: Johnson v. Zerbst, McNabb, Upshaw, Mallory, Powell, Brown, Chambers. Metaphorically, we can almost see the Court fashioning each new facet of the doctrine. The story brings us then to Haley v. Ohio, and here the pace slows.

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40 Brief for the Petitioner, supra note 36, at 11.
41 Studying the brief’s legal story is best done by letting the story do its work on the student, much as it would have worked on its original intended readers. Thus, this article uses the intimacy of the first-person (we, us, our) to cast the brief’s students as its intended readers. In the kind of rhetorical analysis undertaken here, the distance of third-person academic language would blunt the understanding of the brief’s impact. To do a rhetorical analysis is to tell the story of the story. In that meta-story, we, the readers, are key characters. See Anthony G. Amsterdam, Telling Stories And Stories About Them, 1 CLINICAL L. REV. 9 (1994).
42 See supra text accompanying note 63.
43 Brief for the Petitioner, supra note 36, at 11-33.
46 Upshaw v. United States, 335 U.S. 410 (1948).
The discussion spends some time with the *Haley* opinion, naming the four subscribing justices, and then pauses so the narrator can underline the dramatic significance of the case:

We assume that the opinion in *Haley*, had it been of five Justices, would totally control in the instant situation. . . . But there were not five. Justice Frankfurter concurred specially. . . . He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question.52

Perhaps we feel a little disappointment. The birth labor has slowed. The Court was on the verge of completing a long, hard process, but at the last moment, one of the justices hesitated. Notice the first appearance here of another narrative principle – the principle of the gap. As Peter Brooks put it, a gap “demands to be filled; it activates the interpreter’s ingenuity.”53 When a reader sees a gap in a story, the reader wants to fill in that gap,54 and that, of course, is exactly what John Frank wants the Court to do.

After identifying the gap, implicitly inviting the Court to fill it, the story resumes:

In 1957, two new voices were added in this Court on the right to counsel at the interrogation state [sic]. The case was *In re Groban’s Petition*. . . . The majority opinion, by Justice Reed on his last day on the Court, found distinctions because this was an administrative hearing and therefore did not reach the principal question. [Justices Black, Warren], Douglas and Brennan did.55

Disappointment again; another opportunity to fill the gap, missed once again by so close a margin. The pace now quickens:

These same dissenting Justices expressed their views again in *Crooker* . . . and [then again in] *Cicenia* . . . [Justices Douglas, Warren, Black, and Brennan] gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage . . . .56

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54 LARUE, *supra* note 4, at 137
56 Id. at 23.
Notice that since the discussion of Haley v. Ohio, the argument has begun to name the justices who are working to complete the doctrine. Naming the justices helps us identify the characters, understand their goals, and share some of their frustration. This naming continues as the pace picks up speed again, now with added strength and urgency:

Soon after Crooker and Cicenia, the tide which was to overrule Betts began to flow with new vigor. . . . Justices Douglas and Brennan called outright for the overruling of Betts. . . . Justices Frankfurter and Stewart . . held that a confession should not be admitted. . . . Justices Douglas and Black wished to rest frankly on the principle [of the right to consult a lawyer before interrogation.] . . . [T]hese Justices felt that all defendants are entitled to know their constitutional rights.

In this description, we hear the voices of these four justices urging their positions, each speaker breaking in when the prior speaker stops to take a breath. There is narrative energy here. It is a noisy scene with animated voices making their points. The quickened pace then pauses. The individual voices are quiet long enough for the narrator to summarize: “At the end of the Betts period, the condition of the constitutional law on the right to counsel . . . was this.” The argument then lists the components now in place and those still missing.

After this interim summary, the story continues, as Gideon takes the crucial developmental step of overruling Betts:

In overruling Betts, Justice Black . . . closed the circle by applying the principle of his own 1938 opinion of Johnson v. Zerbst to state proceedings. . . . It follows that, so far as the Sixth Amendment is concerned, after March 18, 1963, there is no difference between the right to counsel . . . in the two court systems.

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57 See supra text accompanying notes 51-56.
58 Betts v. Brady had held, in part, that the Sixth Amendment did not apply to state criminal proceedings. 316 U.S. 455, 464 (1942).
60 Id. at 26.
61 One hint that this is a conscious narrative is the narrator’s care in using dates to keep us focused on our progress through the story (the rising action) and our relative distance to the story’s climax. In a typical recitation of precedent, the writer customarily does not draw particular attention to the dates of interim precedent.
62 Brief for the Petitioner, supra note 36, at 27.
Then and only then, after the story of this long process, do we learn the current state of the law.

Our narrator tells us, in tabulated form, that as of the spring of 1963:

1. Defendants were entitled to counsel at all trials in the federal courts under *Johnson v. Zerbst*.
2. Defendants in state courts were entitled to counsel in all trials. *Gideon v. Wainwright*.
3. Persons were entitled to counsel in all federal arraignments . . . and in all arraignments or analogous proceedings under state law at which anything of consequence can happen. *Hamilton v. Alabama*; *White v. Maryland*.
4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it . . . . *Crooker v. California*; *Cicenia v. La Gay*.
5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. *In re Groban’s Petition*; *Crooker v. California*; *Cicenia v. La Gay*.

