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

Linda H. Edwards

*University of Nevada, Las Vegas – William S. Boyd School of Law*

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# ONCE UPON A TIME IN LAW: MYTH, METAPHOR, AND AUTHORITY

LINDA H. EDWARDS\*

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Since at least 1983, when Robert Cover gave us *Nomos and Narrative*,<sup>1</sup> and probably as early as James Boyd White's *The Legal Imagination*,<sup>2</sup> we have been on notice that the law has stories.<sup>3</sup> I am not referring to the fact that clients have stories. We have long known that client stories are crucial

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\* 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 further improved 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, 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, the Thomas Jefferson School of Law, and the University of Arizona, whose comments have proven extraordinarily helpful.

1. Robert M. Cover, *Forward Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (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.").

2. *See generally*, JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973) (a text applying literary concepts and criticism to legal language and culture).

3. Over the years, we have been given further notice of the law's stories. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000); MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* (1985); L. H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* (2001) [hereinafter WINTER, *CLEARING IN THE FOREST*]. But despite the work of these great minds, the law's own stories still are seldom explored.

in litigation.<sup>4</sup> Lawyers and judges hear, transform, and re-present those stories in fact statements of briefs and judicial opinions.<sup>5</sup> But later in those same documents, lawyers and judges also tell stories about the law itself.<sup>6</sup> In discussions of cases, statutes, and constitutional provisions, there are stories of birth, death, battle, betrayal, tricksters, and champions.<sup>7</sup> In fact, we may not be able to talk about these sources of law without telling stories about them. These stories do their narrative work beneath the surface of routine law talk and lead straight to the conclusions that become the law.<sup>8</sup>

Discussions of law do not sound like stories, of course.<sup>9</sup> 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. It is not surprising that we have failed to consider that narrative pervades the analysis of legal authorities.<sup>10</sup> As the old Buddhist saying goes, we don't know who discovered the ocean, but it probably wasn't a fish.<sup>11</sup>

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.<sup>12</sup> The choice of which stories we tell about the law matters greatly.<sup>13</sup> Why? Because we seldom question familiar narratives, and these myths practically run in our veins.<sup>14</sup> 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.<sup>15</sup>

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4. See generally Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2225 (1989) [hereinafter Winter, *The Cognitive Dimension*].

5. See Linda Holdeman Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUDIES FORUM 7, 9 (1996).

6. See generally LARUE, *supra* note 3, at 20. 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.

7. See AMSTERDAM & BRUNER, *supra* note 3, at 113.

8. See LARUE, *supra* note 3, at 19–21.

9. See Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 681 (1994), *reprinted in* 6 J. ALWD 88 (Fall 2009).

10. See *id.* at 682.

11. See Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (1991).

12. See Sherwin, *supra* note 9, at 689.

13. See *id.* at 690 (citations omitted).

14. See WINTER, *CLEARING IN THE FOREST*, *supra* note 3, at 105–06.

15. See LARUE, *supra* note 3, at 20. Peter Brooks has called for just such a study of legal narratology. See Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?* 18 YALE J.L. & HUMAN. 1, 2–3 (2005) [hereinafter Brooks, *Narrative Transaction*].

A word about the texts for this inquiry: Rhetorical analysis often examines judicial opinions, and looks at how a judge influenced law's development by the way the opinion was written.<sup>16</sup> But if rhetorical analysis is limited to judicial opinions, it starts at least one step too late, missing a critical point of influence.<sup>17</sup> To fully understand the rhetorical situation, rhetorical analysis should start with the advocates' briefs.<sup>18</sup> In keeping with that goal, the following pages will explore the birth story from the Petitioner's Brief in *Miranda v. Arizona*<sup>19</sup> and then the rescue story from the Respondent's Brief in *Bowers v. Hardwick*.<sup>20</sup> The final section of the article will compare the different ways that these two stories function and identify some fundamental questions raised by the idea that narrative plays an important, but hidden, role in shaping our view of legal authority. First, though, it will be helpful to review some basic concepts about story structures, cultural myths, and how metaphor works when we think about law.

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16. That was, for instance, LaRue's rhetorical project in analyzing *Marbury v. Madison*, 5 U.S. 137 (1803), and *McCulloch v. Maryland*, 17 U.S. 316 (1819). LARUE, *supra* note 3, at 7. *But see, e.g.,* Sherwin, *supra* note 9, at 681–83.

17. *See* Sherwin, *supra* note 9, at 711.

18. 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: NARRATIVE AND RHETORIC IN THE LAW* 114, 116 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter Brooks, *Storytelling Without Fear*]. 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. *See* brief cited *infra* note 19, at \*22. 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) (Douglas, J., concurring). 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*, 352 U.S. 330, 341–42 (1957) (Black, J., dissenting). Perhaps the point here is that storytelling is rarely a matter of invention; it almost always draws on stories that have been told before.

19. 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.

20. 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.

## 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.<sup>21</sup> A story's two most important components for doing this formative work are character and plot.<sup>22</sup> At the very least, a story needs a protagonist, an antagonist,<sup>23</sup> and a difficult challenge to overcome.<sup>24</sup> Something important must be happening. There must be some narrative movement from an inadequate state of affairs to a resolution of that inadequacy, taking place over a period of time.<sup>25</sup>

One classic plot structure begins with a struggle toward a specific goal.<sup>26</sup> Right from the opening scene, the world (or at least the protagonist's world) needs fixing or lacks something important.<sup>27</sup> Journey stories, for example, often use this structure.<sup>28</sup> The opening scene may find the protagonist far from home, facing a long journey. Homer's epic poem, *The Odyssey*, is a prototypical example.<sup>29</sup> As the story begins, Troy has just fallen, and the warrior Odysseus is standing on the distant shore, ready to return home.<sup>30</sup> The story describes his struggles as he undertakes the ten-year journey back home to Ithaca and to his family there.<sup>31</sup>

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21. Bruner, *supra* note 11, at 4, 10. See Sherwin, *supra* note 9, at 681–695, for an excellent sampling of both recent and ancient writing on the subject, Narrative is intricately related and even foundational to more formal reasoning using rules, analogies, and policies. See Edwards, *supra* note 5, at 9. When we are presented with a new normative legal question, we imagine the prototypical story in which it would arise. See *id.* at 11. 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. See *id.* at 13.

22. See AMSTERDAM & BRUNER, *supra* note 3, at 113 (emphasis omitted) (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.”); see also LARUE, *supra* note 3, at 133 (relying on Kenneth Burke's well-known pentad: “the actor, the act, the scene, the instrument, and the goal”).

23. 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. See AMSTERDAM & BRUNER, *supra* note 3, at 113. The antagonist could be a natural resistance or force, such as fire, flood, storm, draught, disease or entropy. See generally, Winter, *The Cognitive Dimension*, *supra* note 4, at 2237–40.

24. See Winter, *The Cognitive Dimension*, *supra* note 4, at 2237.

25. *Id.* at 2239–40.

26. See, e.g., *id.* at 2236.

27. See *id.* at 2237.

28. See *id.*

29. HOMER, *THE ODYSSEY* 1 (Robert Fitzgerald trans., 1998).

30. *Id.*

31. *Id.* at 2. 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

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.<sup>32</sup> 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.<sup>33</sup>

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 the 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 protagonists as they try to reach their destination or complete their project.<sup>34</sup>

In another common plot structure, the key characteristic of the story's opening scene is its normality and stability.<sup>35</sup> The world is not incomplete and life is more or less as it should be.<sup>36</sup> However, this initially stable world enters a stage of disequilibrium.<sup>37</sup> Amsterdam and Bruner refer to this as a "steady state" followed by "trouble."<sup>38</sup> The steady state is, by definition, legitimate—the legitimate ordinary.<sup>39</sup> In narrative terms, whatever disrupts a steady state is bad.<sup>40</sup> 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

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broadcasts 1995–2001); *see also* DEREK WALCOTT, *OMEROS* (1990) (an epic poem where after many trans-Atlantic journeys, the narrator returns to a home he now sees in new ways).

