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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

¹ Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. I am especially grateful to Tony Amsterdam, Jerome Bruner, and the other faculty at the Persuasion Institute, where so many rich conversations have deepened my understanding of narratives in law. This particular project has been improved further by comments from a set of generous readers, including Linda Berger, Dan Edwards, Lynne Henderson, Bill Krier, Joan Magat, Jay Mootz, Teresa Phelps, Terrill Pollman, David Ritchie, Jack Lee Sammons, Elaine Shoben, Kathy Stanchi, James Boyd White, and Steven Winter. These kind readers are innocent of all mistakes and errors of judgment that may remain. I am grateful to American University’s Washington College of Law for inviting me to speak at its 2007 Law and Rhetoric Conference, where I first presented on this topic. I also want to thank the conference attendees of the 2010 Annual Meeting of the Association for the Study of Law, Culture & the Humanities, Brown University, and the Rocky Mountain Legal Writing Conference, Arizona State University College of Law, and the law faculties of the Boyd School of Law, the University of Nevada Las Vegas; Mercer University; Seattle University; and the Thomas Jefferson School of Law, whose comments have proven extraordinarily helpful.

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.”).

³ JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (Little, Brown, 1973).

that the law has stories.⁴ I do not mean that *clients* have stories. We have long known that client stories are crucial in litigation. Lawyers and judges hear, transform, and re-present those stories in fact statements of briefs and judicial opinions. But later in those same documents, lawyers and judges also tell stories about the law itself.⁵ There, in discussions of cases and statutes, are 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 that do their narrative work beneath the surface of routine law talk and lead straight to the conclusions that become the law.⁶

Discussions of law do not *sound* like stories, of course. They state an issue, cite authority, and purport to rely on a legal rule. But when we talk about legal authority, using the logical forms of rules and their bedfellows of analogy, policy, and principle, we are actually swimming in a sea of narrative, oblivious to the water around us. The idea that narrative pervades the analysis of legal authorities 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.

This article teases out several familiar myths often hidden in discussions of legal authority. These myths are simultaneously true and false, world-shaping yet always incomplete. The choice of which stories we tell about the law matters greatly. Why? Because we so seldom

⁴ Over the years, we have been given further notice, with Milner Ball's LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY (1986); Lash LaRue's CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995); Tony Amsterdam and Jerry Bruner's MINDING THE LAW (2000); and Steven Winter's A CLEARING IN THE FOREST (2001). But despite the work of these great minds, the law's own stories still are seldom explored.

⁵ 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.

⁶ See LARUE, *supra* note 4.

question familiar narratives,⁷ and these myths practically run in our veins. We would be wise to learn to recognize and interrogate these stories, attuned to their truths, alert to their limitations, and ready, when necessary, to seek other more accurate and complete stories for the law.⁸

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 rhetorical 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 analysis should include the advocates' briefs; in fact, it should start there.¹⁰ In keeping with that goal, the following pages will explore the birth story from the Petitioner's Brief in *Miranda v. Arizona*¹¹ and then the rescue story from the Respondent's Brief in *Bowers v. Hardwick*.¹² The final section of the article will compare the differences in the ways these two stories function and identify some of fundamental questions raised by the idea that narrative plays an important, hidden role in shaping our view of legal authority. First, though, it will be helpful to review

⁷ See WINTER, *supra* note 4, ch. 5.

⁸ LARUE *supra* note 4, at 20. Peter Brooks has called for just such a study of legal narratology. Peter Brooks, *Narrative Transactions – Does the Law Need a Narratology?* 18 YALE J.L. & HUMAN. 1 (2005).

⁹ That was, for instance, LaRue's rhetorical project in analyzing *Marbury v. Madison*, 1 Cranch 137 (1803), and *McCulloch v. Maryland*, 4 Wheaton 316 (1819). LARUE, *supra* note 4; *but see, e.g.*, Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994), reprinted at 6 J. A.L.W.D 88 (2009).

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). Perhaps the point here is that storytelling is rarely a matter of invention; it almost always draws on stories that have been told before.

¹¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹² *Bowers v. Hardwick*, 478 U.S. 186 (1986).

some basic concepts about story structures, cultural myths, and how metaphor works when we think about law.

Stories, Myths, and Metaphors

We have known for some time that stories are among the primary ways of making sense of the world, including the world of law.¹³ A story's two most important components for doing this formative work are character and plot.¹⁴ At the very least, a story needs a protagonist, an antagonist,¹⁵ and a difficult challenge to overcome.¹⁶ Something important must be happening, some narrative movement from an inadequate state of affairs to a resolution of that inadequacy, taking place over a period of time.

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. Journey stories, for example, often use this structure. The opening scene may find the protagonist far from home, facing a long journey. Homer's epic poem, the *Odyssey*, is a

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. 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 4, at 113 (emphasis omitted); see also LARUE, *supra* note 4, at 133 (relying on Kenneth Burke's well-known pentad: the actor, the act, the scene, the instrument, and the goal).

¹⁵ The antagonist might not be a character in the sense that Amsterdam and Bruner define it, that is, a person or entity with feelings, intentions, and will. The antagonist could be a natural resistances or forces, such as fire, flood, storm, draught, disease or entropy.