Situation 5 is that presented in the instant case.63

Here is the drum-roll. The legal discussion goes on to offer policy reasons64 for why the Court should resolve “Situation 5,” but the story of the slow, careful development of the law has prepared us to hear those policy arguments. The story began five hundred years ago. We heard how, bit by bit, the right to counsel grew. The story has brought us now to the pleroma – the fullness – of time, when the crucial decision will be made. The long story of the law has met Ernesto Miranda’s case: “Situation 5 is that presented in the instant case.”65

In this story, every part of the doctrine has been added except that last part – the part at issue in Miranda’s case. But that last part – Miranda’s part – need not be created from whole

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63 *Id.* at 28.
64 The brief argues that (1) the additional cost of administering the criminal justice system is justified by the importance of the defendants’ rights; and (2) law enforcement will not be hamstrung by the participation of defense counsel during interrogation. *Id.* at 35-48.
65 *Id.* at 28.
cloth, because to listen to a creation story is to have already imagined the fully developed
doctrine the characters are creating. The doctrine actually exists. It remains only to bring it out
of our minds and onto the pages of an opinion. Here is how the brief states it several pages later:

The right does exist. It is the same. This is not the result of a single case, Escobedo or
any other. Rather there is a tide in the affairs of men, and it is this engulfing tide which
is washing away the secret interrogation of the unprotected accused.

Now the bold assertion that began the Summary of the Argument pages earlier makes sense:

There is a right to counsel for arrested persons when interrogated by the police. The law
has been growing in this direction for more than thirty years.

At first those two sentences seemed inconsistent; surely to say that the law has been growing in
this direction is to implicitly admit that no authority has yet declared the principle. Yet it is
exactly that growth that has created the right, positioning it as the telos, the consummation, the
destiny to which the “affairs of men” inevitably lead. All that remains is to recognize it
formally.

Compare the movement of that plot to a more formalistic structure of legal analysis.
Without the story, the writer likely would begin by baldly articulating the current law with no
action happening anywhere in the discussion. The argument would set out the troublesome
current law as the implicitly legitimate “steady state” and move us nowhere from there. We
would have to seek a legal change with only abstract, sterile policy arguments instead of with a

66 “There is a tide in the affairs of men, which when caught at the flood, leads on to destiny.” WILLIAM
SHAKESPEARE, JULIUS CAESAR, act 1, sc. 2.
67 Brief for the Petitioner, supra note 36, at 34. The argument’s first point heading baldly states, “There Is a Right
to Counsel for Arrested Persons When Interrogated by the Police.” Id. at 11.
68 Id. at 6.
69 I do not mean to imply that the current law does not have stories of its own and that those stories are not encoded
within the existing legal rule or standard. I refer here only to whether those stories are made somehow more explicit
than a mere recitation of the rule provides.
story that encodes the argument’s message: that the process must be completed – as any birth
process must be completed -- and the right to counsel should be fully and finally recognized.

Frank’s argument is a creation or birth story, a primary archetype. In fact, at the end of
the argument section, the brief becomes explicit. It quotes Justice Douglas when he referred to
the right to counsel as “yet unborn” and later refers to the “birth” of the right to counsel at the
interrogation stage. A birth narrative like this one is inherently powerful. It rings true to us on a
deep and unconscious level because it is a primary archetype.

Who are the characters of this story? The protagonists include the many nameless
lawyers and judges involved in all those cases throughout the years, and perhaps especially the
Justices who sat in the minority for so long, coming so close to a majority time and again.
As we hear the story of their struggle, we find ourselves rooting for the protagonists, in part because
of the struggle itself, for when we watch someone trying to do something difficult, we almost
automatically want them to succeed.

A case can be made for a journey narrative as well. Creation and journey narratives share similar characteristics. They both begin in the (often distant) past and set out a long story of movement or development. A classic legal journey narrative, though, is broader in scope, describing the journey of a people or a culture toward its higher destiny. For instance, in the Petitioner’s brief in Aikens v. California, (the functional brief for the consolidated cases commonly known as Furman v. Georgia, 408 U.S. 238 (1972)), we read the story of the movement of humanity in general and the United States in particular toward a more civilized understanding of punishment. Aikens v. California, Brief for the Petitioner, 406 U.S. 813 (1972) (No. 68-5027). There the nation is the character that is moving toward a destination. The story Frank tells in Miranda’s brief, on the other hand, is the story of legal doctrines and their growth. Creation and journey are two distinct myths, but it would be a mistake to place too much importance on the distinctions between them. Implied myths such as these do not and need not operate with such scientific precision.

Since this is a story about the creation of a legal doctrine, the primary protagonists can be legal actors rather than the individual clients who happened to find themselves in need of the doctrine at one point or another. When the clients primarily served by the doctrine are, by definition, problematic in a narrative sense, such as convicted felons, this casting alternative can be most helpful.

In an important sense, this is a story about the Court itself. The brief is telling the Court a story about who it is and about the important work it has been doing. In fact, it may be that almost all stories written to the Court are, ultimately, stories about the Court itself, but that is a topic for another day.
Will they? The birth does not actually happen in the brief. If it did, the tension the brief worked so hard to build would be dissipated, leaving little narrative impetus for the Court to act. Instead, the brief brings the tension of the story to its climactic height, and presents that tension to the Court. It is that height of tension that urges the Court to complete the story, to bring about the destiny toward which the story has been moving. And of course, that is just what the Court in *Miranda* did.\(^75\)

*Bowers v. Hardwick as a Rescue Story*

Because the essence of a birth or creation story is found in a chronology, birth stories such as Miranda’s brief often are presented as explicitly narratival.\(^76\) A series of key events are set out in the order of their occurrence. First this, then that, then something else, moving us on to an anticipated culmination. If we simply stop to notice, we can tell that we are reading a story. Other legal archetypes may be harder to recognize because they may not be signaled by a chronology. To create a narrative situation, these stories may depend not so much on a series of historical events as on particular kinds of characters set in particular kinds of narrative situations. Even if the plotline does not appear on the page, though, the reader will supply it, unconsciously choosing from the ready store of master stories in the shared culture.

Rescue stories can be told overtly or by implication. Either way, the story happens in the midst of danger from evil forces bent on domination or destruction. A band of the faithful, usually outnumbered and outgunned, resists. The object of rescue might be a person; someone

\(^{75}\) *Miranda*, 384 U.S. at 499.