32. *AMISTAD* (DreamWorks 1997).

33. *Id.* Other modern film examples include *PHILADELPHIA* (TriStar Pictures 1993), the story of a lawyer's efforts to apply antidiscrimination laws for the protection of employees with HIV/AIDS; the film *NORMA RAE* (20th Century Fox 1979), the story of a cotton mill worker who successfully unionized the mill where she worked. 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. *See AMISTAD, supra* note 32.

34. *See* Winter, *The Cognitive Dimension, supra* note 4, at 2236–37.

35. *AMSTERDAM & BRUNER, supra* note 3, at 113.

36. *See id.*

37. *Id.* at 114.

38. *Id.* at 113–14.

39. *Id.*

40. *Id.* at 114. 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. *See* Sherwin, *supra* note 9, at 713–14. The power of these assumptions lies in their implication rather than direct assertion. *See id.* Without meeting any kind of a burden of proof, they become the way we see the situation. *See id.* at 714.

(transformation).<sup>41</sup> In *Murder on the Orient Express*, Hercule Poirot boards a train in Istanbul.<sup>42</sup> The train proceeds normally along the scheduled journey until the second night, when a murder occurs.<sup>43</sup> Poirot undertakes to solve the murder.<sup>44</sup> In the end, rough justice is done, and the lives of Poirot and the passengers proceed as we are meant to think they should.<sup>45</sup>

Client stories easily lend themselves to such plot structures.<sup>46</sup> For instance, in *Bowers v. Hardwick*, Michael Hardwick was safely at home (the steady state).<sup>47</sup> The police entered his home, and he was arrested under Georgia's sodomy law (the trouble).<sup>48</sup> By enforcing a Right to Privacy<sup>49</sup>, the United States Supreme Court can return Hardwick to the safety and sanctity of his home (the restoration).<sup>50</sup>

But the law has such stories, too. Just like any other story, the law's story will need characters, a plot, and perhaps a prop here and there. Metaphor can help provide all of these elements of the story.<sup>51</sup> As Lakoff

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41. AMSTERDAM & BRUNER, *supra* note 3, at 113–14. See generally Kenneth D. Chestek, *The Plot Thickens: The Appellate Brief as Story*, 14 LEGAL WRITING 127 (2008) (providing an interesting application of this story structure to a legal brief).

42. AGATHA CHRISTIE, *MURDER ON THE ORIENT EXPRESS*, 10 (Dodd, Mead & Company 1934).

43. *Id.* at 45.

44. *Id.* at 49.

45. *Id.* at 253–54. Although, perhaps, the law would have dictated a different result. A film example is *PATRIOT GAMES* (Paramount Pictures 1992), which finds Jack Ryan peacefully in London with his family when he witnesses a terrorist attack. *Id.* Ryan intervenes to kill one of the terrorists, but the terrorist's brother vows revenge. *Id.* Ryan and his family are attacked several times until, finally, Ryan kills the attackers. *Id.*

46. Chestek, *supra* note 41; 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, 790–91 (2006) (stating that any client, as the hero on his or her journey, follows a similar path).

47. *Bowers v. Hardwick*, 478 U.S. 186, 187–88 (1986).

48. *Id.*

49. 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 (and by analogy, one important constitutional right among many other important constitutional rights).

50. 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. *Hardwick*, 478 U.S. at 188.

51. 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. See generally THE COMPLETE WORKS OF ARISTOTLE 2332–36 (Jonathan Barnes ed., 1984) (Aristotle discusses metaphor in THE POETICS, his explanation of literary theory); Michael R. Smith, LEVELS OF METAPHOR IN PERSUASIVE LEGAL WRITING, 58 MERCER L. REV. 919, 919–20 (noting that law and metaphor have recently been studied in “linguistics, philosophy, rhetoric, cognitive psychology, and literary theory”). Here, we will rely on more modern work in linguistics and cognitive studies.

and Johnson have demonstrated, we think about abstract ideas in metaphors.<sup>52</sup> 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.<sup>53</sup> Lakoff and Johnson would doubt that we can think about a legal theory or a case holding in any other way.<sup>54</sup> Ideas are grounded in concrete physical experience and cannot otherwise exist.<sup>55</sup> 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.<sup>56</sup> There may be characters in a legal discussion after all, and those characters may be doing something—something that might amount to a plot.<sup>57</sup>

One other concept—myth—will help with both characters and plot. The term “myth” has been used in a variety of ways with a variety of definitions. Here I use it to mean, particularly, an archetype or other master story.<sup>58</sup> 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.<sup>59</sup>

52. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 47 (1980).

For instance, “ideas are people:” They can give birth to other ideas, die, and be resurrected. *Id.* “Ideas are plants:” They can be planted, bloom, come to fruition, produce offshoots, and be fertile or barren. *Id.* “Ideas are products:” We can produce them, refine them, and churn them out at a rapid rate. *Id.* “Ideas are commodities:” We can package them, buy and sell them, value them, and offer them in the intellectual marketplace. *Id.* at 47–48. “Ideas are resources:” We can run out of them, waste them, pool them, invest them. *Id.* at 48.

53. See WINTER, *CLEARING IN THE FOREST*, *supra* note 3, at 18–19 (noting that “the underlying metaphor . . . conceptualizes ideas as objects”).

54. See LAKOFF & JOHNSON, *supra* note 52, at 3.

55. *Id.*

56. Normally, a character must be capable of will, emotion, and intention. AMSTERDAM & BRUNER, *supra* note 3, at 113. There are exceptions, however; the antagonist might be a natural resistance or force. See *supra* note 23. 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 *infra* text accompanying notes 177 and 130–142. In fact, will and emotion may be considered secondary phenomena. The metaphorical personification is what counts. See WINTER, *CLEARING IN THE FOREST*, *supra* note 3, at 127–28.

57. LAKOFF & JOHNSON, *supra* note 52, at 25 (“Once we can identify our experiences as entities or substances, we can refer to them, categorize them, group them, and quantify them . . .”). I would add that we can tell stories about them, as well.

58. Archetype and myth have been studied particularly in literary criticism, depth psychology, and anthropology. See, e.g., JAMES G. FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 412 (abr. ed. 1940) (studying personification of corn as a goddess in various cultures); NORTHROP FRYE, *ANATOMY OF CRITICISM* 136 (1957) (studying archetypes in the literary world); C.G. JUNG, *THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS* 4–5, (R.F.C. Hull trans., Princeton Univ. Press 2d ed. 1980) (1934) (studying archetypes as having existed since primordial unconscious).

59. The difference would matter more if the reader and the writer did not share a



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.<sup>60</sup>

Myths provide ready templates for plots.<sup>61</sup> Myths and narrative archetypes such as birth, death, re-birth, journey and sacrifice establish a particular view, a narrative perspective on the events of a story, creating the context in which ideas or events will be interpreted.<sup>62</sup> We carry the blueprints of these archetypal situations, and when events activate those archetypes, we create at least the rough outlines of a particular mythological story through which we view those events.<sup>63</sup> 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.<sup>64</sup> These character templates also stand ready,<sup>65</sup> inviting us to cast both people and things in particular archetypal roles.

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

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common cultural heritage.

60. 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 pre-existing 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* 108 (1982) (“For constructivist theory, perception of what a picture represents depends upon cognitive construction: perceivers must piece together the cues, using their knowledge of either the world or the representational conventions of their culture.”). 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. RICH. L. REV. 1213, 1217 (2010) and Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 412 (2006).