¹⁶ Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1988-1989).

prototypical example. 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 as he undertakes the ten-year journey back to Ithaca and to his family there.¹⁷

In other stories using this 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.¹⁸

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 of an important task or the restoration of the normative world. As the story progresses, a reader will be watching the struggle and rooting for the protagonist throughout her efforts to reach her destination or complete her project.¹⁹

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

¹⁷ HOMER, *THE ODYSSEY*, (Robert Fitzgerald trans., Farrar, Straus and Giroux 1998). Another example is the story of the Israelites' journey to return to Abraham's homeland, told in *Exodus*. Modern incarnations are Gene Roddenberry's television series, *Star Trek: Voyager*, where captain and crew find themselves 70,000 light-years from Earth and must make the long journey home, *Star Trek: Voyager* (UPN television broadcasts 1995-2001); and the epic poem *OMEROS* by Nobel Prize-winning author Derek Walcott, where after many trans-Atlantic journeys, the narrator returns to a home he now sees in new ways. *OMEROS* (Farrar, Straus and Giroux 1990).

¹⁸ *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* (20th 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.

¹⁹ Winter, *supra* note 16.

be. This initial stable world enters a stage of disequilibrium, however. Amsterdam and Bruner speak, for instance, of a “steady state” followed by “trouble.”²⁰ The steady state is, by definition, legitimate -- the legitimate ordinary.²¹ In narrative terms, whatever disrupts a steady state is bad.²² 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).²³ 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.²⁴

Client stories easily lend themselves to such plot structures.²⁵ For instance, in *Bowers v. Hardwick*,²⁶ 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 Hardwick to the safety and sanctity of his home (the restoration).²⁷

²⁰ AMSTERDAM & BRUNER, *supra* note 4, at 113.

²¹ *Id.*

²² A steady state/trouble/resolution structure is inherently conservative, making the unstated assumption that life is 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.

²³ *Id.* For an interesting application of this story structure to a legal brief, see Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEG. WRITING 127 (2008).

²⁴ 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 *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).

²⁵ Chestek, *supra* note 23; 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 U. L. REV. 767 (2006).

²⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

²⁷ After Hardwick’s arrest, Attorney General Michael Bowers decided not to proceed with prosecution, but Hardwick remained vulnerable both to prosecution on the original charge and to further police invasions of his home. *Id.* at 187-88.

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. Metaphor can help provide all of these elements of the story.²⁸ As Lakoff and Johnson have demonstrated, we think about abstract ideas in metaphors.²⁹ 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.³⁰ 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.³¹ This understanding of metaphor reveals something important about the law's stories: Characters can be entities, like courts or legislatures or prosecutors' offices or even abstract concepts, like a principle or a policy, a statute or a case holding.³² So there might be characters in a legal discussion after all, and those characters might be doing something – something that might amount to a plot.³³

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

²⁸ 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.

²⁹ 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).

³⁰ WINTER, *supra* note 4.

³¹ See LAKOFF & JOHNSON, *supra* note 29, at 3-6.

³² Normally, a character must be capable of will, emotion, and intention. Amsterdam & Bruner *supra* note 4, at 113. There are exceptions, however. The antagonist might be a natural resistance or force. *Supra* note 15. We will see another example in the Respondent's Brief in *Bowers v. Hardwick*, where the right to privacy plays the role of a key character. See *supra* text accompanying notes 120-130 and note 109. In fact, will and emotion may be considered secondary phenomena. The metaphorical personification is what counts. Winter, *supra* note 4, at 129-131.

³³ “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 29, at 25. I would add that we can tell stories about them as well.

archetype or other master story.³⁴ 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.³⁵ 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.³⁶

Myths provide ready templates for both characters and plots.³⁷ 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.³⁸ 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, too, provides a ready stock of characters to "people" those plots with champions, children, tricksters, mentors, kings, mothers, demons, and sages. These

³⁴ 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).

³⁵ The difference would matter much more if the reader and the writer did not share a common cultural heritage.

³⁶ Scholars of cognitive science have long known that human perception is largely an act of construction, during which the brain both interprets new stimuli in the context of preexisting knowledge and actively fills in missing information by inferences based on existing knowledge. We expect to see X, and therefore, we see X. See, e.g., ELLEN WINNER, *INVENTED WORLDS: THE PSYCHOLOGY OF THE ARTS* (1982). For additional material on relevant principles of cognitive science, see Michael J. Higdon, *Something Judicious this Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. Richmond L. Rev. ____ (2010); and Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411 (2006).

³⁷ 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.

³⁸ Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007).

character templates also stand ready, inviting us to cast both people and things in particular archetypal roles.³⁹

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 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.⁴⁰ 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 stories⁴¹ 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. There are a number of common myths about the law, and

³⁹ Archetypes can operate in the surface story that prompted the litigation as well. See, e.g., Robbins, *supra* note 25.

⁴⁰ Because the process of story creation is usually unconscious, the reader believes that her perception is her own idea, not an idea someone else (the writer) is pressing upon her. The persuasive effect of such unconscious perception is far greater than the persuasive effect of an expressly stated thesis. Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. CONSUMER RESEARCH 225 (1988); Higdon, *supra* note 36; Stanchi, *supra* note 36.