\(^{76}\) The same is true for a journey story.
we care about is in danger, vulnerable to harm or already captured. The protagonists’ task is to save the vulnerable character. A classic example from world literature is the ancient Sanskrit epic story of Ram’s rescue of his wife, Sita, who had been captured by the evil Ravana, the King of the Demons.  

Another ancient example is the story of Perseus, who rescued Andromeda, his future wife. Andromeda had been chained to a rock as a sacrifice to a sea monster.

The object of rescue might also be an item of great value, such as a talisman or an amulet worn for protection or to enable its possessor to exercise great power. The antagonist is trying to take or destroy the talisman, and the protagonists must retrieve or safeguard it, either for its protective power or to keep its power from hands that would misuse it. Examples of talisman stories abound in literature and film. Most obvious are fantasies such as The Lord of the Rings, Tolkien’s trilogy in which Frodo Baggins and his faithful friends must keep the One Ring from the hands of the Dark Lord Sauron, who intends to use it as the ultimate weapon to rule and brutally oppress Middle-Earth. Battles over the possession of a talisman or some other all-important item exist outside of fantasy as well, for instance, in stories about the possession of a nuclear warhead or an important scientific formula.

Whether the goal is the keep a talisman or to save a character who is in danger, the question is the same: Will the protagonists succeed? That is the question posed by Laurence

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80 Thunderball (United Artists 1965) (James Bond retrieves two thermonuclear weapons stolen from NATO and planned to be used to start World War III); For Your Eyes Only (1981) (James Bond retrieves a stolen British missile command system sought by the KGB).
81 The Saint (Paramount Pictures 1997) (the formula for cold fusion).
Tribe, Kathleen Sullivan, and Brian Koukoutchos, the authors of Michael Hardwick’s brief in 

*Bowers v. Hardwick.*\(^82\) In *Hardwick*, the issue was the right to privacy in intimate relationships.\(^83\) Consistent with a rescue story, the brief necessarily portrays the right as already established. The Eleventh Circuit had recognized the right in the *Hardwick* opinion below,\(^84\) so Tribe, Sullivan, and Koukoutchos could position the right as the narrative’s “steady state.”

Immediately we\(^85\) learn that the right is in danger:

The State of Georgia urges this Court to overturn that ruling and declare that a law reaching into the bedroom to regulate intimate sexual conduct is to be tested by no stricter a standard than a law that regulates the community environment outside the home: namely, a standard of minimal scrutiny. In the State’s view, the most private intimacies may thus be treated as public displays, and the sanctum of home and bedroom merged into the stream of commerce – all subject to regulation whenever there is any conceivable “rational relationship” to the promotion of “traditional” or “prevailing” notions of “morality and decency.”\(^86\)

And again, in the first line of the Argument section:

*[T]he* State of Georgia has criminalized certain sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where. Georgia threatens to punish these activities with imprisonment even if engaged in by two willing adults – whether married or unmarried, heterosexual or homosexual – who have secluded themselves behind closed bedroom doors in their own home, as Michael Hardwick did. All that is at issue in this case is whether a state must have a substantial justification when it reaches that far into so private a realm.\(^87\)

First, notice the powerful metaphor of the State “reaching . . . into a private realm.” In one sentence, the metaphor takes the visceral reaction some readers in 1986 likely would have to

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\(^82\) *Brief for Respondent, Bowers v. Hardwick*, 384 U.S. 436 (1966) (No. 85-140), 1986 WL 720442. Because few readers will have access to the pagination of the original brief filed with the Court, citations to the brief will be to the Westlaw document. Further, for ease of reading and better focus on the narrative moves, quotations from the briefs here will sometimes omit internal citations.

\(^83\) More precisely stated, the issue was whether the state must prove a compelling interest in order to restrict the right of privacy in intimate relationships within the home. *Id.* at 5-6.

\(^84\) *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

\(^85\) As in the discussion of Miranda’s brief, this article uses the intimacy of second-person pronouns to cast us, the brief’s students, as the brief’s intended readers. *See supra* note 41.

\(^86\) *Brief for the Respondent, supra* note 82, at 5-6.

\(^87\) *Id.* at 5.
the act of sodomy 88 and turns that reaction back on the challenged statute. It casts the State of Georgia as the sodomizer of its own citizens. The image recurs throughout the entire legal discussion with phrases like “a law that so thoroughly invades individuals’ most intimate affairs;” 89 or a law that “intrudes the grasp of the criminal law deep into” such an area; 90 or the requirement that the government must give “substantial justification to the individual whose personal dwelling it would enter;” 91 or the “State of Georgia contends that it may extend its criminal authority deep inside the private home.” 92

In the midst of the violent world these images create, characters are playing out a story. The battle scene is set by the procedural statement, in which we learn that the Eleventh Circuit opinion had established a right to privacy but the State of Georgia has appealed, arguing that no such right should exist, at least in this situation. Hardwick and his lawyers are the protagonists, struggling to protect the right to privacy. The antagonist is “the State of Georgia,” a character with a flawed reputation before the Court. 93 The brief personalizes Georgia and capitalizes on its flawed reputation. Repeatedly we hear that the “State of Georgia” has done or is doing something. In fact, the other characters hardly act at all; Georgia is the primary actor in the drama: “The State of Georgia [sent] its police into a private bedroom.” 94 “Georgia threatens to punish . . . .” 95 “Georgia [reads] Griswold.” 96 “Georgia argues . . . .” 97 “Georgia alludes . . . .” 98

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88 Ideally, a lawyer might hope to convince readers that sodomy is not a violent, immoral act, but as a matter of strategy in 1986, that hope might not have been feasible.
89 Id. at 4.
90 Id. at 19.
91 Id. at 9.
92 Id. at 14.
93 The Court had already struck Georgia’s attempt to criminalize the purely private possession of obscene materials within the home, Stanley v. Georgia, 394 U.S. 557, 559 (1969), and for years, the Court had been watching and participating in civil rights cases arising throughout the South.
94 Brief for the Respondent, supra note 82, at 1.
95 Id. at 5.
96 Id. at 10.
“Georgia has never explained . . .”. Instead of referring to what “the statute” does or says, the brief seldom misses a chance to personalize, casting “Georgia” as the bad actor in this drama.