61. Master stories and metaphors both function as embedded knowledge structures. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 269 (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. *See supra* note 18 and accompanying text.

62. *See, e.g.*, WINTER, *CLEARING IN THE FOREST*, *supra* note 3, at 128 (The hero’s journey provides the templates with which “we actively engage in the contrivances of plot and character necessary to make the story work.”).

63. *Id.*

64. *See supra* note 61 and accompanying text.

65. Archetypes can operate in the surface story that prompted the litigation as well. *See, e.g.*, Robbins, *supra* note 46, at 772 (suggesting that lawyers develop narratives by casting their clients as archetypal heroes).

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.<sup>66</sup> If we are not aware that we are inside a story, we cannot decide to step out of it long enough to ask whether there might be other possible stories and whether those other stories might make better sense of the situation.<sup>67</sup>

*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. This article will consider two common archetypes about the law: birth and rescue.<sup>68</sup> We begin with the birth story told in the Petitioner's Brief to the Supreme Court of the United States in *Miranda v. Arizona*.<sup>69</sup>

Ernesto Miranda was brought to police headquarters and taken into Interrogation Room 2.<sup>70</sup> The door was closed, and he was alone with two officers.<sup>71</sup> Two hours later he emerged, having signed a confession.<sup>72</sup> At

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66. Because the process of story creation is usually unconscious, readers believe that their perceptions are their own ideas, not an idea someone else (the writer) is pressing upon them. The persuasive effect of such unconscious perception is far greater than the persuasive effect of an expressly stated thesis. Higdon, *supra* note 60, at 1225; Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. CONSUMER RESEARCH 225, 225 (1988); Stanchi, *supra* note 60, at 422.

67. The operation of cultural myths and archetypes in human perception is consistent with schema theory in cognitive science. See generally JUNG, *supra* note 58, at 5–6 (using the example of primitive tribal lore that tradition has changed over time from the unconscious to “conscious formulae”). 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 60, at 1235.

68. Other common myths about the law include quest, slayer, journey, trickster, and betrayal. See *supra* text accompanying notes 62–64. It is helpful to begin with birth and rescue because these myths commonly use different plot structures and, therefore, are available in 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. See generally AMSTERDAM & BRUNER, *supra* note 3, at 112–14 (examining plot structures and the requirements for unfolding of the plot).

69. Brief for Petitioner, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 65-759), 1966 WL 100543.

70. *Id.* at \*3–4.

71. *Id.* at \*4.

that point, a lawyer was appointed to represent Miranda, but Miranda's fate was already sealed.<sup>73</sup> The author of the Petitioner's Brief, John Paul Frank, tells Miranda's story—this closed room story<sup>74</sup>—in compelling terms. But Frank tells another story too—a story about the governing law.<sup>75</sup> It is the story of the growth and development of the right to counsel.<sup>76</sup>

Appreciating Frank's story calls for a comparison of its structure with an alternate structure common in 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. There would be no plot and no action. The discussion would forego most of narrative's influence on perception. The problem is particularly troubling if the writer wants to change current law because in narrative terms, the argument has presented the current law as the steady state, the "legitimate ordinary."<sup>77</sup> Having done so, the writer must now unseat her own implicit narrative admission that the current law is legitimate.<sup>78</sup>

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."<sup>79</sup> Notice the narrative move in that first sentence. It takes us<sup>80</sup> from the

72. *Id.* at \*9.

73. *Id.* at \*5.

74. *See supra* text accompanying note 18.

75. *See* Brief for Petitioner, *supra* note 69, at \*10–35. *See generally* Sherwin, *supra* note 9, at 711 (noting that Frank's brief "activate[s] the brief reader's implicit values of fairness and equality" while also providing the necessary tools for judgment). 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 Petitioner, *supra* note 69, at \*34–35.

76. *See supra* note 75.

77. *See supra* text accompanying notes 35–41. A brief may 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 41, at 143–44 (proposing that "if the brief writer can successfully, but subtly, identify [his or] her client as the protagonist, and the opposing party or parties as antagonists, [he or] she will have created a reason for the court to want to rule in [his or] her client's favor."). Strategically, however, it would be better, if possible, to find a more positive way to portray current law.

78. *See generally* AMSTERDAM & BRUNER, *supra* note 3, at 113–14 (examining plot structures and the requirements for unfolding of the plot).

79. Brief for Petitioner, *supra* note 69, at \*11.

80. 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

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.<sup>81</sup> 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 Fifteenth Century, we watch the doctrine grow, case by case by case.<sup>82</sup> The narrative pace is steady. One after another come the cases the Court has decided: *Johnson v. Zerbst*, *McNabb v. United States*, *Upshaw v. United States*, *Mallory v. United States*, *Powell v. Alabama*, *Brown v. Mississippi*, and *Chambers v. Florida*.<sup>83</sup> Metaphorically, we can almost see the Court fashioning each new facet of the doctrine. The story brings us then to *Haley v. Ohio*,<sup>84</sup> 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

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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 generally* Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 *CLINICAL L. REV.* 9, 12 (1994) (hypothesizing that appellate briefs become stories when they "create[] a world of characters and actions and experiences.").

81. *See infra* text accompanying note 99.

82. Brief for Petitioner, *supra* note 69, at \*11–33.

83. *Id.* at \*11–21 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938) (finding that the Sixth Amendment protects a federal criminal defendant from deprivation of life and liberty unless he has waived his right to counsel); *McNabb v. United States*, 318 U.S. 332 (1943) (finding confession obtained through extended detention inadmissible); *Upshaw v. United States*, 335 U.S. 410 (1948) (finding a confession inadmissible where it was obtained during an illegal detention); *Mallory v. United States*, 354 U.S. 449 (1957) (finding that a delay in booking an accused must not last long enough that it is likely to compel a confession); *Powell v. Alabama*, 287 U.S. 45 (1932) (finding that an individual's right to counsel requires the court to provide counsel to an accused whether or not he requests it); *Brown v. Mississippi*, 297 U.S. 278 (1936) (finding a confession inadmissible where the accused had been subjected to violence); *Chambers v. Florida*, 309 U.S. 227 (1940) (finding a confession obtained through extended questioning inadmissible where the accused had been isolated from friends and family and was without counsel)).

84. *Id.* at \*21 (citing *Haley v. Ohio*, 332 U.S. 596 (1948) (recognizing the trial court's authority to rule on disputed evidence after assessing the credibility of the evidence supplied by each side)).

should be barred because of specialized circumstances in the particular case, without reaching the broader question.<sup>85</sup>

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.<sup>86</sup> Notice the first appearance here of another narrative principle—the narrative gap. As Peter Brooks put it, a gap “demands to be filled; it activates the interpreter’s ingenuity.”<sup>87</sup> When a reader sees a gap in a story, the reader wants to fill in that gap.<sup>88</sup> 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. Justice[s] Black, [Warren, Douglas, and Brennan] did.<sup>89</sup>

Disappointment again; another opportunity to fill the gap, missed once again by so close a margin. The pace now quickens: “These same dissenting Justices expressed their views again in *Crooker v. California* . . . and [then again in] *Cicenia v. La Gay* . . . . Justice[s] Douglas, [Warren, Black, and Brennan] gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage . . . .”<sup>90</sup> Beginning with the discussion of *Haley v. Ohio*, the argument named the Justices who are working to complete the doctrine.<sup>91</sup> Naming the Justices helps us identify the characters, understand their goals, and share some of their frustration.<sup>92</sup> 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*<sup>93</sup> 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

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85. *Id.* (citing *Haley v. Ohio*, 332 U.S. at 605).