⁴¹ The operation of cultural myths and archetypes in human perception is consistent with schema theory in cognitive science. A schema is an underlying conceptual framework composed of a cluster of facts or ideas that have been associated together and stored in memory as a unit. Robert S. Wyer, Jr. & Dolores Albarracín, *Belief Formation, Organization, and Change: Cognitive and Motivational Influences*, in THE HANDBOOK OF ATTITUDES 273, 280, (Dolores Albarracín, Blair T. Johnson & Mark P. Zanna eds., 2005). One of the primary effects of a schema is its role in obscuring other possible schema. Higdon, *supra* note 36 at ____.

this article will consider two of them: birth and rescue.⁴² First, the birth story told in the Petitioner’s Brief in *Miranda v. Arizona*.⁴³

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 story⁴⁴ – 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.⁴⁵

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. It would seem that there is no plot, no action, nothing happening there. The discussion forgoes 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 argument may have presented the current law as the steady state,

⁴² Other common myths about the law are creation or birth; rescue; quest; slayer; journey; trickster; and betrayal. Future articles will examine some of these 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, however, because these myths commonly use different plot structures and therefore are available in distinctly different legal situations. Birth stories begin in narrative motion and seek change in the law, while rescue stories often begin with a steady state and seek reaffirmation of current law.

⁴³ 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.

⁴⁴ See *supra* text accompanying note 10.

⁴⁵ 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 43, at 34-35.

the “legitimate ordinary.”⁴⁶ Having done so, the writer now must unseat her own implicit narrative admission that the current law is legitimate.

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.”⁴⁷ Notice the narrative move in that first sentence. It takes us⁴⁸ 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.⁴⁹ 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.⁵⁰ The narrative pace is steady. One after another come the cases the Court has decided: *Johnson v. Zerbst*,⁵¹ *McNabb*,⁵² *Upshaw*,⁵³ *Mallory*,⁵⁴

⁴⁶ See *supra* text accompanying notes 20-23. A brief might attempt to avoid this problem, perhaps by presenting current law as the antagonist, the force against which the protagonist must struggle, see *Chestek supra* note 23, but strategically, it would be better, if possible, to find a more positive way to portray current law.

⁴⁷ Brief for the Petitioner, *supra* note 43, at 11.

⁴⁸ Studying the brief’s legal story is best done by letting the story do its work on us, the brief’s students, 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 a 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).

⁴⁹ See *infra* text accompanying note 70.

⁵⁰ Brief for the Petitioner, *supra* note 43, at 11-33.

⁵¹ *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁵² *McNabb v. United States*, 318 U.S. 332 (1943).

⁵³ *Upshaw v. United States*, 335 U.S. 410 (1948).

⁵⁴ *Mallory v. United States*, 354 U.S. 449 (1957).

Powell,⁵⁵ *Brown*,⁵⁶ *Chambers*.⁵⁷ Metaphorically, we can almost see the Court fashioning each new facet of the doctrine. The story brings us then to *Haley v. Ohio*,⁵⁸ and here the pace slows. 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.⁵⁹

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.”⁶⁰ When a reader sees a gap in a story, the reader wants to fill in that gap,⁶¹ and that, of course, is exactly what John Frank wants the present Court to do.

After identifying the gap, 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.⁶²

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

⁵⁵ *Powell v. Alabama*, 287 U.S. 45 (1932).

⁵⁶ *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁵⁷ *Chambers v. Florida*, 309 U.S. 227 (1940).

⁵⁸ *Haley v. Ohio*, 332 U.S. 596 (1948).

⁵⁹ Brief for the Petitioner, *supra* note 43, at 21.

⁶⁰ Brooks, *Storytelling Without Fear*, *supra* note 10, at 117.

⁶¹ LARUE, *supra* note 4, at 137.

⁶² Brief for the Petitioner, *supra* note 43, at 21-22.

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 stage⁶³

Notice that since the discussion of *Haley v. Ohio*,⁶⁴ 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*⁶⁵ 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.⁶⁶

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.”⁶⁷ 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 [procedural] circle by applying the principle of his own 1938 opinion of *Johnson v. Zerbst* to state proceedings. . . . It

⁶³ *Id.* at 23.

⁶⁴ See *supra* text accompanying notes 58-61.

⁶⁵ *Betts v. Brady* had held, in part, that the Sixth Amendment did not apply to state criminal proceedings. 316 U.S. 455, 464 (1942).

⁶⁶ Brief for the Petitioner, *supra* note 43, at 25-26.

⁶⁷ *Id.* at 26.

follows that, so far as the Sixth Amendment is concerned, after March 18, 1963,⁶⁸ there is no difference between the right to counsel . . . in the two court systems.⁶⁹

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. *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.⁷⁰

Here is the drum-roll. The legal discussion goes on to offer policy reasons⁷¹ 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

⁶⁸ 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.

⁶⁹ Brief for the Petitioner, *supra* note 43, at 27.

⁷⁰ *Id.* at 28.

⁷¹ 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.

fullness – of time, when the crucial decision will be made. The long story of the law has met Ernesto Miranda’s case.⁷²

In this story, every part of the doctrine has been added except one. But that last part – Miranda’s part – need not be created from whole cloth, because to listen to a creation story is to have already imagined the fully developed doctrine the characters are creating.⁷³ 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,⁷⁴ and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused.⁷⁵

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.⁷⁶

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

⁷² “Situation 5 is that presented in the instant case.” *Id.* at 28.