The story has protagonists and an antagonist, but the story needs someone or something to rescue or protect. One analysis would cast the right to privacy as the talisman still precariously held by the protagonists but in great danger of destruction by the State of Georgia. This talisman alone provides protection against Georgia’s violation of its citizens, who will otherwise be defenseless against the power of the State. Georgia has mounted a forceful campaign to remove the right and neutralize its protective power. The battle’s purpose is to keep the talisman and its protection in the hands of those who need it.

The concept of the talisman is an easy fit here and works more than adequately to explicate the narrative in the legal argument, but another possible analysis adds interesting narrative dimensions. The Right to Privacy might be seen as a character rather than as a tangible thing; it may, in fact, function as the archetypal Divine or Magic Child. The Magic Child is young, small, and vulnerable, even powerless. She often comes from an unlikely source, such as low social status or some kind of scandal. In the archetypal story, evil forces are out to kill the Divine Child, but if the Child can be saved, she proves to have the power to save or transform us all. There is often an element of surprise in the Child’s power to save. The protagonists may initially be acting for important but less grand reasons, such as the “mere”

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97 Id. at 7.
98 Id. at 27.
99 Id. at 13.
100 The capitalization here is meant to reflect a mythical status approaching divinity in the sense of the Greek or Roman gods. – in other words, as one god among many others (other important Constitutional rights).
101 The Divine Child is an exception to the general principle that a character must be able to will, feel, and act. The whole narrative function of the Divine Child, prior to the climax and resolution, flows from the Child’s inability to act. See supra note 28.
protection of a child. Only as the story progresses do we learn that what is at stake here is much bigger than the safety of one small character.

Culturally, we see the Divine Child in myths such as those surrounding the births of Jesus and Moses. Both Jesus and Moses were powerless infants, completely vulnerable. Both came from unlikely origins, including low social status and, in the case of Jesus, a scandal. Strong forces are out to hurt both, but both are saved and protected by a small, brave group. Then each proves to have the power to save or transform the larger group.\(^{102}\)

At the time of Moses’ birth, the Israelites were slaves in Egypt. Fearing eventual revolt, the Pharaoh ordered the killing of all newborn Israelite boys. Moses’ mother and sister placed him in a basket and set him loose in the river. He was found by the Egyptian princess, who raised him as her own. As an adult, Moses led the Hebrews out of slavery and to the safety of their own land.\(^ {103}\) Remarkably similar myths surround the births of other mythic figures such as Gilgamesh;\(^ {104}\) Romulus and Remus;\(^ {105}\) Perseus;\(^ {106}\) Paris;\(^ {107}\) and King Sargon of Akkad (Assyria).\(^ {108}\)

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\(^{103}\) Exodus 1:1 - 40:38.

\(^{104}\) In one of the earliest known works of literature, an oracle declares to the King of Babylon that his grandson, Gilgamesh, will kill him. The King throws Gilgamesh out of a tower, but an eagle breaks his fall. A gardener finds the infant and raises him. Gilgamesh is portrayed as part human and part divine. In adulthood, he built the legendary walls of Uruk, protecting his people from attack. N.K. Sandars, The Epic of Gilgamesh, (Penguin Books 1972).

\(^{105}\) Romulus and Remus were the twin sons born of the seduction of a vestal virgin by Mars, the god of war. Their uncle, King Amulius, ordered them killed, but a servant placed them in a basket and laid them beside the Tiber River, which carried them away. The infants were later found and cared for by a shepherd, who raised them as his own. In adulthood, Romulus became the King of Rome, and was deified as the divine persona of the Roman people. Pierre Grimal, Dictionary of Classical Mythology (Penguin Books 1990).

\(^{106}\) Perseus was the son of Zeus and the only daughter of the King of Argos. A prophesy warned that the King would be killed by his grandson, so the King placed mother and child into a wooden chest and cast them into the sea. They washed up on shore and were taken in by fishermen, who raised the boy. In adulthood, Perseus founded Mycenae and was the first of the mythic heroes of Greek mythology.

\(^{107}\) Paris was the son of Priam, the King of Troy. A seer foretold that the child would be responsible for the downfall of Troy. The King ordered Paris left exposed on Mound Ida, but he was saved and raised by herdsmen. As a young man, he was rediscovered at a festival in his own honor, a festival honoring the “hero-baby” who had
Jesus was conceived by Mary, an unmarried woman engaged to the carpenter Joseph. Rather than break the engagement and risk the lives of mother and child, Joseph proceeded with the marriage. Just after Jesus was born, sages told King Herod that a future king had been born in Bethlehem. Fearing eventual overthrow, Herod ordered the killing of all infant males in Bethlehem. Joseph was warned in a dream, however, and the couple took the child Jesus and fled to Egypt. Some years later, after Herod’s death, the family returned to Bethlehem.\textsuperscript{109} Jesus grew to be a great teacher and healer and is regarded by Christians as the incarnation of God.

