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# The Lady, or the Tiger? A Field Guide to Metaphor and Narrative

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*We can no longer take language for granted as a medium of communication. Its transparency has gone. We are like people who for a long time looked out of a window without noticing the glass—and then one day began to notice this too.*<sup>1</sup>

## I. INTRODUCTION

Metaphor and narrative reassure us that things hang together, providing a sense of coherence to the patterns and paths we employ for perception and expression. Without the metaphorical process that allows us to gather them up, group them together, and contain them, our perceptions would scatter like marbles thrown on the ground.<sup>2</sup> Without the ability to tell stories that link discrete events together, place them into a storyline with a beginning and end, and compose a coherent accounting, our lives would be constructed of “One Damn Thing After Another.”<sup>3</sup>

In this field guide, I hope to illustrate—with images and stories when possible—how better understanding of metaphor and narrative can guide those engaged in legal rhetoric and persuasion. This Article briefly summarizes cognitive theory relating to metaphor and narrative, provides snapshots of their use in the field, in real-life legal persuasion, and suggests ways to adapt metaphor and narrative to a specific example of legal persuasion. In the field guide section, this Article uncovers a few of the metaphorical frames and narrative paths that exist in practice. In the guided exploration, to illustrate the process of excavating and re-shaping persuasive arguments, this Article explores the briefs and opinions in *Boykin v. Alabama*,<sup>4</sup> the U.S. Supreme

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1. IRIS MURDOCH, *SARTRE* 27 (1953).

2. See Linda Berger, *Preface*, 7 J. ASS'N LEGAL WRITING DIRECTORS vii, vii (2010). This concept draws on the metaphors that the mind is a container and ideas are objects. See, e.g., GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 124–25, 338 (1999).

3. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 30–31 (2002).

4. 395 U.S. 238 (1969).

Court decision requiring an affirmative showing that a guilty plea was entered voluntarily and knowingly.

But first, the story of *The Lady, or the Tiger?*:

Once upon a time, the ruler of a kingdom came up with a fair, final, and prompt way of deciding guilt or innocence as well as the sentence to be imposed. The accused would be taken to the public arena and asked to choose one of two doors leading to two concealed chambers: behind one door was a ravenous tiger, who would devour the guilty; behind the other was a ravishing lady, who would marry the innocent.

It came to pass that the ruler's daughter fell in love with a young man who was unsuitable. Charged with unsuitability, his fate too would be decided in the arena. The ruler's daughter was very much in love, and also very jealous; she had seen her lover exchange words with a beautiful young woman at the court. She set about finding out which door would open to the chambers in which the lady awaited and which to the chambers holding the tiger. In her determination, she discovered not only which door concealed which judgment. She learned also that the lady awaiting her lover was the very same, very beautiful young woman from court.

On the day of judgment, in the public arena, the ruler's daughter sat beside the ruler. The young lovers exchanged a meaningful glance. The ruler's daughter moved her right hand very slightly to the right. Without a moment's hesitation, her lover opened the door to the right. And there the story ends.<sup>5</sup>

I re-tell this story here for two reasons. First, like other good stories, it invites the reader to fill in the blanks, to predict the ending that would occur within the world that the story creates in the reader's imagination. Our predictions of how the story ends—with the lady or the tiger—depend on our prior experiences and knowledge of the world. And we make these predictions largely on the basis of what we already know rather than on what the story reveals. Second, because this story has become part of our cultural knowledge base, it illustrates how imperfectly an oft-told tale becomes embedded in our imagination. For me, a reference to *The Lady, or the Tiger?* conjures up an image of an unsolvable dilemma, a framework of being forced to make a fateful choice whose outcome depends entirely on chance. In the original story, however, the outcome appears to be governed not so much by chance as by the conflicting emotions of love and jealousy.

Like *The Lady, or the Tiger?*, the stories and images we acquire from our culture and experience provide mental blueprints that, for better or for worse, help us sort through and understand new things. Equally important, these images and stories trigger empathy and emotion, helping us persuade others about the paths that events should follow and the frameworks into which things should fit.

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5. I have shortened and otherwise taken liberties with the short story published by Frank R. Stockton, *The Lady, or the Tiger?*, 25 CENTURY 83, 83–86 (1882).

## II. BACKGROUND: COGNITIVE THEORY AND RESEARCH

Although they are as old as rhetoric, it is hard to understand the continuing objections to the study and use of metaphor and narrative in legal arguments. The first objection is that the only legitimate legal argument is the one that is based on reason (even though we can describe reason only by using metaphors: reason is *pure*, *cold*, and *hard*).<sup>6</sup> But at least since Aristotle, we have known that persuasion depends on knowing when and how to use a combination of fact, logic, story, and image.<sup>7</sup> Second, some critics object that metaphorical and narrative expressions are not the literal truth: they do not “fit” reality. As others have pointed out, however, the literal truth is hard to come by, particularly in the kind of legal expression that depends on being able to argue for many different outcomes.<sup>8</sup> The third objection appears to be that using metaphor and narrative to express concepts and describe events may result in unexamined assumptions and unforeseen consequences. Yet, although it likely is true that unthinking adherence to a metaphor may *enslave* thought, it is equally true that unthinking adherence to the syllogistic form will constrain thought.<sup>9</sup>

Despite these objections, much research indicates that because of the way the mind works and the culture is constructed, images and stories unavoidably shape our perceptions and reasoning processes, often unconsciously.<sup>10</sup> Cognitive theory suggests that lawyers will gain two benefits from studying metaphor and narrative, the argument-shaping language uses that are discussed in this Article. First, lawyers will better understand judicial decision-making when they observe metaphor and narrative in action in judicial opinions and briefs. Second, as a result of this deeper understanding, they

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6. Steven Winter noted the metaphorical nature of claims that “reason is *cold*; it is *rigorous*; it is *linear*; it is *clear*; it is *felt*. Indeed, in its dependence on embodied experiences like temperature and rigor, the metaphorical quality of reason is anything but detached and impersonal.” Steven L. Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. 745, 749 (1992); see also STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND 59–62 (2001) [hereinafter WINTER, A CLEARING IN THE FOREST].

7. See, for example, the discussion of narrative rationality as a model for going beyond persuasion based on formal or informal logic alone, starting with Aristotle and continuing through Walter Fisher, in J. Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING INST. 53, 60–63 (2008).

8. “[L]egal argumentation is not concerned with proof of absolute truths, but acknowledges that it is always possible to argue for or against a particular claim.” Kurt M. Saunders, *Law as Rhetoric, Rhetoric as Argument*, 3 J. ASS’N LEGAL WRITING DIRECTORS 166, 167 (2006).

9. Justice Cardozo’s famous quote came in *Berkey v. Third Avenue Ry.*, 155 N.E. 58, 61 (N.Y. 1926): “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” It seems appropriate to offset it here with a quote from Justice Oliver Wendell Holmes:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

10. AMSTERDAM & BRUNER, *supra* note 3, at 217–45; LAKOFF & JOHNSON, *supra* note 2, at 128; see also KENDALL HAVEN, *STORY PROOF: THE SCIENCE BEHIND THE STARTLING POWER OF STORY* 89–122 (2007).

will more effectively use metaphor and narrative to construct persuasive legal arguments.<sup>11</sup>

All the argument-shaping approaches discussed in this Article are metaphorical in the following senses. First, they rely on seeing one thing *as* another. Second, each of them works by mapping or transferring the characteristics, reasoning processes, and outcomes of one domain (the source) onto another (the target). As a result, each of these language uses carries more (or less) meaning than appears. Because they are ways of seeing or highlighting some aspects of a concept, they also are ways of not seeing others.

Thus, when you tell a story, you are asking the listener to see a series of things as related events governed by a particular narrative arc or a plot. If you tell the story well, the listener will expect certain characters and plot developments even though other storylines might also explain the same events.<sup>12</sup> Moreover, if the story you are telling is one that already is embedded in tradition and culture, you need not fill in all the details; you can simply name the characters, and the plot will spring to life in the listener's mind.