⁷³ For an excellent discussion of the cognitive science behind this kind of narrative foreshadowing, see Higdon, *supra* note 36.

⁷⁴ “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.

⁷⁵ Brief for the Petitioner, *supra* note 43, 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.

⁷⁶ *Id.* at 6.

action happening anywhere in the discussion.⁷⁷ 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 policy arguments instead of with a story that encodes the argument’s message: that the process must be completed – as any birth process must be completed -- with the right to counsel fully and finally recognized.

Frank’s argument is a creation or birth story, a primary archetype.⁷⁸ 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”⁷⁹ and later refers to the “birth”⁸⁰ 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 judges⁸¹ 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. In fact,

⁷⁷ 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 may already imply.

⁷⁸ A case can be made for a journey narrative as well. Creation and journey narratives share a common metaphorical structure. 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. We might think of creation and journey as 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 scientific precision. The critical point is the metaphorical structure, which is the same in these two myths. Each tells the story of a long process of setting the world right somehow. These metaphorical structures are sufficiently generalized to allow for many instantiations. See Winter *supra* note 4 at 130.

⁷⁹ Brief for the Petitioner, *supra* note 43, at 30.

⁸⁰ *Id.* at 30

⁸¹ 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.

Will the work be completed? As we hear the story of the 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. The climax is not resolved in the brief, of course. If it were, 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.⁸²

***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 explicitly narrational.⁸³ A series of key events are set out in the order of their occurrence, as challenges are faced and overcome. 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 reciting a series of historical events as on presenting particular kinds of

⁸² *Miranda*, 384 U.S. at 499.

⁸³ The same is true for a journey story, which also relates events in chronological fashion, moving toward a preordained future.

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 supply 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 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.⁸⁴ 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.⁸⁵

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.⁸⁶ 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

⁸⁴ VALMIKI, *THE RAMAYANA* (Arshia Sattar trans., Penguin Books 1996).

⁸⁵ OVID, *METAMORPHOSES IV*, in RHODA A. HENDRICKS, *CLASSICAL GODS AND HEROES: MYTHS AS TOLD BY THE ANCIENT AUTHORS 97-99* (Perennial 1972). A modern example is the story of John McClane's rescue of his captured wife, Holly, and her co-workers in the film *DIE HARD* (20th Century Fox 1988). A darker and less transparent example is the David Lynch and Mark Frost story of Special Agent Dale Cooper's entry into the Black Lodge to rescue Annie Blackburn. *Twin Peaks: Beyond Life and Death* (ABC television broadcast June 10, 1991). Teacher stories often operate as stories of rescue. See, e.g., *THE MIRACLE WORKER* (United Artists 1962); *TO SIR WITH LOVE* (Columbia Pictures 1967); and *DANGEROUS MINDS* (Hollywood Pictures 1995).

⁸⁶ Not every story about a talisman is a rescue story with an antagonist vying for control of the talisman. One of the greatest stories about a talisman is the story of the search for the Holy Grail, a story of quest rather than rescue.

brutally oppress Middle-Earth.⁸⁷ 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 warhead⁸⁸ or an important scientific formula.⁸⁹

Whether the goal is to safeguard a talisman or to save a character in danger, the question is the same: Will the protagonists succeed? That is the question posed by Laurence Tribe, Kathleen Sullivan, and Brian Koukoutchos, the authors of Michael Hardwick's brief in *Bowers v. Hardwick*.⁹⁰ In *Hardwick*, the issue was the right to privacy in intimate relationships.⁹¹ Surprisingly, the brief portrays the right as already established. The Eleventh Circuit had recognized the right in the *Hardwick* opinion below,⁹² so Tribe, Sullivan, and Koukoutchos could position the right as the narrative's "steady state." Immediately, though, we⁹³ 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."⁹⁴

⁸⁷ J.R.R. TOLKIEN, *THE LORD OF THE RINGS* (Geo. Allen & Unwin 1954-55).

⁸⁸ *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).

⁸⁹ *THE SAINT* (Paramount Pictures 1997) (the formula for cold fusion).

⁹⁰ 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.

⁹¹ 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.

⁹² *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985).

⁹³ As in the discussion of Miranda's brief, this article uses the intimacy of the first-person to cast us, the brief's students, as the brief's intended readers. *See supra* note 48.

⁹⁴ Brief for the Respondent, *supra* note 90, at 5-6.

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.⁹⁵

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 the act of sodomy⁹⁶ and turns that reaction back on the challenged statute. It casts the State of Georgia as the sodomizer of its own citizens. The act is more than metaphorical sodomy, in fact, because unlike the lovers in the case, the State’s act is violent and nonconsensual. The image recurs throughout the entire legal discussion with phrases like “a law that so thoroughly invades individuals’ most intimate affairs;”⁹⁷ or a law that “intrudes the grasp of the criminal law deep into” such an area;⁹⁸ or the requirement that the government must give “substantial justification to the individual whose personal dwelling it would enter;”⁹⁹ or the “State of Georgia contends that it may extend its criminal authority deep inside the private home.”¹⁰⁰

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 here. Hardwick and his lawyers are the protagonists, struggling to protect

⁹⁵ *Id.* at 5.