Modern versions of archetypal stories often include a Magic Child component as well. For instance, at the cost of her own life, Harry Potter’s mother saves the infant Harry from Voldemort. Then other brave caretakers protect him during his childhood. As he grows, Harry develops unusual powers, which he ultimately uses to save the wizard world from Voldemort’s brutal domination. Another modern example is the story of the American cultural icon “Superman,” a story notably like the ancient stories of Moses, Romulus and Remus, Gilgamesh, Perseus, Paris, and Sargon. “Superman” was born on Krypton. As an infant named Kal-El, he was saved from his planet’s destruction when his father put him in a rocket and sent him to Earth. There he was found and adopted by a simple farming couple, who raised him with a new name, Clark Kent. It soon became apparent that he possessed superhuman powers, which he used to protect humanity.\textsuperscript{110}

\textsuperscript{108} One text relates that Sargon was the illegitimate son of a priestess and an unknown father. After his birth, his mother placed him in a basket of rushes and put him in the river. The river took him to Akki, a drawer of water, who raised Sargon as his own. In adulthood, Sargon became the emperor of Mesopotamia. L.W. King, \textit{Chronicles Concerning Early Babylonian Kings II} 87-96 (1907).

\textsuperscript{109} \textit{Matthew} 1:1 – 2:18.

\textsuperscript{110} The modern film version is \textit{Superman} (Warner Bros. 1978).
So is there a Divine Child in Michael Hardwick’s brief? If Lakoff and Johnson are right that people reify ideas, then a constitutional principle or an important case holding might be cast as a Divine Child. Like the archetypal Divine Child, a Constitutional doctrine is not able to protect itself. But if citizens and the Court protect the doctrine, it will ultimately protect and save each and every citizen. The Hardwick brief may cast the right to privacy as the Divine Child. The argument quotes Justice Harlan’s reference to liberty under the Due Process Clause as “a living thing.”\(^{111}\) It establishes the right’s supreme importance by quoting Justice Brandeis:

> This case is thus about the very core of that “most comprehensive of rights and the right most valued by civilized man,” namely, “as against the Government, the right to be let alone.”\(^{112}\)

Like the archetypal Child, the right is very young, having been born only a few months earlier in the decision below. It is especially vulnerable precisely because of its recent birth. It is not a doctrine of long-standing, which would be harder to overturn. Rather, the Court could simply reverse the holding below. It would not need even to overturn an established holding from an earlier case.

Also like the archetypal Child, the Right was associated in the 1980’s with a situation of low social status tainted with scandal. It was invoked to protect the world of alternative sexualities, driven underground by the law and therefore necessarily often enacted in metaphorically dark places in the company of the scorned and the outcast.\(^{113}\) But again like the myth of the Magic Child, the right to privacy has the power to transcend particular situations and to extend its protection to all who need it. Throughout the argument are nearly constant implied images that any of us could be next, that Georgia’s police could soon be invading our own

\(^{111}\) Id. at 8, citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
\(^{112}\) Id. at 7, quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
\(^{113}\) Scenes in the movie MILK paint a dismally instructive picture of the consequences of the law’s treatment of LGBT communities during this time frame. MILK (Universal Pictures 2008).
bedrooms. The argument describes the issue as what Georgia can do to its citizens rather than what it has done to Michael Hardwick. The brief speaks of bedrooms (plural). It reminds us that the statue applies to any “two willing adults -- whether married or unmarried, heterosexual or homosexual – who have secluded themselves behind closed bedroom doors in their own home.”

It makes ample use of plural first-person pronouns: “such casual state control of our most private realm”; “our government cannot lightly trespass in the intimacies of our sexual lives – whether or not our conduct of those intimacies at any given moment involves a choice about conceiving a child.”

“When we retreat inside that line [the door of our homes] . . . .”

“The home not only protects us from government surveillance, but also ‘provide[s] the setting for . . . intimate activities . . . .’”

“The home surely protects more than our fantasies alone.”

Thus, protecting the right to privacy here will protect each reader as well.

Whether this rescue story is a struggle over protection of a talisman or a Divine Child, the battle is intense. The right to privacy is under attack by the Evil Antagonist (the State of Georgia). The doctrine is utterly unable to protect itself. A small band is working to protect it. Ultimately, the only savior is the story’s Champion, the Supreme Court, who is asked to come to the rescue. The archetype promises that if this Champion will here protect the right to privacy, the right will survive to protect us all.

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114 Id. at 5. Id. at 15-16 (quoting Oliver v. United States, 466 U.S. 170, 179 (1984)). “The home surely protects more than our fantasies alone.” Id. at 16.
115 Id. at p. 6.
116 Id. at p. 12.
117 Id. at 15.
118 Id. at 15-16 (quoting Oliver v. United States, 466 U.S. 170, 179 (1984)).
119 Id. at 16.
This masterful brief very nearly won. The decision was five-to-four, and Justice Powell vacillated throughout the deliberations.\textsuperscript{120} When asked about the decision just four years later, Powell said “I think I probably made a mistake on that one.”\textsuperscript{121} Asked for clarification, he said “When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments.”\textsuperscript{122} Had Justice Powell gone the other way, the right to privacy in intimate relationships would have been established in 1986, long before Lawrence v. Texas.\textsuperscript{123}

**Telling Stories About Law**

Unearthing the stories beneath these legal arguments expands our academic understanding of how law develops. But the implications of legal narratives are even greater if these alternative stories operate differently in legally significant ways. As it turns out, that is in fact the case.