Because they emerge from and exist within our culture and experience, these argument-shaping language uses carry with them not only information but also values and beliefs. By helping to establish meaning and create identity,<sup>13</sup> they unconsciously transmit traditions, cultural values, and ideologies.<sup>14</sup>

### A. Metaphor and Other Conceptual Frames

Because metaphor carries over attributes, inferences, frameworks, reasoning methods, and evaluation standards from one source to another, its use can help the writer persuade the reader to make the leap and to do it "in such a way as to make it seem graceful, compelling, even obvious."<sup>15</sup> When we consciously use metaphor and other language frames, we provide concrete

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11. According to Steven Winter,

From a cognitive perspective, it does not matter that legal decisionmaking is a product of tacit knowledge rather than doctrinal logic. The process is one of persuasion. To ask about the characterizations that people are likely to find convincing is to inquire into what will make the most sense to them under the circumstances. It is to inquire into the nature of their categories and concepts—for it is our categories and concepts that define our expectations and, in so doing, powerfully shape what we find believable, what we judge accurate, what we experience as cogent, compelling and convincing.

WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 152–53.

12. According to Winter, narrative is understood because of metaphor; that is, we have constructed an idealized cognitive model of a story that includes conceptual schemas that "serve as a kind of genetic material or template for a wide variety of stories in which the plot structure follows a protagonist through an agon to a resolution." WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 110.

13. Philip C. Kissam, *The Ideology of the Case Method/Final Examination Law School*, 70 U. CIN. L. REV. 137, 142–43 (2001) (discussing PAUL RICOEUR, LECTURES ON IDEOLOGY AND UTOPIA (1986)).

14. Kissam, *supra* note 13, at 147–48 (discussing J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY (1998)). Balkin discussed "cognitive mechanisms that help produce and fashion beliefs and judgments," including cultural heuristics, narratives and scripts, metaphor and metonymy, homologies, and associations. BALKIN, *supra*, at 3.

15. Donald A. Schön, *Generative Metaphor: A Perspective on Problem-setting in Social Policy*, in METAPHOR AND THOUGHT 137, 147 (Andrew Ortony ed., 2d ed. 1993).

images that make it easier to think about and manage abstract or unfamiliar concepts. If the audience accepts the metaphor that a copyright constitutes *property* like real estate, it will transfer inferences and rules from one concept to the other and certain consequences will follow. Like real estate, copyrights can be bought and sold, divided, leased, and even protected against trespass. Similarly, if the person who copies a piece of music in violation of a copyright is a *pirate*, then the copier is an outlaw who should be subject to capture and punishment.

In addition to purposefully using metaphor and other framing devices to aid in understanding, we often are unconsciously affected by them. Imaginative maps for understanding become deeply embedded in our consciousness because we acquire them through our daily experience in the world.

Metaphor is obviously helpful to understand new and unfamiliar concepts. Years after we were introduced to the Internet, metaphor still pervades the way that we talk about it. We receive electronic *mail* on our *desktop*, we *browse* for information as we might in a bookstore, and we use *folders* and *bookmarks*. Because of these images, it seems appropriate to treat a legal issue concerning the delivery of an e-mail the same way that we analyze an issue involving a letter written on paper, deposited in a mailbox, and delivered to a physical desktop.

Conceptual metaphor is equally effective for understanding and reasoning about the abstract concepts that often underlie legal arguments. For example, the lawyer who wishes to argue that the First Amendment should protect corporate political advertising relies on the metaphors that a corporation is a person and that money is speech. She is thus able to portray corporate advertising as protected expression no different from the speech of individuals.

According to the cognitive researchers who study metaphor, its persuasive power derives from several sources. First, we are often governed by tacit knowledge and unconscious assumptions and inferences: both information and understanding float beneath the surface, neither consciously acquired nor examined.<sup>16</sup> Because the tacit knowledge we have acquired through experience is at work automatically and always, it can remain uncontested.

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16. LAKOFF & JOHNSON, *supra* note 2, at 9–15; see also Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 117 (2007) (discussing “[c]ultural cognition . . . [that is,] psychological mechanisms that moor our perceptions of societal danger to our cultural values”); John B. Mitchell, *Narrative and Client-Centered Representation: What Is a True Believer to Do When His Two Favorite Theories Collide*, 6 CLINICAL L. REV. 85, 88–89 (1999) (“It makes complete sense to me that our legal texts float in a sea of varied and often conflicting cultural and historical narratives from which their ultimate meaning is derived.”); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985) (“Like law, rhetoric invents; and, like law, it invents out of something rather than out of nothing. It always starts in a particular culture and among particular people . . . . Rhetoric always takes place with given materials.”).

Second, thought processes themselves are said to be metaphoric: metaphor is both a figure of thought and a way of thinking.<sup>17</sup> Metaphors are derived from bodily experience (*balance* keeps you upright; *more is up* because when you pile things on top of each other, the stack goes up),<sup>18</sup> visual images (the *mouth* of the river, the *long arm* of the law), and stories (the Trojan Horse, the Sword in the Stone, the Holy Grail). Concepts such as *knowing is seeing* and *understanding is grasping* are directly linked to the way we learn about the world through the senses of sight and touch.<sup>19</sup> And because metaphor transfers inferences from one domain to another, we are able to perceive and understand abstract concepts in the same way that we *see* and *grasp* physical ones.

Third, logical reasoning appears to be structured metaphorically.<sup>20</sup> We make sense out of new experiences by placing them into categories<sup>21</sup> and cognitive frames called schema or scripts that emerge from prior experience.<sup>22</sup> Because of our experience in the world, we see categories as *containers* with an interior, an exterior, and a boundary.<sup>23</sup> Similarly, as we go about our lives, we acquire and construct schema and scripts. For example, we experience movement from a beginning along a path to the end, giving rise to the source-path-goal image schema, which in turn leads to more complex conceptual metaphors such as life as a journey.<sup>24</sup> The resulting mental blueprints provide both shortcuts and stereotypes.

### B. Narrative and Other Event Paths

Narrative shapes our understanding and expression in a somewhat different way. Compared with metaphor, a story is more path than template, and its outcome is more an expected ending than a compelled one. Compared with syllogistically structured arguments, which appear to be designed to

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17. Schön, *supra* note 15, at 137 (describing metaphor as referring “both to a certain kind of product—a perspective or frame, a way of looking at things—and to a certain kind of process—a process by which new perspectives on the world come into existence”). Lakoff writes that the word “metaphor” has come to mean “a cross-domain mapping in the conceptual system” while the term “metaphorical expression” means the linguistic expression of the mapping. George Lakoff, *The Contemporary Theory of Metaphor*, in METAPHOR AND THOUGHT 203 (Andrew Ortony ed., 2d ed. 1993).

18. Lakoff, *supra* note 17, at 240.

19. WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 55–56.

20. *Id.* at 56–68.

21. See AMSTERDAM & BRUNER, *supra* note 3, at 19–109 (explaining categories and their use at the U.S. Supreme Court). For discussions of the use of categories in law, see Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 779–80 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1189 (1995); Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1154–55 (2002). See generally Anthony Edward Falcone, *Law and Limits: How Categories Construct Constitutional Meaning*, 8 U. PA. J. CONST. L. 1005 (2006).

22. See generally Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1131–1218 (2004) (describing the literature showing the ways in which categories and schemas are “critical building blocks of the human cognitive process”).