86. *See supra* note 85 and accompanying text.

87. Brooks, *Storytelling Without Fear*, *supra* note 18, at 117 (citations omitted).

88. *See* LARUE, *supra* note 3, at 137.

89. Brief for the Petitioner, *supra* note 69, at \*21–22 (citations omitted).

90. *Id.* at \*23–24 (citations omitted).

91. *See supra* text accompanying notes 58–61 & 84–86.

92. *See supra* note 22 and accompanying text.

93. Brief for Petitioner, *supra* note 69, at \*25 (referencing *Betts v. Brady*, 316 U.S. 455, 471 (1942) (holding in part that the Sixth Amendment did not apply to state criminal proceedings)).

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.<sup>94</sup>

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.<sup>95</sup> 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. . . .”<sup>96</sup> The argument then lists the components now in place and those still missing.<sup>97</sup>

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* [sic] to state proceedings. . . .

It follows that so far as the Sixth Amendment is concerned, after March 18, 1963,<sup>98</sup> there is no difference between the right to counsel . . . in the two court systems.<sup>99</sup>

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 . . . .<sup>100</sup>
2. Defendants in state courts were entitled to counsel in all trials.<sup>101</sup>
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.<sup>102</sup>

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94. Brief for Petitioner, *supra* note 69, at \*25–26 (citations omitted).

95. See *supra* notes 93–94 and accompanying text.

96. Brief for Petitioner, *supra* note 69, at \*26.

97. *Id.* (citations omitted).

98. 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.

99. Brief for Petitioner, *supra* note 69, at \*27 (citation omitted) (referencing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

100. *Id.* at \*28 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

101. *Id.* (citing *Gideon*, 372 U.S. 335 (1963)).

102. *Id.* (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963)).

4. Several Justices believed that in all cases, a person who requested counsel at pre-arraignment investigation was entitled to it . . . .<sup>103</sup>
5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right.<sup>104</sup>

Situation 5 is that presented in the instant case.<sup>105</sup>

Here is the drum-roll. The legal discussion goes on to offer policy reasons<sup>106</sup> 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.<sup>107</sup> We heard how, bit by bit, the right to counsel grew. The story has brought us now to the pleroma—the fullness—of time, when the crucial decision will be made. The long story of the law has met Ernesto Miranda’s case.<sup>108</sup>

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.<sup>109</sup> 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,<sup>110</sup> and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused.”<sup>111</sup> The bold assertion that began the Summary of the Argument pages earlier now makes sense: “There is a right to counsel for arrested persons when interrogated by the police. The law has been growing in this

103. *Id.* (citing *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. La Gay*, 357 U.S. 504 (1958)).

104. *Id.* (citing *In re Groban*, 352 U.S. 330 (1957); *Crooker*, 357 U.S. 4333; *Cicenia*, 357 U.S. 504).

105. *Id.*

106. *Id.* at \*35–48. 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.*

107. *See supra* note 82 and accompanying text.

108. “Situation 5 is that presented in the instant case.” Brief for Petitioner, *supra* note 69, at \*28.

109. *See generally* Higdon, *supra* note 60 (discussing the cognitive science behind this kind of narrative foreshadowing).

110. Brief for Petitioner, *supra* note 69, at \*34 (citing WILLIAM SHAKESPEARE, JULIUS CAESAR, act 4, sc. 3) (“There is a Tide in the Affairs of Men, Which taken at the Flood, leads on to Fortune.”).

111. Brief for Petitioner, *supra* note 69, at \*34. The argument’s first point heading boldly states, “There Is a Right to Counsel for Arrested Persons When Interrogated by the Police.” *Id.* at \*11.

direction for more than thirty years.”<sup>112</sup> 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.<sup>113</sup> 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.<sup>114</sup> All that remains is to recognize it formally.<sup>115</sup>

Compare the movement of that plot to a more formalistic structure of legal analysis. Without the story, the writer likely would begin by baldly articulating the current law with no action happening anywhere in the discussion.<sup>116</sup> The argument would set out the troublesome current law as the implicitly legitimate “steady state” and move us nowhere from there.<sup>117</sup> 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.<sup>118</sup>

Frank’s argument is a creation or birth story, a primary archetype.<sup>119</sup> In fact, at the end of the argument section, the brief becomes explicit. Frank

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112. *Id.* at \*6.

113. *See supra* note 77 & 78 and accompanying text.

114. *See supra* text accompanying notes 109 & 110.

115. *See id.*

116. 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 in a creation story than in a mere recitation of the rule. *See supra* p. 11 and note 77.

117. *See supra* pp. 11–12 and notes 77–82.

118. *See supra* notes 34 & 51–57 and accompanying text.

119. A case can be made for a journey narrative as well. Creation and journey narratives share a common metaphorical structure. *See supra* notes 26–33 and accompanying text. They both begin in the (often distant) past and set out a long story of movement or development. *See supra* notes 28–35 and accompanying text. 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. *See* Brief for Petitioner at 7, *Aikens v. California*, 406 U.S. 813 (1972) (No. 68-5027). There, the nation is the character that is moving toward a destination. *See id.* The story Frank tells in *Miranda*’s brief, on the other hand, is the story of legal doctrines and their growth. *See supra* notes 75–76 and accompanying text. 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. *See* WINTER, CLEARING IN THE FOREST, *supra* note 3, at 130. The critical point is the metaphorical structure, which is the same in these two myths. *See supra* notes 26–33 and accompanying text. 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, CLEARING IN THE FOREST, *supra* note 3, at 130.



quotes Justice Douglas when he referred to the right to counsel as “yet unborn”<sup>120</sup> and later refers to the “birth”<sup>121</sup> 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, a familiar plot we know by heart.<sup>122</sup>

Who are the characters in this story? The protagonists include the many nameless lawyers and judges<sup>123</sup> involved in all the cases throughout the years, and especially the Justices who sat in the minority for so long, coming so close to a majority time and again.<sup>124</sup> In fact, in an important sense, this is a story about the Court itself.<sup>125</sup> 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 in briefs 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 attempt 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 dissipate, leaving the Court with little narrative impetus to act. Instead, the brief brings the tension of the story to its climactic height, and presents that tension to the Court. The height of the tension 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.<sup>126</sup>

#### BOWERS V. HARDWICK AS A RESCUE STORY

Unlike the birth story in *Miranda*, a rescue story is often less obviously narrational. In a birth story, the facts usually are presented as a chronology.<sup>127</sup> Key events are set out as challenges that are faced and overcome.<sup>128</sup> 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

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120. Brief for Petitioner, *supra* note 69, at \*30 (citations omitted).

121. *Id.* (citations omitted).

122. *See supra* notes 58–66 and accompanying text.

123. *See supra* note 83 and accompanying text. 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. *See supra* text accompanying note 56. When the clients primarily served by the doctrine are, by definition, problematic in a narrative sense (e.g., convicted felons) this casting alternative can be most helpful.

124. *See supra* text accompanying notes 84–86, 89–90, 93–94, 99 & 101–104.

125. *See supra* notes 55–56 and accompanying text.

126. *Miranda v. Arizona*, 384 U.S. 436, 499 (1965).