Birth stories and rescue stories each have particular limitations and each bring particular advantages to the task of persuasion\textsuperscript{124} and thus to the development of law. A foundational difference is that a birth story, by definition, calls for a change in the law, while a rescue story positions itself as asking for protection for the status quo. A birth story, then, is a way to make a call for change seem more conservative. This is no revolution, says the analysis. This is merely the culmination of a normal process in which the law has been engaged for a long time. This

\textsuperscript{120} JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 513-530 (Scribner’s Sons 1994).
\textsuperscript{121} Id. at 530.
\textsuperscript{122} Id.
\textsuperscript{124} Any written legal analysis in a litigation setting has the purpose of persuading, including the analysis in a judicial opinion.
normal, natural process is moving the law in a trajectory toward a future that has been envisioned from the start. In a birth story, there is nothing unusual or alarming about that forward movement. In fact, the end result of the natural developmental process is nothing more than our path toward establishing an anticipated steady state, the proper “legitimate ordinary.” In a narrative sense, a birth story allows the narrator to use the idea of a steady state even when it does not yet exist.

The resolution for a rescue story, on the other hand, is reaffirmation of the status quo. In a rescue story, the antagonist is the character seeking change. The story uses a steady state/trouble plot structure, so it can position itself as even more conservative than a birth story. Such a story does not ask for change; it asks only for the return to normal, legitimate, ordinary life, a request that seems little enough to ask.

A related point of comparison is how the two stories treat current law. As Miranda’s brief demonstrates, a birth story deemphasizes inconvenient current law. In fact, the story can make current law almost disappear in the course of the narrative sweep from the distant past to a seemingly preordained future. A rescue story, on the other hand, bolsters current law, arguing that it is, in fact, vital to the shared enterprise and the welfare of many. Those attacking it are seeking to remove its protections, perhaps disregarding the careful developmental work that resulted in the existing normative legal standards.

125 As my good friend Jack Sammons points out, the kind of birth we speak of here is not so much the creation of a new life but rather the gradual uncovering of what has been there all along. The Enlightenment continues.
126 AMSTERDAM AND BRUNER, supra note 5, at 113.
127 One of the most interesting rhetorical moves of Hardwick’s brief was its treatment of the Eleventh Circuit’s opinion as the legal status quo. See supra text accompanying notes 84-85. A rescue story might work even better where the existing law had a life span of longer than several months and had been declared or at least implicitly accepted by the court now considering the case.
128 See supra text accompanying notes 40-43.
The source of the desired outcomes and the degree of their implied legitimacy differ as well. For a rescue story, the litigants are in a battle, which places them initially in a rhetorically equal setting. The simple fact that a battle is occurring gives no narrative hint of how the battle should end. A leaning in favor of protection arises once a reader begins to relate to the battle as a rescue story, but because that leaning does not seem preordained, it must be bolstered substantially by an affirmative case showing the goodness and importance of the talisman or Magic Child.\textsuperscript{129} A birth story, too, must also be accompanied by an affirmative case, but in a birth story, the legitimacy of the desired outcome (the culmination of the birth of a particular doctrine) is embedded in the narrative. And since this assumption happens outside the reader’s notice, it is less subject to resistance from the reader.

The stories also differ in the degree to which they must remain mired in hand-to-hand combat. A birth story need not rely primarily on casting two opposing forces. It can rise above the fray of the litigation, leaving behind much of the mud-slinging and ugliness of battle, and therefore reducing the focus on the opposing arguments. It can work instead in the much more abstract, rarified setting of law creation, transcending the current case and inviting the reader to join in a larger effort. A rescue story, however, nearly always takes place in the context of a heated battle, and taking a side means participating on a battlefield.

On a closely related point, the reader of a birth story may not have to choose sides quite so blatantly since the story does not rely primarily on casting opposing forces. A reader has already participated implicitly in the creative effort by imagining the end result of the birth process. Therefore, on some level, the reader has already been cast as a part of the protagonists’

\textsuperscript{129} Of course every legal analysis should make such an affirmative case. Both Miranda’s and Hardwick’s case did an excellent job of making this corresponding affirmative case. The question here is how much groundwork for that affirmative case can be laid by the story itself.
creative effort. Rather than listening to a dispute from the narrative perspective of a removed arbiter, the story casts the reader as having joined the creative team long ago. This assumption, too, happens outside the reader’s notice and therefore is less susceptible to resistance from the reader.

The stories differ in the degree to which they can distance themselves from litigants with whom a reader may have trouble identifying. A birth story is about the completion of an historic process. A reader can be invested in the process without identifying particularly with a group of litigants, so there is less pressure on the narrator to successfully characterize a particular group as worthy of protection. Judges as characters draw attention away from the litigants. For instance, in Miranda’s brief, one almost feels that the State of Arizona is litigating against Justices Douglas, Brennan, Frankfurter, and Stewart rather than against Ernesto Miranda, a convicted felon with a long rap sheet. A rescue story, however, depends more on the reader’s acceptance of the need for protection. Characters must be cast as good guys and bad guys, which may not always be easy and may be less persuasive when the court has a natural tendency to identify more with one side than the other. It may be more important, then, for a rescue story to broaden the group in need of protection by the talisman or Magic Child, as the brief in Hardwick did so effectively.\(^\text{130}\)

Finally, the two kinds of stories differ in their relative ease of creating the necessary dramatic tension. A birth story must do extra work to convince the reader that the outcome of the process matters. A reader’s investment in the outcome of a birth story derives from watching a creative process unfold, and the story will have to work hard to keep that process from seeming bland. Ideally, a compelling birth process should be long and difficult, and its direction should

\(^{130}\) See supra text accompanying note 113-119.
be consistent, with almost no backward or sideways steps. The relevant legal authorities may or may not make such a depiction realistically possible. In a battle or rescue story, by contrast, the reader’s investment derives from watching a metaphorically violent struggle, where one side is vulnerable to great harm. Generally, the impulse to protect someone from danger is stronger than an impulse to create someone or something new. The danger in a rescue story makes it seem that there is more at stake. The difference between a weak birth story and a well-told rescue story would be like the difference between watching an artist painting a picture and watching Bruce Willis sweating and bleeding in Die Hard. Bruce Willis is far more riveting, and we are inclined to be much more invested in whether John McClane (Bruce) and his wife Holly (Bonnie Bedelia) live or die.