23. Lakoff, *supra* note 17, at 212–13.

24. LAKOFF & JOHNSON, *supra* note 2, at 32–34, 60–66.

convince another of their truth, stories appear more concerned with persuading others of their believability.<sup>25</sup>

Still, the story told in a legal brief “is thought to be a matter of demonstration, not persuasion . . . . We can find the true and real world, says the convention, and we simply should report it in the story.”<sup>26</sup> Despite this conventional view, we also recognize that the legal arguments made in a brief are constrained because argument often must appeal to already accepted values.<sup>27</sup> In contrast,

[S]tories by their very nature can appeal to what is, by convention, still taboo in a culture. Because facts themselves capture and reflect values, what cannot be argued explicitly can be sneaked into a story. Indeed, the genius of storytelling as an act of persuasion is that it buries argument in the facts.<sup>28</sup>

Like metaphor, stories are entangled in culture, resulting in common archetypes, myths, and master stories that help construct social and cultural norms, both by shaping them directly and by supporting particular ways of interpreting experiences.<sup>29</sup> One aspect of this cultural entanglement may be what Professor Milner Ball identified as the natural affinity between narrative and democracy: while the “language of command . . . is hierarchical and distancing and therefore unsuitable to democracy, narrative is inherently communal. A story is shared.”<sup>30</sup> Because of this attribute, narrative may be most effective as persuasion when the audience becomes part of the telling and the reader is invited to fill in the blanks in order to predict the ending.<sup>31</sup>

Like metaphor, stories embedded in our experience provide mental blueprints and cognitive shortcuts. In this way, storytelling becomes central to our ability to make sense out of a series of chronological events that we otherwise would experience as discrete and lacking in coherence and consistency.<sup>32</sup> Stories also make it easier for us to communicate our experiences, help us predict what will happen, and sketch out what we will need to do when we find ourselves entangled in a typical plight.<sup>33</sup> Stories can become “recipes for structuring experience itself, for laying down routes into memory, for not only guiding the life narrative up to the present but directing it into the future.”<sup>34</sup>

Narrative is thought to be persuasive for reasons similar to those supporting the persuasiveness of metaphor. Thus, narrative may be persuasive

25. JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 11 (1986) [hereinafter BRUNER, *ACTUAL MINDS*]. Bruner since has questioned his former comparisons between the narrative mode of thought and the logical-paradigmatic mode. JEROME BRUNER, *MAKING STORIES: LAW, LITERATURE, LIFE* 27 n.19 (2002).

26. Gerald P. López, *Lay Lawyering*, 32 *UCLA L. REV.* 1, 31–32 (1984).

27. *Id.* at 32.

28. *Id.* at 33.

29. Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 *UCLA WOMEN'S L.J.* 457, 458 (1996).

30. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 *MICH. L. REV.* 2280, 2288 (1989).

31. *Id.*

32. AMSTERDAM & BRUNER, *supra* note 3, at 30–31.

33. *Id.* at 117.

34. Jerome Bruner, *Life as Narrative*, 71 *SOC. RES.* 691, 708 (2004).



because, like metaphor, it is based on components we unconsciously understand because of our experience in the world. For example, the theme of a story incorporates a seemingly universal plight—such as “human jealousy” or “thwarted ambition”—as well as familiar characters who are more or less conscious of their plight.<sup>35</sup> We have grown accustomed to and expect a common framework for the narrative; the story arc begins with a normal or ordinary situation, which is interrupted by Trouble, followed by efforts by the characters to address or resolve the Trouble, and culminating in a restoration of the old or the creation of a new “canonical . . . steady state.”<sup>36</sup>

Some scholars theorize that narrative is inherent in the nature of our minds or language.<sup>37</sup> Others claim that narrative persuades because it provides mental models of the ordinary course of events by structuring the characteristic plights of humans. By doing so, narrative makes experiences understandable and allows us to roughly predict the result. Finally, narrative may be persuasive because it meets our psychological needs to hear coherent and believable accounts of the way the world works.<sup>38</sup>

For lawyers, narrative does more than put logical propositions and legal arguments into an attractive form; it allows the storyteller to set the scene, establish a time frame, and tap into the listener’s understanding and identification with the characters and their plights.<sup>39</sup> As are other forms of rhetorical analysis, narrative analysis also is a tool for uncovering and discovering.<sup>40</sup> By calling attention to the “narrative transactions performed within the law,” narrative analysis can uncover what was unseen and unconscious in a judicial opinion.<sup>41</sup> Legal storytelling also takes place beneath the surface.<sup>42</sup> Lawyers

35. *Id.* at 696.

36. BRUNER, *ACTUAL MINDS*, *supra* note 25, at 16. Amsterdam and Bruner described the plot elements as follows:

(1) an initial *steady state* . . . , (2) that gets disrupted by a *Trouble* . . . , (3) in turn evoking *efforts* at redress or transformation, which succeed or fail, (4) so that the old steady state is *restored* or a new (*transformed*) steady state is created, (5) and the story concludes . . . through some coda—say, for example, Aesop’s characteristic *moral of the story*.

AMSTERDAM & BRUNER, *supra* note 3, at 113–14 (emphasis in original).

37. AMSTERDAM & BRUNER, *supra* note 3, at 114–16.

38. *Id.* at 117. To answer the question “what is it about narratives that makes them persuasive in the law?” Chris Rideout suggested the following:

(1) Narratives are “innate” ways of understanding and structuring human experience; this makes them inherently persuasive.

(2) Narrative models go beyond models of persuasion based on formal or informal logic, to encompass “narrative rationality.”

(3) Narratives embody several properties that are psychologically persuasive:

(a) Coherence (a formal property);  
 (b) Correspondence (a formal property);  
 (c) Fidelity (a substantive property).

Rideout, *supra* note 7, at 55.

39. AMSTERDAM & BRUNER, *supra* note 3, at 134–35.

40. Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology*, 18 *YALE J.L. & HUMAN.* 1, 26–28 (2006). Narrative analysis is an “analytic instrument[] in [the] toolkit that might actually be of some use with the legal plumbing.” *Id.* at 28.

41. *Id.* The opinion, as well as the story it tells, can be analyzed as a narrative written to persuade an audience that its story is “true” and correct and that each new episode fits into a master narrative about what courts do. *Id.* at 26–28 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866 (1992)).

42. AMSTERDAM & BRUNER, *supra* note 3, at 135.

and judges argue and decide within a context that is limited, but also illuminated, by experiences and preconceptions derived from the culture's models and myths.<sup>43</sup>

### III. THE FIELD GUIDE

This field guide is divided into two main categories. Within the conceptual framing category, it describes language uses ranging from metonymy (using a part to stand for the whole) to ideographs (using a labeling word to call up a larger value or principle) to image schemas (using the images that we immediately identify as metaphors) to complex frames (combining metaphors and other framing devices into more complex structures).<sup>44</sup> Within the path-making category of narrative, rather than factual stories about a client's plight, the field guide will focus on the inside stories that occur within appellate court briefs and opinions. These are stories about the law-making process, and in particular, they are stories about the roles of judges and the development of the law.

#### A. Framing Devices (*Lost and Found*)

Metaphor *frames* issues by allowing us to map inferences from concrete visual images onto abstract concepts and to fit concepts into categories. The results of either metaphorical process appear natural and inevitable. If Church and State are separated by a *wall*, their working together is prohibited; if privacy falls within the category of *liberty*, it is protected by the Constitution.

Although lawyers and judges use both image schemas<sup>45</sup> and categorization, categorizing is far less suspect, perhaps because it appears in the form of a syllogism.<sup>46</sup> According to cognitive research, however, our perception that a category is a *box* or container with clearly defined boundaries derives from metaphor, not empirical observation. We see ideas as objects and categories as physical containers. We gather up ideas, group them together, and *contain* them; objects fit *inside* or fall *outside* the boundaries of the container. As a result, the process of assigning objects to categories takes on the aura of literal, concrete truth. Rather than being box-like, however, the research suggests that categories have a radial center-periphery structure. Because categories radiate out from a prototype at the

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43. See, e.g., *id.* at 232–39.

44. As might be expected from the description of categories, see *infra* Part III.A.1–4, these categories are not clearly delineated, and I have assigned some examples to one category when they might well have fit into more than one. For another metaphor categorization scheme, see Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 MERCER L. REV. 919 (2007).

45. An image schema is an “image-based metaphor[] in which the visualized scene serves as the source domain whose inferential structure can be mapped to the abstract . . . domain.” WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 36.