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

128. *See supra* text accompanying notes 82, 83 & 100–104.

story. A rescue story, however, may be harder to recognize because it may not be signaled by a chronology. To create a narrative situation, a rescue story may depend not so much on reciting a series of historical events, as on presenting particular kinds of characters set in particular kinds of narrative situations. The plotline does not appear on the page, but the reader will supply it, unconsciously choosing from the ready supply of master stories in the shared culture.<sup>129</sup>

Rescue stories can be told overtly or by implication. Either way, the story happens in the midst of danger presented by 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, King of the Demons.<sup>130</sup> Another ancient example is the story of Perseus, who rescued Andromeda, his future wife.<sup>131</sup> Andromeda had been chained to a rock as a sacrifice to a sea monster.<sup>132</sup>

The object of rescue might also be an item of great value, such as a talisman or an amulet worn for protection or power. The antagonist is trying to take or destroy the talisman, and the protagonists must retrieve or safeguard it, either to preserve its protective power or to prevent its misuse.<sup>133</sup> Examples of talisman stories abound in literature and film. Most obvious are fantasies such as *The Lord of the Rings*, Tolkien's trilogy in which Frodo Baggins and his faithful friends must keep the One Ring from the hands of the Dark Lord Sauron, who intends to use it as the ultimate weapon to rule and brutally oppress Middle-Earth.<sup>134</sup> Battles over the possession of a talisman or some other all-important item exist outside of fantasy as well, for instance, in stories about the possession of a nuclear warhead<sup>135</sup> or an important scientific formula.<sup>136</sup>

129. See *supra* notes 58–60 and accompanying text.

130. VĀLMIKI, *THE RAMAYANA* (Arshia Sattar trans., Penguin Books 2003).

131. Ovid, *Metamorphoses*, in *CLASSICAL GODS AND HEROES: MYTHS AS TOLD BY THE ANCIENT AUTHORS* 97–99 (Rhoda A. Hendricks trans., 1972).

132. *Id.* 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* (Twentieth Century Fox 1988). A darker and less transparent example is David Lynch and Mark Frost's 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., *DANGEROUS MINDS* (Hollywood Pictures 1995); *THE MIRACLE WORKER* (United Artists 1962); *TO SIR, WITH LOVE* (Columbia Pictures 1967).

133. 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.

134. J.R.R. TOLKIEN, *THE LORD OF THE RINGS* (Geo. Allen & Unwin 1954–1955).

135. *FOR YOUR EYES ONLY* (United Artists 1981) (James Bond retrieves a stolen British

Whether the goal is to safeguard a talisman or to save a character in danger, the nature of the task is the same: rescuing someone or something important. That is the task faced by Laurence Tribe, Kathleen Sullivan, Brian Koukoutchos, and Kathleen Wilde in Michael Hardwick's brief to the United States Supreme Court in *Bowers v. Hardwick*.<sup>137</sup> Hardwick centered upon the right to privacy in intimate relationships.<sup>138</sup> Surprisingly, the brief portrays the right as already established. Because the Eleventh Circuit had recognized the right in the Hardwick opinion below,<sup>139</sup> Tribe, Sullivan, Koukoutchos, and Wilde could position the right as the narrative's "steady state."<sup>140</sup> Immediately, though, we<sup>141</sup> 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."<sup>142</sup>

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

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missile command system sought by the KGB); *THUNDERBALL* (United Artists 1965) (James Bond retrieves two stolen thermonuclear weapons intended to be used to start World War III).

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

137. Brief for Respondent, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1986 WL 720442.

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

139. *Hardwick v. Bowers*, 760 F.2d 1202, 1212 (11th Cir. 1985).

140. See *supra* notes 38-41 and accompanying text.

141. 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 80.

142. Brief for Respondent, *supra* note 137, at \*5-6.

a substantial justification when it reaches that far into so private a realm.<sup>143</sup>

First, notice the powerful metaphor of the State “reaching . . . into a private realm.” In one sentence, the metaphor takes the visceral reaction that some readers in 1986 likely would have had to the act of sodomy<sup>144</sup> 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, because unlike the lovers in the case, the State’s act is violent and nonconsensual.<sup>145</sup> The image recurs throughout the entire legal discussion in phrases like “a law that so thoroughly invades individuals’ most intimate affairs,”<sup>146</sup> or a law that “intrudes the grasp of the criminal law deep into” such an area,<sup>147</sup> or the requirement that the government must give “substantial justification to the individual whose personal dwelling it would enter,”<sup>148</sup> or the “State of Georgia contends that it may extend its criminal authority deep inside the private home.”<sup>149</sup>

In the midst of the violent world these images create, the characters play out the story. The procedural statement sets the battle scene. We learn that the Eleventh Circuit opinion established a right to privacy, but the State of Georgia has appealed, arguing that no such right should exist for the intimate/sexual activities at issue here.<sup>150</sup> Hardwick and his lawyers are the protagonists, struggling to protect the right to privacy.<sup>151</sup> The antagonist is “the State of Georgia,” a character with a flawed reputation before the Court.<sup>152</sup> The brief capitalizes on this flawed reputation by personalizing Georgia. 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 private bedrooms . . . .”<sup>153</sup> “Georgia threatens to punish . . . .”<sup>154</sup> “Georgia

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143. *Id.* at \*5.

144. 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.

145. Brief for Respondent, *supra* note 137, at \*1 (noting that the parties arrested under the Georgia statute were two adults engaging in consensual sexual acts).

146. *Id.* at \*4.

147. *Id.* at \*19.

148. *Id.* at \*9.

149. *Id.* at \*14.

150. *Id.* at \*5–6.

151. *See generally* WINTER, CLEARING IN THE FOREST, *supra* note 3 (“The protagonist slot is filled out by the central idea or theory of the argument. The antagonist is the mistaken idea, author, or theory under challenge.”).

152. 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).

153. Brief for Respondent, *supra* note 137, at \*1.

would read”<sup>155</sup> “Georgia argues . . . .”<sup>156</sup> “Georgia alludes . . . .”<sup>157</sup> “Georgia has never explained . . . .”<sup>158</sup> Instead of referring to what “the statute” does or says, the brief seldom misses a chance to personalize 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.<sup>159</sup> 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.<sup>160</sup> 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 to neutralize its protective power.<sup>161</sup> The battle’s purpose is to keep the talisman and its protection in the hands of those who need it.

The concept of the talisman is an easy fit here and works more than adequately to explicate the narrative in the legal argument, but another possible analysis adds interesting narrative dimensions. The right to privacy<sup>162</sup> might be seen as a character itself; it may function, in fact, as the archetypal Divine or Magic Child.<sup>163</sup> The Magic Child is young, small, and vulnerable, even powerless.<sup>164</sup> The Child often comes from an unlikely source, such as from a low socioeconomic background or from some kind of scandal. In the archetypal story, evil forces are out to kill the Divine Child, but if the Child can be saved, the Child 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 the Child. Only as the story progresses do we learn that what is at stake is much bigger than the safety of one small character.

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154. *Id.* at \*5.

155. *Id.* at \*10.

156. *Id.* at \*7.

157. *Id.* at \*27.

158. *Id.* at \*13.

159. *See generally* AMSTERDAM & BRUNER, *supra* note 3, at 112–14 (examining plot structures and the requirements for unfolding of the plot).

160. *See* Brief for Respondent, *supra* note 137, at \*5–6.

161. *See id.* at \*5–8.

162. *See supra* text accompanying note 53.

163. *See generally* JUNG, *supra* note 58 (an important Jungian archetype in Jungian psychology).

164. The Divine Child is an exception to the general principle that a character must be able to will, to feel, and to act. The whole narrative function of the Divine Child, prior to the climax and resolution, flows from the Child’s *inability* to act. *See* AMSTERDAM & BRUNER *supra* note 3, at 113; WINTER, CLEARING IN THE FOREST, *supra* note 3, at 109; *see also supra* text accompanying note 22.