⁹⁶ Ideally, a lawyer might hope to convince readers that, in and of itself, sodomy is not a violent, immoral act, but as a matter of strategy in 1986, that hope might not have been feasible.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* at 9.

¹⁰⁰ *Id.* at 14.

the right to privacy. The antagonist is “the State of Georgia,” a character with a flawed reputation before the Court.¹⁰¹ 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.”¹⁰² “Georgia threatens to punish”¹⁰³ “Georgia [reads] *Griswold*.”¹⁰⁴ “Georgia argues”¹⁰⁵ “Georgia alludes”¹⁰⁶ “Georgia has never explained”¹⁰⁷ 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 destroy the right or 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

¹⁰¹ 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 Deep South.

¹⁰² Brief for the Respondent, *supra* note 90, at 1.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.* at 10.

¹⁰⁵ *Id.* at 7.

¹⁰⁶ *Id.* at 27.

¹⁰⁷ *Id.* at 13.

narrative dimensions. The Right to Privacy,¹⁰⁸ 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.¹⁰⁹ 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" 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 even 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.¹¹⁰

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 an 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.¹¹¹ Remarkably similar myths surround the births of other mythic figures such as

¹⁰⁸ 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).

¹⁰⁹ 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* notes 15 and 32.

¹¹⁰ *Exodus* 1:1 – 40:38 and *Matthew* 1:1 – 2:18.

¹¹¹ *Exodus* 1:1 - 40:38.

Gilgamesh;¹¹² Romulus and Remus;¹¹³ Perseus;¹¹⁴ Paris;¹¹⁵ and King Sargon of Akkad (Assyria).¹¹⁶

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 fled to Egypt with the child. Some years later, after Herod's death, the family returned to Bethlehem.¹¹⁷ 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

¹¹² 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).

¹¹³ Romulus and Remus were 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).

¹¹⁴ 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.

¹¹⁵ 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 that Paris be 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 saved Troy by his supposed death. RICHARD P. MARTIN, *MYTHS OF THE ANCIENT GREEKS* 266-69 (New American Library 2003).

¹¹⁶ 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, *CHRONICLES CONCERNING EARLY BABYLONIAN KINGS II* 87-96 (1907).

¹¹⁷ *Matthew* 1:1 – 2:18.

develops unusual powers, which he ultimately uses to save the wizard world from Voldemort's brutal domination.¹¹⁸ 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 subsequently used to protect others in danger.¹¹⁹

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 a line of cases, or even one important case holding might be cast as the character of the Divine Child. Like the archetypal Divine Child, a Constitutional doctrine is not able to protect itself. It is constantly vulnerable to erosion or even destruction. But if citizens and the Court protect the doctrine, it will ultimately protect and save us all.¹²⁰ The Hardwick brief casts 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."¹²¹ 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."¹²²

¹¹⁸ J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (Scholastic 1998); J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (Scholastic 1999); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (Scholastic 1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (Scholastic 2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (Scholastic 2003); J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (Scholastic 2005); J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (Scholastic 2007).

¹¹⁹ The modern film version is SUPERMAN (Warner Bros. 1978).

¹²⁰ In fact, we may so closely identify the doctrine with our own need for privacy in the realm of sexual intimacy that we may think of ourselves as the Child being rescued.

¹²¹ Brief for the Respondent, *supra* note 90, at 8, citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

¹²² *Id.* at 7, quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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 a 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, a world driven underground by the law and therefore relegated to metaphorically dark places and peopled by the scorned and the outcast.¹²³ 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 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 statute 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."¹²⁴ It makes ample use of plural first-person pronouns: "such casual state control of our most private realm"¹²⁵; "our government cannot lightly trespass in the intimacies of our sexual lives -- whether or not our

¹²³ Early black and white scenes in the movie MILK paint a dimly instructive picture of the consequences of the law's treatment of LGBT communities during the time frame leading up to the Hardwick brief. MILK (Universal Pictures 2008).

¹²⁴ Brief for the Respondent, *supra* note 90, at 15-16 (quoting *Oliver v. United States*, 466 U.S. 170, 179 (1984)). "The home surely protects more than our fantasies alone."

¹²⁵ *Id.* at 6.

conduct of those intimacies at any given moment involves a choice about conceiving a child.”¹²⁶ “When we retreat inside that line [the door of our homes]”¹²⁷ “The home not only protects us from government surveillance, but also ‘provide[s] the setting for [our]. . . intimate activities’”¹²⁸ “The home surely protects more than our fantasies alone.”¹²⁹ Thus, protecting the right to privacy here will protect each reader from violation by the State.¹³⁰

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 later protect us all.

This masterful brief very nearly won this difficult case. The decision was five-to-four, and Justice Powell had vacillated throughout the deliberations.¹³¹ When asked about the decision four years later, Powell said “I think I probably made a mistake on that one.”¹³² Asked for clarification, he said “When I had the opportunity to reread the opinions a few months later, I

¹²⁶ *Id.* at 12.

¹²⁷ *Id.* at 15.

¹²⁸ *Id.* at 15-16 (quoting *Oliver v. United States*, 466 U.S. 170, 179 (1984)).

¹²⁹ *Id.* at 16.