46. See *id.* at 62–64 for a discussion of syllogisms.

center, the *fit* of two items that fall into the same category can be significantly different.<sup>47</sup>

### 1. Metonymy: Money

Metonymy and metaphor often work together, illustrating the elasticity of our imaginative ability to see one thing as another. While a metaphor asks us to view one thing as something that it is not, metonymy asks us to see part of one thing as a stand-in for the whole. Thus, one author has written that metaphor cannot claim to tell “nothing but the truth,” while metonymy cannot claim to tell “the whole truth.”<sup>48</sup> While “a share of stock stands metonymically for a share of the company, which is itself a metaphorical entity, . . . the company in turn stands metonymically for the company’s assets. One’s name is metaphorical property, but it is also metonymic for the person named.”<sup>49</sup>

Rather than mere wordplay, rhetorical choices such as these significantly affect our understanding, reasoning, and evaluation.<sup>50</sup> The U.S. Supreme Court’s decisions about campaign contributions by corporations are recent and controversial examples that dramatically reveal what a difference such rhetorical choices can make.

As I have discussed elsewhere,<sup>51</sup> corporate participation in the marketplace of ideas often takes the form of money. Money is given to someone to conduct the public relations, lobbying or advertising campaign, or to participate in a political campaign. Before *Citizens United v. Federal Election Commission*,<sup>52</sup> the U.S. Supreme Court treated different uses of corporate money very differently: corporate money used to sell products or state positions on issues was transformed into *speech* while corporate money spent in election campaigns was viewed as the *root of evil*.<sup>53</sup>

Transforming corporate money into protected speech required three metaphors to work together to form a complex frame: (1) the corporation must be viewed as a person, (2) spending money must be viewed as speech, and

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47. See LAKOFF & JOHNSON, *supra* note 2, at 499–502; WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 69–103.

48. Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2515 (2003). As Schroeder and Carlson put it: [N]either metaphor [nor] metonymy can take the stand as witness without perjuring itself. Metaphor can “swear to tell the truth, the whole truth” but would lie if it implied that it also tells “nothing but the truth.” In contrast, metonymy can “swear to tell the truth . . . and nothing but the truth” but is unable to promise to tell “the whole truth.”

*Id.*

49. Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 866 (2007). Judith Harris suggested that the simplest use of metonymy, which she termed “street metonymy,” involves the naming of visceral parts for the whole—ranging from “brain” to “big mouth” to those that “liken[] the subject to his or her reproductive organs.” Judith A. Harris, *Recognizing Legal Tropes: Metonymy as Manipulative Mode*, 34 AM. U. L. REV. 1215, 1219 (1985).

50. See, e.g., Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949 (2007).

51. *Id.*

52. 130 S. Ct. 876 (2010).

53. See generally McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003); Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).

(3) the free market must be viewed as the appropriate model for analyzing free speech issues.<sup>54</sup> With those metaphors mapping the way, corporate *money talks*, and it can be protected as speech.

Instead of this metaphorical process, a majority of the U.S. Supreme Court isolated money—a metonymical move—as the reference point for corporate participation in election campaigns in *McConnell v. Federal Election Commission*,<sup>55</sup> the decision overruled in *Citizens United*.<sup>56</sup> In *McConnell*, the metonymical choice of money as the stand-in to refer to an entire concept was followed by another metaphorical transformation, but with a different result. Corporate money in election campaigns was “portrayed as the wellspring of evil, a source of temptation, a taint or a poison, a torrent that will flood the market and drown individual voices.”<sup>57</sup> These metaphors freed regulatory impulses. If money corrupts, tempts, poisons, and flows out of control, it must be subject to regulation.<sup>58</sup> Thus, while speech in the metaphorical market deserves protection, money in metonymical isolation requires regulation.

The *McConnell* majority disassociated corporate money that enters election campaigns from the speech or political participation that the money can buy; in other words, the majority isolated as *only money* what corporations contribute to the electoral process.<sup>59</sup> In this way, the majority was able to treat the corporation’s First Amendment interests as less important than the government’s interests in regulating the adverse effects of corporate money.<sup>60</sup> There are many good arguments that this is the appropriate result—corporations differ from individuals in ways that are important for self-expression or self-government—but the majority never acknowledged that it was adopting such an argument.

In the joint opinion of Justices Stevens and O’Connor upholding Titles I and II of the Bipartisan Campaign Reform Act (“BCRA”), the majority first depicted corporate money as the ability to buy influence:

More than a century ago the “sober-minded Elihu Root” advocated legislation that would prohibit political contributions by corporations in order to prevent “the great aggregations of wealth, from using their corporate funds, directly or indirectly,” to elect legislators who would “vote for their protections and the advancement of their interests as against those of the public.”<sup>61</sup>

The goal of the current legislation (BCRA) was “to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions.”<sup>62</sup>

54. See *infra* text accompanying notes 114–126.

55. 540 U.S. 93 (upholding a pre-election prohibition on “electioneering communications” funded by corporations and unions).

56. 130 S. Ct. at 913.

57. See Berger, *supra* note 50, at 950.

58. See, e.g., *McConnell*, 540 U.S. at 115.

59. *Id.* at 203–05.

60. See *id.*

61. *Id.* at 115 (quoting *United States v. UAW-CIO*, 352 U.S. 567, 571 (1957)).

62. *Id.* (quoting *UAW-CIO*, 352 U.S. at 572).

In addition to buying influence, large financial contributions threaten both actual corruption and “the eroding of public confidence in the electoral process through the appearance of corruption.”<sup>63</sup> Even without corruption, undue influence itself leads the public to buy into the “cynical assumption that large donors call the tune.”<sup>64</sup> Not only might donors be seeking influence, they might also be interested in “avoiding retaliation, rather than promoting any particular ideology.”<sup>65</sup> Rather than an opportunity to speak or participate in the political process, campaign fundraisers are “peddling access” to federal candidates and officeholders.<sup>66</sup> Because money is the source of evil, including the result that officeholders will vote according to the wishes of their largest contributors, the best means of prevention is “to identify and to remove the temptation.”<sup>67</sup> In fact, “[i]mplicit . . . in the sale of access is the suggestion that money buys influence.”<sup>68</sup>

As for the restriction in the BCRA’s Title II on spending by corporations and labor unions on “electioneering communications,” the majority found a compelling state interest for the restrictions. Prior decisions “represent respect for the ‘legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.’”<sup>69</sup> The majority wrote that “[w]e have repeatedly sustained legislation aimed at ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.’”<sup>70</sup> Once money is isolated as the source of potential evil, “[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.”<sup>71</sup>

This metonymical view of corporate money was overtaken by the *Citizens United* view that corporate money is speech. The metaphorical perspective on money as speech will be discussed in the complex framing section.<sup>72</sup>

## 2. Ideographs: Liberty, Property, Equality, Ten Commandments

Ideographs are labeling words that carry ideological baggage as they invoke values, beliefs, and interpretations of how the world works.<sup>73</sup> In his

63. *Id.* at 136 (quoting *Fed. Election Comm’n v. Nat’l Right to Work Comm.*, 459 U.S. 197, 208 (1982)).

64. *Id.* at 144 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000)).

65. *Id.* at 148.

66. *Id.* at 150.

67. *Id.* at 153.

68. *Id.* at 154.

69. *Id.* at 205 (quoting *Fed. Election Comm’n v. Beaumont*, 539 U.S. 146, 155 (2003)).

70. *Id.* (quoting *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

71. *Id.* at 223–24 (quoting *Burroughs v. United States*, 290 U.S. 534, 545 (1934)).