The idea that unnoticed stories have unnoticed effects on how readers think about legal doctrines may raise significant questions and might even cause us some concern. The formal reasoning a court pronounces may depend, in part, on what story about the law the court finds most compelling. Assumptions about both legal reasoning and jurisprudence may need reevaluation. The scholarly conversation may have to confront (again) the accusation that articulated legal reasoning is merely a disguise for myth-entrenched cultural traditions.

At the very least, the relationship between stories and tools of formal reasoning such as analogy, statutory interpretation, and stare decisis will need clarification. Are they unrelated or

131 Miranda’s brief was able to tell this kind of birth story. See supra text accompanying notes 43-63.
132 Die Hard supra note 78.
133 The resolution of these questions is far beyond the scope of this paper, but it is important to recognize how fundamental these questions may be in understanding the legal enterprise.
134 Unlike the telling of a client’s story, the telling of the law’s story does not sound like what it is. When reading a fact statement in a brief, any court will read with some degree of skepticism, knowing that it is, after all, a story. But in legal argument, a court may not recognize that a story is being told. The court’s narrative antennae may not be raised, so the court may be especially susceptible to unconscious narrative influence.
135 These cultural stories may raise questions of particular interest to feminist legal scholars. For instance, one might wonder about the gender implications of battle and rescue stories as opposed to creation or birth stories.
does one precede and therefore constitute the other?\textsuperscript{136} If myth is the origin of reason, do we still need both?\textsuperscript{137} If we do, what roles should each play?\textsuperscript{138} If each has its own role, how can we evaluate how well that role is performed?

This matter of evaluation raises the even thornier question of truth and falsehood, whatever those terms may mean in the context of narrative. As the New Rhetoricians have taught, the reality we perceive is not simply observed and reported, but rather it is constructed through language.\textsuperscript{139} “[L]anguage neither mirrors nor reveals truth; it defines or makes truth possible.”\textsuperscript{140} If the New Rhetoricians are right, then it is a complicated question indeed to ask whether a story is “true.”\textsuperscript{141}

The topic of this paper assumes a story in which the reported facts (case holdings, statutory content, procedural strategies) are true in a historical sense,\textsuperscript{142} but that kind of truth

\textsuperscript{136} Ernst Cassirer believed that myths precede and culminate in linear thought and understanding. Susanne K. Langer wrote that Cassirer’s “great thesis, based on the evidence of language and verified by his sources with quite thrilling success, is that philosophy of mind involves much more than a theory of knowledge; it involves a theory of prelogical conception and expression, and their final culmination in reason and factual knowledge.” Susanne K. Langer, Preface to ERNST CASSIRER, LANGUAGE AND MYTH x (Susanne K. Langer trans., Dover Publ'ns. 1953).

\textsuperscript{137} Lash LaRue wrote of our yearning for both stories and theories. LaRUE, supra note 4, at 73. He wrote that if story “is one of the fundamental ways to understand the world, then a good story does not need to be replaced by a good theory.” Id. at 149.

\textsuperscript{138} We need rules and theories for good reasons – our hope for fairness and predictability, our desire for certainty and our fear of an unknown future. Gretchen Craft, The Persistence of Dread in Law and Literature, 102 YALE L.J. 521 (1992). We want them because they seem to be more easily tested and evaluated and because we have a lot at stake when we ask legal questions. But we also need stories, even after they have helped us craft a rule or theory, because, as Robert Cover taught, we need narrative’s ongoing paideic reevaluation of legal norms. Cover, supra note 2. See also Edwards, supra note 13.

\textsuperscript{139} “[M]yth, art, language and science appear as symbols; not in the sense of mere figures which refer to some given reality by means of suggestion and allegorical renderings, but in the sense of forces each of which produces and posits a world of its own.” ERNST CASSIRER, LANGUAGE AND MYTH 8 (Susanne K. Langer trans., Dover Publ'ns. 1953).


\textsuperscript{141} “Because arguments are based on language, and because language is susceptible to alternative interpretations, universal proofs are not possible.” Michael R. Smith, Rhetoric Theory and Legal Writing: An Annotated Bibliography, 3 J. ASSN. LEG. WRITING DIR. 129, 139 (Fall 2006).

\textsuperscript{142} Even inaccurate historical facts can tell a story that is as true as any story can be. “[T]he ratio of fact to fiction in a story does not correspond to the ratio of truth to falsehood in that story.” LaRue, supra note 4, at 56. But when lawyers write briefs, they should get their history right, and for our purposes here, we will assume that they have.
does not resolve the question. Facts can be historically true, and yet the story they help to
construct might not be “true.” Stories are true or false, depending not so much on what they say
as on what they omit and what they imply. Since every story both omits and implies some things
and not others, every story is both true and false. In fact, several alternative stories can each be
“true” (and “false”). How then can one tell when omission and implication cross a (perhaps
hypothetical) line from truth into falsehood?

Without doubt, all stories are incomplete. Perhaps, though, we can say a bit more
about what it might mean for a story to be so incomplete as to be troublingly misleading. A story
is incomplete if it omits significant historical facts that occurred during the story’s plot line.