¹³⁰ The archetype encapsulates the necessary narrative concept of identification. As Steven Winter explains, “We imagine ourselves as the protagonist and picture ourselves in the protagonist’s shoes as we proceed from introduction to conclusion.” Winter, *supra* note 16. I would add that identification can function also when we imagine the protagonist as someone we care about. *See infra* note 132.

¹³¹ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 513-530 (Scribner’s Sons 1994).

¹³² *Id.* at 530. Jeffries describes how Justice Powell had been unable to understand gay men on a human level. At least twice, he made the remarkable proclamation that he had never known a homosexual. He did not know that he had, in fact, had gay men as clerks in the past and had a gay man as a clerk at the time of the deliberations in *Bowers v. Hardwick*. Because Powell perceived that this clerk was more liberal than the others, Powell had initiated several conversations with him, trying to understand what it meant to be gay. Jeffries reports that Powell was never able to come to terms with homosexuality as “a logical expression of the desire and affection that gay men felt for other men.” *Id.* at 521. In other words, in the case of Justice Powell, the necessary narrative component of identification had failed.

thought the dissent had the better of the arguments.”¹³³ 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*.¹³⁴

Telling Stories About Law

Unearthing the stories beneath the legal arguments in *Miranda* and *Hardwick* expands our academic understanding of how law develops. But our interest in legal narratives is greater than mere academic curiosity 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 persuasion¹³⁵ and thus to the development of law. At the very least, these stories differ in how they treat current law; in the outcomes they desire; in the degree of their implied legitimacy; in the degree to which they require the court to identify with a party; and in the degree to which they can create dramatic tension.

A foundational difference is that a rescue story calls for reaffirming existing law or at least existing policy. In a rescue story, the antagonist is the character seeking change, while the protagonists seek protection for something that already exists, albeit in a vulnerable situation.

¹³³ *Id.* at 530.

¹³⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003). Prior to *Lawrence v. Texas*, the Georgia Supreme Court struck the Georgia sodomy statute as unconstitutional under the Georgia Constitution. Ironically, that case was styled *Powell v. Georgia*, 510 S.E.2d 18 (1998).

¹³⁵ The purpose of any written legal analysis in a litigation setting, including the analysis in a judicial opinion, is to persuade. K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (Oceana Publications, Inc. 1981); Judith S. Kaye, *Judges as Wordsmiths*, 69 NOV. N.Y. ST. B.J. 10 (1997) (“Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade. Lawyers want to satisfy clients and win cases. Judges want to persuade lawyers, litigants, and the community at large that the decision they have made . . . is the absolutely correct one.”); Steven Winter, *Making the Familiar Conventional Again*, 9 MICH. L. REV. 1607, 1636 (2001). Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 260 n. 104 (1990).

The story uses a steady state/trouble plot structure, so it can position itself as conservative, a particularly helpful rhetorical posture.¹³⁶ Such a story asks only for a return to normal, legitimate, ordinary life, a request that seems little enough to ask.

A birth story, on the other hand, calls for a change in the law, but the change is presented as the natural culmination of a normal process. A birth story, then, offers 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 natural and inevitable process in which the law has been engaged for a long time. This normal, natural process is moving the law in a trajectory toward a future that has been preordained from the start.¹³⁷ In a birth story, there is nothing unusual or alarming about that forward movement. In fact, the end result is nothing more than our path toward establishing an anticipated steady state, the preordained “legitimate ordinary.”¹³⁸ 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.

A related point of comparison, then, is how the two stories are able to treat current law. As Miranda’s brief demonstrates,¹³⁹ 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 preordained future. A typical rescue story, on the other hand, bolsters current law, arguing that it is vital to society’s shared enterprise and to the welfare of many. Those

¹³⁶ See *supra* text accompanying note 22. The Hardwick brief presented the ruling from the lower court as the legal status quo. A rescue story would work even better, however, where the existing law had a life span of longer than several months and had been declared or at least implicitly accepted by more than one court. To the extent that a reader might not be willing to see the 11th Circuit holding as current law, the argument might have been better served by the story of a quest, searching for the protective talisman which is almost – but not quite -- within reach. The distinction is small, however, because the metaphorical structure of rescue and quest is quite similar, and it is the structure that does the work. *Supra* note 78.

¹³⁷ As my good friend Jack Sammons points out, the kind of birth we speak of here may be not so much the creation of a new life as the gradual uncovering of what has been there all along.

¹³⁸ AMSTERDAM AND BRUNER, *supra* note 4, at 113.

¹³⁹ See *supra* text accompanying notes 47-49.

attacking current law are seeking to eviscerate its protection, perhaps by disregarding the careful developmental work that created normative legal standards.

The stories differ also in the source of the desired outcome and the degree of implied legitimacy that outcome can claim. 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 may not seem preordained,¹⁴⁰ it needs an affirmative case showing the worthiness of the person or doctrine to be protected.¹⁴¹ A birth story, too, must be accompanied by an affirmative case, but in a birth story, the legitimacy of the desired outcome (the culmination of an ongoing birth process) is embedded in the narrative itself. And since this narrative assumption happens outside the reader's notice, it is less subject to the reader's resistance.¹⁴²

The stories also differ in the degree to which they must remain mired in combat. A birth story need not rely primarily on casting opposing armies, with one army intent on doing harm. It can rise above the fray of the litigation, leaving behind much of the ugliness of conflict, 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, purer 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.