72. See *infra* Part III.A.4.

73. “An ideograph is a culturally biased, abstract word or phrase . . . [that] represent[s] in condensed form the normative, collective commitments of the members of a public . . .” CELESTE MICHELLE CONDIT & JOHN LOUIS LUCAITES, *CRAFTING EQUALITY: AMERICA’S ANGLO-AFRICAN WORD* xii (1993).

essay entitled *The “Ideograph”: A Link Between Rhetoric and Ideology*, Michael Calvin McGee proposed that our political beliefs and ideologies are shaped by these words.<sup>74</sup> Like Chinese characters, words are “ideographs” because “they signify and ‘contain’ a unique ideological commitment . . . .”<sup>75</sup>

Among the most prominent ideographs in American legal rhetoric are *liberty* and *property*. The ideological commitments behind these ideographs are linked, the concept of individual property seemingly the basis for the concept of individual liberty:

But in America, and here alone, we have gone at once to the fountain of liberty, and raised the people to their true dignity. Let the lands be possessed by the people in fee simple, let the fountains be kept pure, and the streams will be pure of course . . . . All other [free] nations have wrested *property* and *freedom* from *barons* and *tyrants*; we begin our empire with full possession of property and all its attending rights.<sup>76</sup>

Property as an ideological concept was at the center of the explosive controversy surrounding the *taking* of homes in *Kelo v. City of New London*.<sup>77</sup> There, Justice Thomas in dissent complained that the U.S. Supreme Court had it backwards when it adopted a

searching standard of constitutional review for nontraditional property interests, such as welfare benefits, while deferring to the legislature’s determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals’ traditional rights in real property. The Court has elsewhere recognized “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,” when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to “second-guess the City’s considered judgments,” when the issue is, instead, whether the government may take the infinitely more intrusive step of tearing down petitioners’ homes. Something has gone seriously awry with this Court’s interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not.<sup>78</sup>

As Justice Thomas noted, because of its utility, the concept of property has been metaphorically extended far beyond land, houses, and concrete objects capable of possession. When lawyers discuss property, we know that they are discussing a *bundle of sticks* or a “collection of attributes in relation

74. See generally Michael Calvin McGee, *The “Ideograph”: A Link Between Rhetoric and Ideology*, 66 Q.J. SPEECH 1 (1980).

75. *Id.* at 7. For a discussion of McGee’s work with reference to legal briefs, see Ann Sinsheimer, *The Ten Commandments as a Secular Historic Artifact or Sacred Religious Text: Using Modrovich v. Allegheny County to Illustrate How Words Create Reality*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 325 (2005).

76. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 350 (1991) (quoting Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* (1787), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 60–61 (Paul Leicester Ford ed., 1888)) (emphasis in original).

77. 545 U.S. 469 (2005). “Property—the cluster of beliefs tied up to the right to own one’s home, the right to have a voice in governmental decisions involving taxes on wages or other holdings, the right to pass on holdings from one generation to another, etc.—is a classic American ideograph.” Richard A. Matasar, *Trial Narratives and the Study of Law: Some Questions*, 76 IOWA L. REV. 207, 212 n.25 (1990).

78. *Kelo*, 545 U.S. at 518 (Thomas, J., dissenting) (citations omitted).

to things, . . . [attributes that] spring to life almost automatically once we say something is property . . . .”<sup>79</sup> When we are asked to view new concepts as property, we assume certain characteristics, including “a discrete physical object or spatial expanse; that persists through time; is subject to exclusion from use by others; is alienable; and is useful.”<sup>80</sup> But as we move away from the prototype that created the category, some of these characteristics become less useful and drop away. Water rights are treated like property rights though water is not a discrete object, intellectual property is treated as property even though it is “only metaphorically an entity, and it is only metaphorically transferable to another for their use.”<sup>81</sup>

The ideograph of *equality*, similarly linked to the country’s origins, has been asked to carry more weight than it could bear, especially since the holding in *Brown v. Board of Education*<sup>82</sup> fifty years ago that “in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>83</sup> Today, *Brown* is said to stand in for the concept of a color-blind U.S. Constitution<sup>84</sup> and a seemingly syllogistic proposition:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.<sup>85</sup>

Because of its cultural connection with the story of the country’s origins, equality is a concept with great power. Law and society scholar Martha Fineman has long argued that a formal equality model—one that ignores gender differences and treats spouses as if they are the same—will “only further and deepen existing inequalities.”<sup>86</sup> Professor Fineman offers the possibility of a more effective framing of the issue, pointing to the 1999 decision of the Vermont Supreme Court holding that “same-sex couples were entitled to

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79. John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290, 294 (1992).

80. Johnson, *supra* note 49, at 866 (internal format modified).

81. *Id.* at 866.

82. 347 U.S. 483 (1954).

83. *Id.* at 495.

84. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring); see Rideout, *supra* note 7, at 78–86 (giving a brief narrative analysis of *Parents Involved*).

85. *Parents Involved*, 551 U.S. at 747–48 (Roberts, J., concurring) (citations omitted).

86. Martha Albertson Fineman, *Evolving Images of Gender and Equality: A Feminist Journey*, 43 NEW ENG. L. REV. 437, 445 (2009). Professor Fineman writes that equality has been “reduced in its collective potential to a mere individual entitlement to be treated the same as everyone else regardless of the differences in material, social, historical, or other resources.” *Id.* at 453.

receive the legal benefits and protections” available to married couples of opposite sexes.<sup>87</sup>

Ideographic analysis can uncover the persuasiveness of word choices seemingly less loaded with ideological value than equality, liberty, and property, such as the use of the word *tablets* rather than *plaques* or *monuments* for displays of the Ten Commandments.<sup>88</sup> In *Van Orden v. Perry*,<sup>89</sup> the U.S. Supreme Court adopted the historical *monument* approach:

The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments’ text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law)—a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States.<sup>90</sup>

Professor Sinsheimer noted that in finding the display to be constitutional in *Van Orden*, the majority and concurring opinions referred to the Ten Commandments as “the monument” while the dissenting opinions referred to “the Commandments.”<sup>91</sup> In *McCreary County v. American Civil Liberties Union of Kentucky*,<sup>92</sup> issued the same day and finding the Ten Commandments displays at county courthouses to be unconstitutional, the majority and concurring opinions referred to “the Commandments,” while the dissenting opinion selected neutralizing language such as “the Foundations Displays.”<sup>93</sup>

After analyzing the use of similar terms by the attorneys and the courts in prior cases, Professor Sinsheimer concluded that their word choices had the effect of neutralizing the religious nature of the displays at issue and instead presented “the Ten Commandments as an historic plaque.”<sup>94</sup> That is:

87. *Id.* at 458. The Court based its decision not on the Equal Protection Clause, but on “a more expansive and earlier notion of equality derived from the experience of colonial America,” the Vermont Constitution’s Common Benefits Clause. *Id.* That clause states that the “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.” *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999) (citing VT. CONST. ch. I, art. 7).

88. See Sinsheimer, *supra* note 75, at 340.

89. 545 U.S. 677 (2005).

90. *Id.* at 700–01 (Breyer, J., concurring) (emphasis in original omitted).

91. Sinsheimer, *supra* note 75, at 347–48.

92. 545 U.S. 844 (2005).

93. Sinsheimer, *supra* note 75, at 348.

94. *Id.* at 340.



The United States Court of Appeals for the Third Circuit decided that the Ten Commandments represented history and not religious expression by the state because it selected among a range of ideographs. These ideographs were presented to the court, in part, by the parties to the dispute in their legal pleadings which include the complaint and answer, and their briefs.<sup>95</sup>

### 3. Image Schemas: Wall of Separation, Penumbra

Image schemas are the metaphors we most readily identify because they seek to map the inferences from concrete visual images onto abstract concepts.<sup>96</sup> The best-known image schemas in American constitutional analysis are among the most heavily criticized. Nonetheless, Thomas Jefferson's metaphor of the "*wall of separation* between Church & State" has essentially replaced the language of the law,<sup>97</sup> and the image of a wall has become our common-sense understanding about the relationship between religion and the government.<sup>98</sup> One author concludes that the metaphor has been so powerful because it works so well: it is "simple, concrete, visual, creative, and concise."<sup>99</sup>

Similarly, the *penumbra* metaphor has been used to visualize and to explain the extension of a right or an obligation more broadly than the original understanding.<sup>100</sup> Several authors have suggested that the penumbra metaphor reflects an understanding of the (center-periphery) radial structure of categories:

Certain activities are protected, for example, by lying "within" the First Amendment (association), the Fourth Amendment (protection from search and seizure), or the Fifth Amendment (freedom from forced surrender). Certain rights clearly lie within the center. But not all the categories for rights are so precisely defined or presented. For privacy, a right he was confident existed, Douglas had to look in the metaphorical periphery.<sup>101</sup>

Professor Winter classified Professor H. L.A. Hart's use of the term "penumbra" as an early example of radiating categories from prototypes.<sup>102</sup>

Perhaps the most criticized example of the penumbra metaphor<sup>103</sup> is Justice Douglas' decision recognizing a constitutional right of privacy in

95. *Id.* at 340–41.