143 “Telling the truth in fiction can mean one of three things: saying that which is factually correct, a trivial kind of
truth . . . ; saying that which, by virtue of tone and coherence, does not feel like lying, a more important kind of
truth; and discovering and affirming moral truth about human existence – the highest truth of art.” JOHN GARDNER,
144 Rather than thinking of truth and falsehood as a binary dichotomy, we should think instead of a continuum,
asking not whether a story is true, but how true it is as compared to how false it is. LaRue, supra note 4, at 128-29.
Better yet, when we talk about stories constructed from accurate historical facts, as we are doing here, perhaps we
should not ask about truth at all, but rather about completeness. How many historical facts are accounted for in this
story and how many are omitted? How many contested interpretations of motive and causation are accounted for
and how many ignored?
145 LA RUE, supra note 4, at 128-29. LaRue admits the difficulty of asking the truth question, and he cautions us to
be careful with those labels. Id. at 128-29. Yet he ventures into this dangerous territory himself when he writes that
the “onward and upward” story of growth in McCulloch v. Maryland is a lie. (“[W]e are tempted to tell sentimental
tales (the path of the law has been onward and upward), and thus lie, because we weaken and give up before we look
in all the places we should look.” Id. at 149. See also Id. at 121-25, 153.) LaRue is, of course, referring here to
stories in judicial opinions, where the writer undertakes a role and a rhetorical task much different from that of the
writer of a brief.
146 For example, Robert Tsai has written that stories of growth “present a political tradition as a coherent and
progressive whole, thereby playing an important part in the continuation of the rule of law, but they occlude the
naturally complicated currents of linguistic development. An inordinate focus on the refinement of rules may lead
one to overlook the contradictions, discontinuities, and reversal in the construction of the political imagination. As a
result, the tale . . . necessarily misses the heuristics and vocabulary that arose to make sense of historical events.
Within these vehicles of constitutional transformation can be found not only the pooled learning of a people, but also
loss and gain, convergence and dissensus, control and resistance.” ROBERT L. TSAI, ELOQUENCE AND REASON:
CREATING A FIRST AMENDMENT CULTURE 49-50 (2008). I would add that stories of creation and birth, closely
related to stories of growth, are incomplete because they assume an end to the birth or growth process.
Conveniently, culmination of the birth process happens to be the result desired in the case, implying that the birth is
accomplished. In law, however, such is never the case.
That kind of incompleteness is the criticism mounted by both LaRue and Tsai. But a story can be incomplete also if it starts too late or ends too early. Suppose, for example, as I suspect is true, that the right-to-life movement relies on the myth of the Magic or Divine Child as its constitutive myth. In that kind of abortion story, the fetus is the Divine Child, placed in mortal danger by the forces of evil whose goal is to kill the Child. The Child has supreme value, making a balancing of interests immoral, unthinkable. But the Child is vulnerable, unborn and therefore unable to defend herself. Only those working against abortion can save the Child, and these faithful protectors must be prepared to endure hardship and danger on her behalf. Extreme members of the movement may even believe that they are called to break the law or kill doctors.

Then notice what happens once the Child is saved from abortion and, perhaps, born into the profoundly difficult situation that may have prompted thoughts of abortion. According to the myth of the Divine Child, the faithful band has finished its job, and its responsibility for the Child’s welfare has ended. By heroic efforts, the protagonists have completed their narrative task and earned the right to go on about their own lives. If one see the abortion question through the lens of the myth of the Divine Child, as many of its opponents do, it is easy to feel no further responsibility once the child is born. Anti-abortion demonstrators often stand on the steps of the Supreme Court pressing for an end to abortion. How often do they stand on the steps of legislatures or take to the streets pressing for infant healthcare and preschool programs? Seldom, I fear, because those concerns lie outside their story. Their job is done at birth.

The abortion story’s premature ending demonstrates the importance of becoming more aware of the narratives through which we see the world. The point here is not to say that abortion opponents are either right or wrong. It is only to suggest that the movement’s dominant narrative

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147 LA RUE, supra note 4; TS AI, supra note 146.
obscures important responsibilities because they fall outside the constitutive archetype. All of us are vulnerable to these kinds of omissions in the myths through which we see the world. The more able we are to notice that we are standing within a story, indeed, that we are characters in that story ourselves, the more able we will be to ask what the story omits. We could ask whether there are other, more complete stories – stories that do a better job of accounting for important facts. That kind of narrative awareness would bring a freedom to think more broadly, deeply, and clearly about the legal issues we encounter, and it would make the lawyers and judges who do the law’s work far more skillful rhetors.

CONCLUSION

This article has unearthed two master narratives and some unexpected characters in the legal analyses from the landmark briefs in *Miranda v. Arizona* and *Bowers v. Hardwick*. These legal characters and plots are disguised in the routine language of law talk, but their impact is all the more effective for that. Because narrative’s power in the sacred domain of legal authority is so effectively hidden, the law needs a well-honed narrative sensibility -- a narratology, in fact.

We need a narratology for at least two reasons. First, discomfort with narrative’s influence might tempt us to deny that narrative plays a role in the analysis of authority, but ironically, that very denial would leave narrative’s influence largely unchecked. Narrative is powerful, and any powerful influence not well understood can be dangerous. But this is no more

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149 Brief for the Respondent, *supra* note 82.
true of narrative than it is true of unthinking overreliance on rule articulations or abstract policy or strained analogies. Narrative’s power is all the more reason to understand it well, so we can use it well.

And narrative does have a constructive role. Legal rules and doctrines give us stability and some hope of applying the law consistently, but narrative gives the law its life. It provides both the narrative soil from which rules and doctrines grow and an ever-present measuring rod to be sure the law is still doing its job. We need a narratology so we can let narrative do its life-giving work in the legal world. We must learn to recognize the stories through which we see that world and interrogate them bravely and without blinking. If we do, we will see that, like the cowboys and the farmers of the Old West,\textsuperscript{151} narrative and formal legal reasoning can be friends,\textsuperscript{152} and our understanding and use of legal authority will be the better for it.

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\item[151] OKLAHOMA! (RKO Radio Pictures, Inc. 1955).
\item[152] Edwards, \textit{supra} note 13.
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