¹⁴⁰ If the reader has begun to identify with the object or character needing rescue, *see supra* note 130, then of course the leaning may already seem preordained.

¹⁴¹ Of course every legal analysis should make such an affirmative case. Both Miranda's and Hardwick's briefs 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.

¹⁴² *Supra* note 40; *See also* Winter, *The Cognitive Dimension*, *supra* note 16.

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' creative effort.¹⁴³ 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.¹⁴⁴

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 with a particular group of litigants, so there is less pressure on the narrator to successfully characterize a particular group as worthy of protection. Additionally, judges as characters draw attention away from the litigants themselves. 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 to protect someone. 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 tried to do.¹⁴⁵

¹⁴³ Steven Winter argues that this is true in all stories because the very process of making meaning is one of identification and collaboration. Winter *supra* note 4, chs. 5 & 8.

¹⁴⁴ Winter, *The Cognitive Dimension* *supra* note 16.

¹⁴⁵ See *supra* text accompanying note 123-130.

Finally, the two kinds of stories differ in their relative ease of creating the necessary dramatic tension. A creation story may need to do extra work to convince the reader that the outcome of the process matters. A reader's investment in a creation story derives from watching a creative process unfold, and the story will have to work to keep that process from seeming bland. Ideally, a compelling birth or creation process would be long and difficult, and its direction should be consistent, with no backward steps.¹⁴⁶ 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 we already know from danger is stronger than an impulse to create 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 is like the difference between watching an anonymous artist painting a picture and watching Bruce Willis sweating and bleeding in *DIE HARD*.¹⁴⁷ Many viewers would find the *DIE HARD* story far more riveting as they wonder whether John McClane (Willis) and his wife Holly (Bonnie Bedelia) will live or die.

The choice of underlying myth, then, can play a significant role in persuasion and thus in the development of the law. The operative narrative and its accompanying metaphors create the lens through which we view a legal issue and the context within which we imagine it operating. Myth and metaphor provide characters, give those characters motives, and identify the "right ending" for the story of the law. Thus, these myths and metaphors raise again the familiar

¹⁴⁶ Miranda's brief was able to tell this kind of birth story. *See supra* text accompanying notes 47-72.

¹⁴⁷ *DIE HARD supra* note 85.

foundationalist/anti-foundationalist debate,¹⁴⁸ but now opened in yet another front. If unnoticed stories about the law have unnoticed effects on how we analyze legal authority, we have some important work to do. And to do that work, we will need a more complete narratology of law.¹⁴⁹ Questions abound.¹⁵⁰ At the very least, we need to clarify the relationship between stories and tools of formal reasoning such as rule articulation, analogy, statutory interpretation, policy, and stare decisis. Are stories unrelated to these more familiar analytical moves, or does one precede and therefore constitute the other?¹⁵¹ Is traditional legal reasoning simply the language we use to relate the end of a story that began and lives still in the mists of narrative imagination?¹⁵² If myth is the origin of reason, do we still need both?¹⁵³ If we do, what roles should each play?¹⁵⁴ If each has its own role, how can we evaluate how well each role is performed in a particular

¹⁴⁸ Jane Baron & Julia Epstein, *Is Law Narrative?* 45 BUFFALO L. REV. 141 (1997).

¹⁴⁹ Brooks, *Narrative Transactions* *supra* note 8; Richard Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

¹⁵⁰ The resolution of these questions is far beyond the scope of this paper, but it is important to mention a few of them in order to show how fundamental these questions are in understanding the legal enterprise. Steven Winter addresses many of these questions in chapters three and five of *A CLEARING IN THE FOREST*, *supra* note 4.

¹⁵¹ 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).

¹⁵² If the outcome of a case depends, in part, on what story captures the court's imagination, judges badly need a well-honed narrative sensitivity, for 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 skepticism, knowing that it is, after all, someone's 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.

¹⁵³ 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.

¹⁵⁴ 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, even after they have helped us craft a rule or theory, we still need stories 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.

rhetorical setting? For those who yearn for a clear and articulable legal method, these questions may be particularly difficult.¹⁵⁵

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.¹⁵⁶ If the New Rhetoricians are right, then it is a complicated question indeed to ask whether a story is “true.”¹⁵⁷

The topic of this paper assumes a story in which the reported facts (case holdings, statutory content, procedural developments) are true in a historical sense,¹⁵⁸ but that kind of truth does not resolve the question.¹⁵⁹ 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

¹⁵⁵ Baron & Epstein, *supra* note 148.

¹⁵⁶ “[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.” CASSIRER *supra* note 151; “[L]anguage neither mirrors nor reveals truth; it defines or makes truth possible.” Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 174 (1993).

¹⁵⁷ “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). See also WINTER, *supra* note 4, chs. 3 & 5.

¹⁵⁸ 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.

¹⁵⁹ “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, *THE ART OF FICTION* 129 (Vintage Books 1991) (1984).

hypothetical line¹⁶⁰ from truth into falsehood?¹⁶¹ Perhaps when we talk about stories constructed from accurate historical facts, as we are doing here, 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?