Culturally, we see the Divine Child in myths such as those surrounding the births of Jesus<sup>165</sup> and Moses.<sup>166</sup> Both Jesus and Moses were vulnerable infants from unlikely origins, including low social status and even scandal. Strong forces were out to hurt both, but both were saved and protected by a small, brave group. Both proved to have the power to save or transform the larger group.<sup>167</sup>

At the time of Moses' birth, the Israelites were slaves in Egypt.<sup>168</sup> Fearing eventual revolt, the Pharaoh ordered the killing of all newborn Israelite boys.<sup>169</sup> Moses' mother and sister placed him in a basket and set him loose on the river.<sup>170</sup> He was found by an Egyptian princess, who raised him as her own.<sup>171</sup> As an adult, Moses led the Hebrews out of slavery and to the safety of their own land.<sup>172</sup> Remarkably similar myths surround the births of other mythic figures such as Gilgamesh,<sup>173</sup> Romulus and Remus,<sup>174</sup>

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165. See *Matthew* 1:18–2:11.

166. See *Exodus* 2:1–10.

167. See generally *Exodus* 1:1–40:38; *Matthew* 1:1–15:39.

168. *Exodus* 1:8–14.

169. *Id.* at 1:22.

170. *Id.* at 2:3.

171. *Id.* at 2:5–10.

172. *Id.* at 14:13–31.

173. 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. See generally *THE EPIC OF GILGAMESH* (Maureen Gallery Kovacs trans., Stanford Univ. Press 1989).

174. 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, *THE PENGUIN DICTIONARY OF CLASSICAL MYTHOLOGY* 389–391 (Stephen Kershaw ed., A.R. Maxwell-Hyslop trans., Penguin Books 1991).

Perseus,<sup>175</sup> Paris,<sup>176</sup> and King Sargon of Agade (ancient Mesopotamian city).<sup>177</sup>

Jesus was born of Mary, an unmarried woman engaged to the carpenter Joseph.<sup>178</sup> Rather than break the engagement and risk the lives of mother and child, Joseph proceeded with the marriage.<sup>179</sup> Just after Jesus was born, sages told King Herod that a future king had been born in Bethlehem.<sup>180</sup> Fearing eventual overthrow, Herod ordered the killing of all infant males in Bethlehem.<sup>181</sup> Joseph was warned in a dream, however, and the couple fled to Egypt with the child.<sup>182</sup> Some years later, after Herod's death, the family returned.<sup>183</sup> Jesus grew to be a great teacher and healer and is regarded by Christians as the human incarnation of God.<sup>184</sup>

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.<sup>185</sup> Then other brave caretakers protect him during his childhood.<sup>186</sup> As he grows, Harry develops

175. 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. RICHARD P. MARTIN, MYTHS OF THE ANCIENT GREEKS 185–199 (New American Library 2003).

176. 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. *Id.* at 266–69 (New American Library 2003).

177. 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. 2 LEONARD WILLIAM KING, CHRONICLES CONCERNING EARLY BABYLONIAN KINGS 87–96 (1907).

178. *Matthew* 1:18–25.

179. *Id.* at 1:18.

180. *Id.* at 2:3–5.

181. *Id.* at 2:16.

182. *Id.* at 2:13–14.

183. *Id.* at 2:14–15.

184. *See generally id.* at 4:12–15:39.

185. J.K. ROWLING, HARRY POTTER AND THE SORCEROR'S STONE 294 (Arthur A. Levine Books 1997).

186. J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (Arthur A. Levine Books 1997); J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS (Arthur A. Levine Books 1998); J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (Arthur A. Levine Books 1999); J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (Arthur A. Levine Books 2000); J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX (Arthur A. Levine Books 2003); J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (Arthur A. Levine Books 2005); J.K. ROWLING, HARRY POTTER AND THE DEATHLY

unusual powers, which he ultimately uses to save the wizard world from Voldemort's brutal domination.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup> There he was found and adopted by a simple, farming couple, who raised him with a new name, Clark Kent.<sup>190</sup> It soon became apparent that he possessed superhuman powers, which he subsequently used to protect others in danger.<sup>191</sup>

So is there a Divine Child in Michael Hardwick's brief? If Lakoff and Johnson are right that people reify ideas,<sup>192</sup> then a constitutional principle, 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.<sup>193</sup> The Hardwick brief can be seen to cast the right to privacy as the Divine Child. The argument quotes Justice Harlan's reference to liberty under the Due Process Clause as "a living thing."<sup>194</sup> 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 men,' namely, 'as against the Government, the right to be let alone.'"<sup>195</sup>

Like the archetypal Child, the right is very young, having been born only a few months earlier in the decision below.<sup>196</sup> It is especially vulnerable precisely because of its recent birth. It is not a long-standing doctrine, which would be harder to overturn. Rather, the Court could simply reverse the holding below.<sup>197</sup> It would not even need to overturn a holding from an earlier case.

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HALLOWS (Arthur A. Levine Books 2007).

187. J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS, *supra* note 186, at 743–44.

188. SUPERMAN (Warner Bros. 1978).

189. *Id.*

190. *Id.*

191. *Id.*

192. *See generally* LAKOFF & JOHNSON, *supra* note 52.

193. 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.

194. Brief for the Respondent, *supra* note 137, at \*8 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

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

196. Brief for Respondent, *supra* note 137, at \*5–6 (referencing *Bowers v. Hardwick*, 760 F.2d 1202 (1985)).

197. *Id.*



Also, like the archetypal Child, the right was associated in the 1980s 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.<sup>198</sup> 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.<sup>199</sup> Throughout the argument are nearly constant, implied images that any of us could be next and that Georgia's police could soon be invading our own bedrooms.<sup>200</sup> The argument frames the issue in terms of what Georgia can do to its citizens rather than what it has done to Michael Hardwick.<sup>201</sup> The brief speaks of bedrooms, reminding 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."<sup>202</sup> In addition, the brief makes ample use of plural first-person pronouns: "such casual state control of our most private realm;"<sup>203</sup> "our government cannot lightly trespass in the intimacies of our sexual lives—whether or not our conduct of those intimacies at any given moment involves a choice about conceiving a child;"<sup>204</sup> "When we retreat inside that line [(the door of our homes)];"<sup>205</sup> "The home not only protects us from government surveillance, but also 'provide[s] the setting for [our] . . . intimate activities;"<sup>206</sup> and "The home surely protects more than our fantasies alone."<sup>207</sup> Thus, protecting the right to privacy here will protect each individual from violation by the State.<sup>208</sup>

198. Early black and white scenes in the movie *MILK* paint a dismally instructive picture of the consequences of the law's treatment of lesbian, gay, bisexual, and transgendered ("LGBT") communities during the time frame leading up to the Hardwick brief. *MILK* (Universal Pictures 2008).

199. Just as Jesus and Moses each transcended their particular vulnerabilities and extended their protection to others. See *supra* text accompanying notes 165–167. See generally *Exodus* 1:1–40:38; *Matthew* 1:1–15:39.

200. See generally Brief for Respondent, *supra* note 137, at \*10–11 ("There can thus be no doubt that our fundamental liberty entitles us to demand strong reason when government would bar us from procreating.").

201. See generally *id.*, at \*19 ("[A] Georgia citizen must be entitled to demand not only a warrant of the Georgia police officer who enters his bedroom, but also a justification of the Georgia legislature when it declares criminal the consensual intimacies he chooses to engage in there.")

202. *Id.* at \*5. "The home surely protects more than our fantasies alone." *Id.* at \*16.

203. *Id.* at \*6 (emphasis added).

204. *Id.* at \*12 (emphasis added).

205. *Id.* at \*15 (emphasis added).

206. *Id.* at \*15–16 (quoting *Oliver v. United States*, 466 U.S. 170, 179 (1984) (emphasis added)).

207. *Id.* at \*16 (emphasis added).