96. Professor Winter uncovers the consequences of the use of image schemas for constitutional analysis in his examination of the image schema of standing. Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

97. Julie A. Oseid, *The Power Of Metaphor: Thomas Jefferson's "Wall Of Separation Between Church & State,"* 7 J. ASS'N LEGAL WRITING DIRECTORS 123, 125, 125 n.6 (2010) (quoting PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 1 (2002)).

98. *Id.* at 125 n.7 (quoting Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 628 (1999)).

99. Oseid, *supra* note 97, at 125.

100. Professor Hart refers to "problems of the penumbra" as "problems which arise outside the hard core of standard instances or settled meaning." H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

101. J. Christopher Rideout, *Penumbra Thinking Revisited: Metaphor in Legal Argumentation*, 7 J. ASS'N LEGAL WRITING DIRECTORS 155, 177 (2010).

102. WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 197–99.

103. See, e.g., Burr Henly, "*Penumbra*": *The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81, 83 (1987); Rideout, *supra* note 101.

*Griswold v. Connecticut*.<sup>104</sup> By the time of the decision, the penumbra metaphor was both generally accepted and had been used by both judges and legal scholars. Justice Douglas' use of the metaphor may be subject to criticism, but not because it is a metaphor and not subject to rigorous analysis. Instead, metaphor is "highly constrained—both by its internal systematicity and coherence and by the social contexts in which the meaning of its systems of correspondences is grounded."<sup>105</sup> What fails is not the metaphor itself, but Justice Douglas' "expression of the metaphor."<sup>106</sup>

#### 4. Complex Frames

##### a. *The Family*

Although increasingly rare in nature, embedded images of good mothers and nuclear families lie quietly beneath the surface of judicial decisions. For example, the concept of the marital family as the ideal family was critical in *Michael H. v. Gerald D.*,<sup>107</sup> when a biological father sought visitation rights with his child.<sup>108</sup> Justice Scalia, writing for the plurality, stated that "California law, like nature itself, makes no provision for dual fatherhood."<sup>109</sup> Justice Scalia's image of the ideal family allowed him to depict the plaintiff—the biological father—as an outsider without rights because historical tradition protects the traditional marital family unit as opposed to the biological one.<sup>110</sup>

An enduring image of the ideal mother as primarily a nurturing figure who is willing to sacrifice other priorities for her children is widespread in child custody litigation. Here is just one example, from a 2006 child custody decision from Idaho, where the magistrate extended the image of the ideal parent to both husband and wife.<sup>111</sup> Asked to decide who should gain custody of the couple's children, the magistrate expressed his frustration that neither parent fit the image:

I would encourage both of you to seek changes to your either [sic] employment schedule or the status of your employment. The evidence I've heard so far, I'm gonna be up front with you about, indicates to me that these children don't have two primary parental figures in their lives. You're only available a couple of

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104. 381 U.S. 479, 484 (1965).

105. Rideout, *supra* note 101, at 189.

106. *Id.* at 190.

107. 491 U.S. 110 (1989).

108. *Id.* at 114.

109. *Id.* at 118.

110. *Id.* at 124. Justice Scalia concludes:

Thus, the legal issue in the present case reduces to whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection. We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the marital family (Gerald, Carole, and the child they acknowledge to be theirs) against the sort of claim Michael asserts.

*Id.*

111. *Silva v. Silva*, 136 P.3d 371, 374 (Idaho Ct. App. 2006).

nights a week . . . . Your kids have been raised by a step-dad, daycare providers, friends and grandparents. That's who has raised your children so far.

Now you're in front of me asking to be awarded primary custody. And you know what? It's gonna be probably the first among you who steps up, who wants to be there, available to them when they get out of school, when they're in bed, when they need help with their homework, when they need dinner and when they need breakfast. You don't want to do that, then this is gonna be a real toss-up, I can tell you right now. It's gonna be very difficult for me to decide.<sup>112</sup>

### b. *The Marketplace*

The images upon which First Amendment protection depends once focused on the individual speaker: the printing press, the orator on the street corner, the pamphleteer at your door.<sup>113</sup> More complex First Amendment metaphors derived from commercial transactions now appear to have achieved the status of received truth.<sup>114</sup> Thus, in *Citizens United*, Chief Justice Roberts wrote:

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern . . . . First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer.<sup>115</sup>

This position had been stated earlier, in the dissenting opinions in *McConnell*. There, Justices Scalia and Thomas viewed corporate money with a different lens than the majority's view of money in this context as the *root of evil*.<sup>116</sup> The dissenting justices wrote that the majority's decision upholding Titles I and II of BCRA constitutes "a sad day for the freedom of speech";<sup>117</sup> the legislation itself is "the most significant abridgement of the freedoms of speech and association since the Civil War."<sup>118</sup> Money is not a root of evil,

112. *Id.*

113. See Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1186–95 (1989) (tracing evolution from a First Amendment image of an individual on a soapbox and a basement press cranking out leaflets to the marketplace of ideas, which draws on the metaphors of minds as machines and ideas as products and commodities); see also Linda L. 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) (applying metaphor theory to analyze the briefs filed in the U.S. Supreme Court in a case raising First Amendment corporate speech issues).

114. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 156–57 (1980).

115. 130 S. Ct. 876, 917 (2010) (Roberts, J., concurring).

116. 540 U.S. 93, 247 (2003) (Scalia, J., concurring in part and dissenting in part); *id.* at 264 (Thomas, J., concurring in part and dissenting in part).

117. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part).

118. *Id.* at 264 (Thomas, J., concurring in part and dissenting in part).

but a necessary means to give voice to corporations. Failing to recognize this, the majority has

smile[d] with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government . . . . [T]his legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations . . . .<sup>119</sup>

Not only do these entities have the resources to make their criticism heard, they have much to express: “giving the government power to exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views.”<sup>120</sup> Thus, “[a] candidate should not be insulated from the most effective speech that the major participants in the economy and major incorporated interest groups can generate.”<sup>121</sup>

Rather than a compelling state interest, the legislation itself had no goal other than to regulate speech. Justice Scalia criticized the Court’s “cavalier attitude toward regulating the financing of speech” and he explained that “[d]ivision of labor requires a means of mediating exchange, and in a commercial society, that means is supplied by money.”<sup>122</sup> Even if the target is money, “where the government singles out money used to fund speech . . . it is acting against speech as such . . . .”<sup>123</sup> All corporations are doing is associating with others to disseminate ideas; like those who engage in “singing or speaking in unison,” they are merely “pooling financial resources for expressive purposes.”<sup>124</sup> Recognizing that one proposition might justify the decision—“that the particular form of association known as a corporation does not enjoy full First Amendment protection”—Justice Scalia responds that “the text of the First Amendment does not limit its application in this fashion . . . [n]or is there any basis in reason why First Amendment rights should not attach to corporate associations.”<sup>125</sup>

Turning to the marketplace model, Justice Scalia insists that the use of corporate money “to speak to the electorate is unlikely to ‘distort’ elections” because

[t]he premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source. If that premise is wrong, our democracy has a much greater problem to overcome than merely the influence of amassed wealth. Given the premises of democracy, there is no such thing as too much speech.<sup>126</sup>

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119. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part).

120. *Id.* at 257–58.

121. *Id.* at 258.

122. *Id.* at 251–52.

123. *Id.* at 252.

124. *Id.* at 255.

125. *Id.* at 256.

126. *Id.* at 258–59 (emphasis omitted).

### B. Narrative (*Beginnings and Endings*)

Storytelling extends beyond jury trials and fact statements in which the parties and claims may be portrayed as characters in a plot. In appellate opinions, the characters, events, and setting of the decision-making process are the stuff of stories. Here, stories about law and judging often take center stage.