Without doubt, all stories are incomplete,¹⁶² but we should learn to ask whether a particular story is 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, as LaRue and Tsai demonstrate,¹⁶³ or if it starts too late or ends too early,¹⁶⁴ or if its governing metaphor or

¹⁶⁰ 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.

¹⁶¹ LARUE, *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.

¹⁶² 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.

¹⁶³ LaRue and Tsai effectively demonstrate the limitations of growth narratives, showing the parts of history that are omitted or muted in such a tale. LARUE, *supra* note 4; TSAI, *supra* note 162. LaRue has also critiqued narratives of limits and of equality on similar grounds. LARUE, *supra* note 4.

¹⁶⁴ Suppose, for example, that the right-to-life movement relies on the Divine Child as its constitutive myth. The fetus (the Divine Child), is placed in mortal danger by forces whose goal is to kill the Child. The Child is helpless, so the protagonists must protect her. According to the myth of the Divine Child, however, once the Child is saved, the story is over. Seeing the abortion question only through the lens of the Divine Child can obscure other responsibilities that arise after the abortion crisis is averted, responsibilities like infant healthcare and preschool programs. These concerns lie outside the constitute archetype, which ends at birth.

narrative has been co-opted to produce a result far removed from its original meaning.¹⁶⁵ All of us are vulnerable to these kinds of omissions in the myths through which we see the world.¹⁶⁶

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 that story omits.¹⁶⁷ We could ask whether there are other, more complete stories – stories that do a better job of accounting for important facts and crucial questions. That kind of narrative awareness would make the lawyers and judges who do the work of the law more skillful rhetors, but it would do far more than that. It would provide all of us a freedom to think more broadly, deeply, and clearly about the legal issues we encounter.¹⁶⁸

CONCLUSION

¹⁶⁵ For example, one could argue that Griswold's reiterated insistence that it is preserving the intimacy of the marriage bed was co-opted and perhaps corrupted by Baird's quick extension of the ban to protect all legal sex. Either there is a sense of hypocrisy in the original use of the marriage bed metaphor, or the metaphor has been harnessed to do work it was not intended to do. The Divine Child of the marriage bed is suddenly expanded in Baird to include the Divine Child of the backseat of a car, and these are not the same. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also, Linda Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 *Mercer L. Rev.* 949 (2007); and Linda Berger, *What is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 *J. Ass'n Leg. Writing Directors* 169 (2004). Berger shows how two well-known legal metaphors (the corporation as person and the marketplace of ideas) have been co-opted to produce results originally unintended. See also Steven Winter, *John Roberts's Formalist Nightmare*, 63 *UNIV. OF MIAMI L. REV.* 549 (2009), in which Winter argues against Chief Justice Roberts's misuse of *Brown v. Bd. of Educ.*, 347 U.S. 583 (1954) to decide *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007).

¹⁶⁶ Such interpretive “pitfalls and snares . . . infest every path that any lawyer or judge could follow” AMSTERDAM AND BRUNER, *supra* note 4, at 291 (emphasis omitted).

¹⁶⁷ “We end up buying our own rhetorics as avidly as we sell them to others.” AMSTERDAM AND BRUNER, *supra* note 4, at 176.

¹⁶⁸ “[E]pistemological issues, with or without ideological dimension, almost always have a consequence for how one goes about one’s business.” AMSTERDAM AND BRUNER, *supra* note 4, at 218.

This article has unearthed two master narratives and some unexpected characters in the legal analyses from the landmark briefs in *Miranda v. Arizona*¹⁶⁹ and *Bowers v. Hardwick*¹⁷⁰. These legal characters and plots are disguised in the routine language of law talk, but their impact is all the more important for that disguise. Because narrative's power in the sacred domain of legal authority is so effectively hidden, the law needs a well-honed narrative sensibility, including a sensibility to the role of myth and metaphor in law's stories.

We need this legal narratology¹⁷¹ for several reasons. Certainly, in law practice, an understanding of narrative's powerful role in the analysis of authority will produce more skilled advocates and more sophisticated opinion writers. In judicial decision-making, an understanding of how narrative creates and constrains legal argument will produce judges far more skilled in evaluating competing arguments and selected wisely from among them.

A better understanding of narrative's constructive role, in both senses of that word, will help us understand the roles and limits of articulated rules and other forms of traditional legal analysis. We talk in the language of rules, analogies, and policies. That language gives us a sense of stability and some hope of applying the law consistently.¹⁷² But myth and metaphor create the narrative world that gives the law its life, and they provide an ever-present measuring rod to be sure the law is still doing its job.¹⁷³

Finally, we need a narratology so we can recognize these constitutive stories and be prepared to interrogate them bravely and without blinking. If we do, we will see that, like the

¹⁶⁹ Brief for the Petitioner, *supra* note 43.

¹⁷⁰ Brief for the Respondent, *supra* note 90.

¹⁷¹ Brooks, *supra* note 8.

¹⁷² I leave for another day the topic of how misleading this sense of stability and consistency may be.

¹⁷³ Cover, *supra* note 2.

cowmen and the farmers of the Old West,¹⁷⁴ narrative and formal legal reasoning can be friends,¹⁷⁵ and our understanding and use of legal authority will be the better for it.

¹⁷⁴ OKLAHOMA! (RKO Radio Pictures, Inc. 1955).

¹⁷⁵ Edwards, *supra* note 13.