208. The archetype encapsulates the necessary narrative concept of identification. As

Regardless of 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) and the doctrine is utterly unable to protect itself. A small band is working to protect it, but ultimately, the only savior is the story's Champion, the United States Supreme Court, who is asked to come to the rescue. The archetype promises that if this Champion will protect the right to privacy, the right will survive to later protect us all.<sup>209</sup>

This masterful brief very nearly won this difficult case. The decision was five-to-four, and Justice Powell had vacillated throughout the deliberations.<sup>210</sup> Asked about the *Bowers v. Hardwick* decision four years later, Justice Powell said, "I think I probably made a mistake in that one."<sup>211</sup> He explained, "When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments."<sup>212</sup> 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*.<sup>213</sup>

#### TELLING STORIES ABOUT LAW

Unearthing the stories beneath the legal arguments in the *Miranda* and *Hardwick* briefs 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

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Steven Winter explains, "We imagine ourselves as the protagonist and picture ourselves in the protagonist's shoes as we proceed from introduction to conclusion." See Winter, *The Cognitive Dimension*, *supra* note 4, at 2272. I would add that identification can function also when we imagine the protagonist as someone we care about. See *infra* note 211.

209. See *supra* text accompanying notes 165–167.

210. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521–24 (Scribner's Sons 1994).

211. *Id.* at 530. Jeffries describes how Justice Powell had been unable to understand gay men on a human level. *Id.* at 521. At least twice, he made the remarkable proclamation that he had never known a homosexual. *Id.* He did not know that gay men had served as clerks for him in the past, nor that a gay man was serving as his clerk at the time of the deliberations in *Bowers v. Hardwick*. *Id.* 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. *Id.* 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.* In other words, in the case of Justice Powell, the necessary narrative component of identification had failed.

212. *Id.* at 530.

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

turns out, that is in fact the case. Birth stories and rescue stories each have particular limitations, and each bring particular advantages to the task of persuasion<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> The story uses a steady state/trouble/resolution plot structure, so it can position itself as conservative, a particularly helpful rhetorical posture.<sup>217</sup> Such a story asks only for a return to normal, legitimate, ordinary life—a request that seems little enough to ask.<sup>218</sup>

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.<sup>219</sup> A birth story, then, offers a way to make a call for change seem more conservative.<sup>220</sup> This is no revolution, says the analysis. This is merely the

214. The purpose of any written legal analysis in a litigation setting, including the analysis in a judicial opinion, is to persuade. *See generally* K.N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960); Judith S. Kaye, *Judges as Wordsmiths*, 69 N.Y. ST. B.J. 10, 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 L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1635–36 (2001); Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 260 n.104 (1990).

215. *See* AMSTERDAM & BRUNER, *supra* note 3, at 113; *see also* text accompanying notes 35–41.

216. Because antagonists are trying to disrupt the steady state, the narrative structure positions their cause as the threat to be overcome. *See* text accompanying note 40.

217. *See supra* text accompanying note 133. The *Hardwick* brief presented the ruling from the lower court as the legal status quo. Brief for Respondent, *supra* note 137, at \*3 (citing *Hardwick*, 760 F.2d 1202 (11th Cir. 1985) (decided on May 21, 1985)). 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 Eleventh 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.

218. *See* AMSTERDAM & BRUNER, *supra* note 3, at 113.

219. *See generally* Winter, *The Cognitive Dimension*, *supra* note 4, at 2277. (“For, if the legal rule is not already grounded in social experience, the legal stories told by those who would make law will seem arbitrary and illegitimate.”).

220. *See generally id.* (“Transformative argument is possible because the advocate can use narrative to invite the audience into the world of the rights-holder (or rights-seeker). That world will be constructed in part of models and metaphors already shared with 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.<sup>221</sup> 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.”<sup>222</sup> In a narrative sense, a birth story allows the narrator to establish an imagined steady state even when it does not yet exist.<sup>223</sup>

A related point of comparison, then, is how the two stories are able to treat current law. As Miranda’s brief demonstrates,<sup>224</sup> 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 attacking current law are seeking to eviscerate its protection, perhaps by disregarding the careful, developmental work that created normative legal standards.<sup>225</sup>

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.<sup>226</sup> 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,<sup>227</sup> it needs an affirmative case showing the worthiness of the person or doctrine to be protected.<sup>228</sup> A birth story, too, must be accompanied by an affirmative case, however, the legitimacy of the desired outcome (the culmination of an ongoing birth process) is embedded in the narrative of the birth story itself.<sup>229</sup> And since this

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audience.”).

221. 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.

222. AMSTERDAM & BRUNER, *supra* note 3, at 113.

223. *See id.*

224. *See generally* Brief for Petitioner, *supra* note 69.

225. *See generally* AMSTERDAM & BRUNER, *supra* note 3 (noting that the “legitimate steady state” is disrupted by “Trouble”).

226. *Contra* Higdon, *supra* note 60; text accompanying note 109.

227. If the reader has begun to identify with the object or character needing rescue, *see* Winter, *The Cognitive Dimension*, *supra* note 4, at 2272, then the leaning may already seem preordained.

228. Of course every legal analysis should make such an affirmative case. The briefs in both *Miranda* and *Hardwick* 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.

229. *See generally* Sherwin, *supra* note 9, at 711 (noting that Frank’s brief provides the

narrative assumption happens outside the reader's notice, it is less subject to the reader's resistance.<sup>230</sup>

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 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.<sup>231</sup> A rescue story, however, nearly always takes place in the context of a heated battle, and taking a side means participating on a battlefield.

On a closely related point, the reader of a birth story may not have to choose sides quite so blatantly since the story does not rely primarily on casting opposing forces. A reader has already participated implicitly in the creative effort by imagining the end result of the birth process.<sup>232</sup> Therefore, on some level, the reader has already been cast as a part of the protagonists' creative effort.<sup>233</sup> 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.<sup>234</sup>

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.<sup>235</sup> 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.<sup>236</sup> 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,

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reader "with all that is needed for judgment").

230. See *supra* note 66; see also Winter, *The Cognitive Dimension*, *supra* note 4, at 2270 (noting that legal stories that are not grounded in social experience run the risk of "failed communication").

231. See *supra* notes 52 & 62 and accompanying text.

232. See *supra* note 109 and accompanying text.

233. Steven Winter argues that this is true in all stories because the very process of making meaning is one of identification and collaboration. WINTER, CLEARING IN THE FOREST, *supra* note 3, chs. 5 & 8.

234. Winter, *The Cognitive Dimension*, *supra* note 4, at 2270.

235. Compare, with Winter, *The Cognitive Dimension*, *supra* note 4, at 2272 (asserting that readers identify with characters in a narrative).

236. See generally Brief for Petitioner, *supra* note 69.

which may not always be easy and may be less feasible if the court has a natural tendency to disidentify with the relevant group.<sup>237</sup> 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.<sup>238</sup>

Finally, the two kinds of stories may 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.<sup>239</sup> Ideally, a compelling birth or creation process would be long and difficult, and its direction would be consistent, with no backward steps.<sup>240</sup> The relevant legal authorities, which provide the raw material for the story, 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. The impulse to protect someone we already know is stronger than an impulse to create something new.<sup>241</sup> 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 landscape and watching Bruce Willis sweating and bleeding in *Die Hard*.<sup>242</sup> Many viewers would find *Die Hard* 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.<sup>243</sup> 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.<sup>244</sup>

237. Winter, *The Cognitive Dimension*, *supra* note 4, at 2272.

238. See *supra* text accompanying notes 201–208.

239. “Stories go somewhere. They have an end, a *telos*. If someone drifts in telling a story, we urge him or her to “get to the point.” What gives stories this “point” is that, just as they have a *telos*, they also have to do with some *obstacle* blocking progress toward it. If there is no obstacle, no Trouble, there is no story—only a recital of some happening that unfolded banally with nothing untoward to tell about.” AMSTERDAM & BRUNER, *supra* note 3, at 127.