#### 1. Law Stories

##### a. *A Story of Origins: The U.S. Constitution*

Given the development of American law, the story of the U.S. Constitution is the foundational story of origins. Uncovering Frederick Douglass' ability to frame the U.S. Constitution to serve as a stand-in for equality (despite its explicit support for unequal citizenship), Professor Milner Ball<sup>127</sup> identified the metaphor at work:

“The Constitution, as well as the Declaration of Independence, and the sentiments of the founders of the Republic, give us a platform broad enough, and strong enough, to support the most comprehensive plans for the freedom and elevation of all the people of this country.” On that platform, the Constitution, which never employs the word “slavery,” could be interpreted as antislavery, and the continuation of slavery could be interpreted as a discrepancy between the Constitution as written and the Constitution as administered.<sup>128</sup>

Ball credits President Lincoln's Gettysburg Address for helping to solidify the Douglass version into the American canon:

Lincoln's opening, “Fourscore and seven years ago”—a type of “once upon a time”—was a reference not to 1789 and the adoption of the Constitution, but to 1776 and the Declaration of Independence. In that beginning the nation had been dedicated to the “proposition” about equality.

....

Where Douglass drew out the story of origins by contrasting it with the story of slavery, Lincoln interpreted the story of origins through compatible narrative extension. He interpreted the story of bringing forth the nation by embroidering it with the story of the war for that nation's life. The methods of both men were means for engaging narrative in the transformation of the legal order, telling stories so that law might include and respect the black people who had been excluded.<sup>129</sup>

As Professor Ball noted, because this story of equality is now canonical, coherence has been achieved: “The fourteenth amendment appears to have belonged in the Constitution all along, the Constitution appears to have grown

127. Ball, *supra* note 30, at 2280.

128. *Id.* at 2284 (quoting Frederick Douglass, *The Dred Scott Decision: An Address Delivered, in part, in New York, New York, in May 1857, in 3 THE FREDERICK DOUGLASS PAPERS 171–72* (J. Blasingame ed., 1985)).

129. *Id.* at 2285.

out of the Declaration of Independence, and the Declaration appears to have emerged from a constitutive devotion to equality.”<sup>130</sup>

*b. Stories of Beginnings: Brown and Marbury*

Continuing this canonical story of equality, *Brown* has during the last fifty years become the shorthand symbol for the ideograph of equality:

*Brown* fits nicely into a widely held and often repeated story about America and its Constitution. This story has such deep resonance in American culture that we may justly regard it as the country’s national narrative. I call this story the Great Progressive Narrative. The Great Progressive Narrative sees America as continually striving for democratic ideals from its founding and eventually realizing democracy through its historical development . . . . The basic ideals of Americans and their Constitution are promises for the future, promises that the country eventually will live up to, and, in so doing, confirm the country’s deep commitments to liberty and equality.<sup>131</sup>

In the words of an amicus brief in a recent school district desegregation case, for example:

We begin with *Brown*.<sup>132</sup>

The brief continues to portray *Brown* as the source, or the beginning:

That decision neither established nor supports the proposition that race may never be considered in the assignment of students to public schools. Rather, the Court there held that the use of race for segregative purposes is impermissible. Nothing in *Brown* indicates that race-conscious integrative student assignments violate the Equal Protection Clause. Indeed, its language and spirit . . . suggest the opposite: that adoption of integrative policies would be encouraged, since the harms of racial segregation occur regardless of whether that segregation is *de jure* or *de facto*.

No reference to strict scrutiny can be found in *Brown*, nor in any of the Court’s later school desegregation or voluntary integration decisions.<sup>133</sup>

The path from *Brown* went in one direction; other directions were followed in other cases:

These distinct jurisprudential paths have not converged. Although the Court’s school desegregation rulings discussed the appropriate remedies for a constitutional violation, it is telling that the Court never articulated a need to balance those remedies against any students’ claims to a supposed “right” to attend “neighborhood” schools, or to be free from assignments to integrated schools where they would have to associate with pupils of a different racial or ethnic group. To the contrary, the Court has recognized that school authorities may (and should) pursue steps to achieve racial integration because it benefits all students, regardless of race.<sup>134</sup>

130. *Id.*

131. Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 5* (Jack M. Balkin ed., 2001).

132. Brief of the NAACP Legal Def. & Educ. Fund, Inc. as Amicus Curiae in Support of Respondents at \*5, *Parents Involved in Cmty Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

133. *Id.*

134. *Id.* at \*6–7 (citations and emphasis omitted).

The path from *Brown* leads inevitably to this result:

At bottom, respondents have done precisely what this Court has long indicated that it hoped all public school systems . . . would do: they have made a conscious effort to build upon their prior achievements, to learn from their mistakes, and to continue striving toward *Brown*'s vision of equal, integrated public schools.<sup>135</sup>

Like *Brown*, *Marbury v. Madison*<sup>136</sup> stands in for a heavily weighted concept. It is the source for and "the fountainhead of judicial review."<sup>137</sup> The U.S. Supreme Court routinely cites *Marbury*, with no explanation necessary, to justify its overturning of legislative actions. Its status is such that "[i]f we did not already know that *Marbury* was so momentous a case, we would be hard pressed to explain why it is so celebrated."<sup>138</sup> But it is not the holding alone that makes *Marbury* significant both as story and symbol. Instead "[w]ithin the fields of constitutional law and federal courts law, *Marbury* is not merely a case of historical importance, but a living paradigm of the necessary and proper function of courts in exercising judicial review."<sup>139</sup>

*Marbury* embodies the role of the lawyer and the judge in constitutional adjudication:

To be a constitutional lawyer is to participate in a practice that is substantially founded on *Marbury*. There is no stronger constitutional argument against a position than that it contravenes *Marbury*'s central holding; *Marbury* is too foundational, too ensconced, and too pervasive in influence to be rejected as mistaken. Correspondingly, perhaps the strongest argument of principle in favor of a disputed constitutional position is that *Marbury* entails it. Again, the rejection of *Marbury* is unthinkable.<sup>140</sup>

### c. *A Story of Birth: Miranda*

Law stories of beginnings include the recognition of new legal rights. Analyzing the briefs filed in *Miranda v. Arizona*,<sup>141</sup> Linda Edwards concludes that the petitioner's brief tells a story about the birth of the right to counsel.<sup>142</sup> She points out that the brief's legal argument does not begin by explaining the

135. *Id.* at \*15.

136. 5 U.S. 137 (1803).

137. Miguel Schor, *The Strange Cases of Marbury and Lochner in the Constitutional Imagination*, 87 TEX. L. REV. 1463, 1463–64 (2009) (analyzing *Marbury* as in the canon of constitutional law and *Lochner* as in the "anticanon," representing "the fear that independent courts armed with the power of judicial review might run amok").

138. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1039 (1997). "However intriguing its politics (including Marshall's failure to recuse himself), the fact remains that the decision had little palpable import." *Id.* That is, even "if it did contribute something to the acceptance of judicial review, its impact was limited to the least controversial category of cases: matters relating to the proper duties of the judiciary itself . . ." *Id.*

139. Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 11 (2003).

140. *Id.* Fallon goes on to quote Paul Kahn: "The study of constitutional law not only begins with this case, it ends there as well . . ." *Id.* at 12 (quoting PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTITUTION OF AMERICA* 4 (1997)).

141. 384 U.S. 436 (1966).