240. The *Miranda* brief was able to tell this kind of birth story. The argument carefully laid out the development of the law with regard to the right to counsel in a manner akin to a long and difficult “labor.” See *supra* text accompanying notes 82–108.

241. See generally Sherwin, *supra* note 9, at 714 (“[W]ho needs facts when the uncertainties involved implicate such vulnerability and potential for . . . abuse?”).

242. *DIE HARD*, *supra* note 132.

243. See Sherwin, *supra* note 9, at 688–690 (noting that a prosecutor who wishes to elicit a passive response from a jury will use a different style of narrative than a defense attorney who wishes to elicit a more active response).

244. Edwards, *supra* note 5, at 9–13.

Myth and metaphor provide characters, give those characters motives, and identify the “right ending” for the story of the law.<sup>245</sup> Thus, these myths and metaphors again raise the familiar foundationalist/anti-foundationalist debate,<sup>246</sup> but now opened on yet another front. If unnoticed stories about the law have unnoticed effects on how we analyze legal authority,<sup>247</sup> we have some important work to do. And to do that work, we will need a more complete narratology of law.<sup>248</sup> Questions abound.<sup>249</sup> 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?<sup>250</sup> 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?<sup>251</sup> If myth is the origin of reason, do we still need both?<sup>252</sup> If we do, what roles should each play?<sup>253</sup> If each has its own role, how can we evaluate how well

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245. See *supra* notes 12–15 and accompanying text.

246. Jane Baron & Julia Epstein, *Is Law Narrative?* 45 *BUFF. L. REV.* 141, 173 (1997).

247. Brooks, *Storytelling Without Fear*, *supra* note 18, at 117; LARUE *supra* note 3, at 137.

248. Brooks, *Narrative Transactions* *supra* note 15, at 2; Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *STAN. L. REV.* 39, 51 (1994).

249. 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. See WINTER, *CLEARING IN THE FOREST*, *supra* note 3, chs. 3 & 5 (addressing many of these questions).

250. 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* (Susanne K. Langer trans., Harper & Bros. 1946) (alteration in original).

251. 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. Any court will read a brief’s fact statement with skepticism, knowing that it is, after all, someone’s story. But in a legal argument, a court may not recognize that a story is being told. With its narrative antennae at rest, the court may be especially susceptible to unconscious narrative influence.

252. Lash LaRue wrote of our yearning for both stories and theories. LARUE, *supra* note 3, 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.

253. 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 A. Craft, *The Persistence of Dread in Law and Literature*, 102 *YALE L.J.* 521, 522 (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,

each role is performed in a particular rhetorical setting? For those who yearn for a clear, articulable, and predictable legal method, these questions may be difficult.<sup>254</sup>

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.<sup>255</sup> If the New Rhetoricians are right, then it is a complicated question indeed to ask whether a story is “true.”<sup>256</sup>

The topic of this article assumes a story in which the reported facts (case holdings, statutory content, procedural developments) are true in a historical sense,<sup>257</sup> but that kind of truth does not resolve the question.<sup>258</sup> Facts can be historically true, and yet the story they help to construct might not be “true.”<sup>259</sup> Stories are true or false, depending not so much on what they say as on what they omit and what they imply.<sup>260</sup> Since every story both omits and implies some things and not others, every story is both true and false.<sup>261</sup> In fact, several alternative stories can each be “true” (and “false”).<sup>262</sup> How then can we tell when omission and implication cross a

we still need stories because, as Robert Cover taught, we need narrative’s ongoing “paideic” reevaluation of legal norms. Cover, *supra* note 1, at 16; *see also* Edwards, *supra* note 5, at 42 (explaining that “rules are codifications of a particular narrative perspective”).

254. Baron & Epstein, *supra* note 246, at 145.

255. “[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 250, at 8; “[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).

256. “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. ASS’N. LEGAL WRITING DIRECTORS 129, 139 (2006); *see also* WINTER, CLEARING IN THE FOREST, *supra* note 3, at 65–66 & 123–25.

257. 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 3, at 56. But when lawyers write briefs, they should get their history right, and for our purposes here, we will assume that they have.

258. “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: NOTES ON CRAFT FOR YOUNG WRITERS* 129 (1984).

259. LARUE, *supra* note 3, at 121.

260. *Id.* at 56.

261. *Id.* at 14.

262. *Id.* at 56.



possibly hypothetical line<sup>263</sup> from truth into falsehood?<sup>264</sup> 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 are ignored or obscured?

Without doubt, all stories are incomplete,<sup>265</sup> 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,<sup>266</sup> or if it starts too late or ends too early,<sup>267</sup> or if its governing metaphor or narrative has

263. 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 3, at 128–29.

264. *Id.* LaRue admits the difficulty of asking the truth question, and he cautions us to be careful with those labels. *Id.* Yet he ventures into this dangerous territory himself when he writes that the “onward and upward” story of growth in *McCulloch v. Maryland*, 17 U.S. 316 (1819), is a lie. LARUE, *supra* note 3, at 149 (“[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.”); *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.

265. For example, Robert Tsai has written that stories of growth:

[P]resent 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 reversals 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. In a birth or creation story, the brief's desired result is framed as the culmination of the birth or growth process. In law, however, birth and growth never stop. There is no culmination. The law continues growing and changing as history unfolds.

266. 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 3, 70–88; TSAI, *supra* note 265. LaRue has also critiqued narratives of limits and of equality on similar grounds. LARUE, *supra* note 3, 41–48, 93–100.

267. 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 it.

been co-opted to produce a result far removed from its original intended meaning.<sup>268</sup> All of us are vulnerable to these kinds of omissions in the myths through which we see the world.<sup>269</sup> 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.<sup>270</sup> 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.<sup>271</sup>

#### CONCLUSION

This article has unearthed two master narratives and some unexpected characters in the legal arguments from the landmark briefs in *Miranda v. Arizona*<sup>272</sup> and *Bowers v. Hardwick*.<sup>273</sup> These legal characters and plots are disguised in the routine language of law talk, but their impact is all the

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According to the myth of the Divine Child, however, once the Child is saved, the work of the protagonist is over. Seeing the abortion question only through the lens of the Divine Child can obscure other important needs of the child—needs that arise after the abortion crisis is averted, like infant healthcare and preschool programs. These needs are easy to overlook because they lie outside the constitute archetype, which ends at birth.

268. 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. *See*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965). 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. *See* also Steven Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 555–56 (2009), in which Winter argues against Chief Justice Roberts's misuse of *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) to decide *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.* 127 S. Ct. 2738, 2767–68 (2007). *See generally*, Linda Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007); 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 LEGAL 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.

269. Such interpretive “pitfalls and snares . . . infest every path that any lawyer or judge could follow.” AMSTERDAM & BRUNER, *supra* note 3, at 287 (emphasis omitted).

270. “[W]e end up buying our own rhetorics as avidly as we sell them to others.” *Id.* at 176.

271. “[E]pistemological issues, with or without ideological dimension, almost always have a consequence for how one goes about one’s business.” *Id.* at 218.

272. Brief for Petitioner, *supra* note 69.

273. Brief for Respondent, *supra* note 137.

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 narratology<sup>274</sup> 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 selecting 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.<sup>275</sup> 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 that the law is still doing its job.<sup>276</sup>

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 cowmen and the farmers of the Old West,<sup>277</sup> narrative and formal legal reasoning can be friends,<sup>278</sup> and our understanding and use of legal authority will be the better for it.

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274. See generally Brooks, *supra* note 15.

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

276. Cover, *supra* note 1, at 4-5.

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

278. Edwards, *supra* note 5, at 50.