142. Linda H. Edwards, *Once upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 891–92 (2010).

current state of the law,<sup>143</sup> but instead with this sentence: “We deal here with growing law, and look to where we are going by considering where we have been.”<sup>144</sup> After tracing the birth and development of the concept of the right to counsel, the brief concluded:

The right does exist. It is the same. This is not the result of a single case, *Escobedo* or any other. Rather, there is a tide in the affairs of men, and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused.<sup>145</sup>

That the story involves not only the development of the law but the characters of the judges involved at different stages is clear in Edwards’ description of one section of the brief:

[W]e hear the voices of these four Justices urging their positions, each speaker breaking in when the prior speaker stops to take a breath. There is narrative energy here. It is a noisy scene with animated voices making their points.<sup>146</sup>

## 2. Stories of Judging

### a. *The Wise Judge: King Solomon*

The tale of King Solomon’s wisdom is one of the story metaphors we live by: the ideal judge of our imagination is like the image derived from the Biblical story.<sup>147</sup> Like Solomon, the ideal judge embodies wisdom and judgment; the judge is wisdom because he determines the right answer through the exercise of reason; he exemplifies judgment because he accurately assesses evidence that would stymie others.<sup>148</sup>

The continuing influence of Solomon’s image as a frame and filter for our perceptions of judges and judging is shown in the language of judicial opinions as well as the claims made in public debates about how judging should work. Consider this statement from the confirmation hearings on the nomination of Judge Sonia Sotomayor to the U.S. Supreme Court:

[O]ur legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.<sup>149</sup>

143. *Id.* at 892–93.

144. Brief of Petitioner at \*11, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 65-759).

145. *Id.* at \*34.

146. Edwards, *supra* note 142, at 895. For a narrative analysis of the brief filed by Abe Fortas on behalf of Gideon in *Gideon v. Wainwright*, see Jennifer Sheppard, *Once upon a Time, Happily Ever After, and In a Galaxy Far Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255 (2009).

147. See Ann Althouse, *Beyond King Solomon’s Harlots: Women in Evidence*, 65 S. CAL. L. REV. 1265, 1268–69 (1992) (noting that the “story appears in various forms in at least twenty-two folk tales from many cultures,” including Bertolt Brecht’s *The Caucasian Chalk Circle*).

148. For an extended discussion of this concept, see 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 (2009).

149. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary, United States Senate*, 111th Cong. 6 (2009) (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary). A more



Though it fits neatly into this formalist view of how the law works, the image of the wise judge also works within the opposite perspective on how judges make decisions. Thus, when Judge Posner writes in *How Judges Think*, “[t]he radical uncertainty that besets judges in many of the most interesting and important cases makes conventional decision theory largely inapplicable to judicial decision making and necessitates eclectic theorizing,”<sup>150</sup> who better to exemplify eclectic theorizing in a case of radical uncertainty than Solomon?

Starting out as a story, the image of Solomon now stands for an entire decision-making framework or narrative plot complete with characters and conflict. Thus, when a trial judge is acting within the recognized range of his discretion, he may view his judgment of the parties’ characters as akin to Solomon’s. So, for example, the trial judge in one child custody case awarded sole physical custody to the mother based on his observations of the witnesses: “[The father] was evasive and vague . . . . He evaded cross examination with an intense passivity that was almost pugnacious . . . . He had a hovering presence. He was not intimidating as much as he was unsettling.”<sup>151</sup> On the other hand, the mother “testified in a temperate manner, soft of speech, spontaneous and without a pattern of aggression. When offered opportunities to make partisan points, she demurred . . . .”<sup>152</sup> As a result, the trial judge felt confident that the father’s courtroom demeanor predicted his conduct as a parent, that “he is the more rigid, the less yielding, the less sensitive, the more aggressive and the less likely to be willing to adjust . . . .”<sup>153</sup>

Appellate courts also may view the trial judge’s decisions through the lens of Solomon’s wisdom. Reviewing a trial court decision, the South Carolina Supreme Court in *Parris v. Parris*<sup>154</sup> explained why the judge’s decision should be considered neutral, reasonable, and wise despite his use of language that seemed to show bias and prejudice:

In making custody decisions the totality of the circumstances peculiar to each case constitutes the only scale upon which the ultimate decision can be weighed. The trial judge, who observes the witnesses and is in a better position to judge their demeanor and veracity, is given broad discretion . . . .<sup>155</sup>

The family court judge was presumed to have judged wisely based on the facts before him, though he may have spoken rashly.

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restrained, but similar, description can be found at Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument* (U. of Chicago, Olin Law & Economics Program, Research Paper Series, Working Paper No. 466, 2009), available at <http://ssrn.com/abstract=1414317>.

150. RICHARD A. POSNER, *HOW JUDGES THINK* 35 (2008).

151. *Joseph v. Joseph*, No. FA-90-0094663, 1992 WL 91684, at \*3 (Conn. Super. Ct. Apr. 16, 1992).

152. *Id.*

153. *Id.*

154. 460 S.E.2d 571 (S.C. 1995).

155. *Id.* at 572 (citation omitted).

Similar deference to the trial judge's assessment of the testimony given by the parents is found in many other cases. In *Randall v. Steward*,<sup>156</sup> the appellate court explicitly relied on the King Solomon story to provide support for its holding that it was reasonable for the trial court to conclude that the "father has the greater capacity and disposition . . . to give the children love and affection and guidance, which includes fostering a proper respect for the opposite parent."<sup>157</sup> Like the judge in *Randall*, the judge in another child custody decision said that "[y]ou can't cut the child in half, so I have to make a decision one way or the other and I made that decision. And, I based my decision on . . . the testimony that came through at the trial," thus justifying his rejection of the recommendation of the custody evaluator.<sup>158</sup>

*b. The Judge as Reluctant Hero: Bush v. Gore*

Robert Tsai identified the trope of the reluctant lawgiver in an article discussing *Marbury* and *Brown*.<sup>159</sup> As he noted there, the U.S. Supreme Court labored to convey the image of the judge as reluctant lawgiver in its per curiam decision in *Bush v. Gore*,<sup>160</sup> which overturned the Florida Supreme Court's order to recount the votes and resulted in George W. Bush becoming President.<sup>161</sup> In that decision, the unnamed Justices wrote the following:

None are more conscious of the vital limits on judicial authority than are the Members of this Court, and none stand more in admiration of the Constitution's design to leave the selection of the President to the people, through their legislatures, and to the political sphere. When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.<sup>162</sup>

Tsai characterized this rhetorical move as myth making, casting the job of judicial interpretation as a "divine calling" that is the judiciary's destiny.<sup>163</sup> Relying on the judicial role embodied by *Marbury*, Justice Robert Jackson portrayed the Court in *West Virginia State Board of Education v. Barnette*<sup>164</sup> as the reluctant lawgiver when it overturned a state regulation and also overruled its own decision made only a few years earlier.<sup>165</sup> In his widely admired opinion striking down a regulation of the West Virginia State Board of Education requiring the flag salute and pledge of allegiance, Jackson wrote,

156. 426 N.W.2d 465 (Minn. Ct. App. 1988).

157. *Id.* at 469. The court said that the trial court's analysis was supported by statute and "corroborated by scientific studies on the welfare of children and understandings of ancient origin," that is, the story of King Solomon. *Id.* at 470 n.3.

158. *Petersen v. Petersen*, No. A06-1801, 2007 WL 1248192, at \*3 (Minn. Ct. App. May 1, 2007).

159. See Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1124-29 (2005), for a discussion of what he calls the "constitutional iconography" of these cases.

160. 531 U.S. 98 (2000).

161. *Id.* at 111.

162. *Id.*

163. Tsai, *supra* note 159, at 1126.

164. 319 U.S. 624 (1943).

165. *Id.* at 640.

“We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.”<sup>166</sup>

*c. The Appellate Judge as Hero: Miranda*

The prototypical judge as hero can save the victim and advance the law.<sup>167</sup> After analyzing the briefs filed on both sides, Professor Richard Sherwin concluded that the brief filed for the petitioner in *Miranda* is “a strikingly dramatic narrative” in which the deciding judge is asked to take on “the active (one might say heroic) role of advancing a progressive movement within the law in the direction of basic beliefs.”<sup>168</sup> Constructed around universal themes of fate, chance, and secrecy, Sherwin concluded that the brief prepares the reader to reach (for himself or herself) the proper outcome to the case:

When Miranda walked out of Interrogation Room 2 on March 13, 1963, his life for all practical purposes was over. Whatever happened later was inevitable; the die had been cast in that room at that time. There was no duress, no brutality. Yet when Miranda finished his conversation with Officers Cooley and Young, only the ceremonies of the law remained; in any realistic sense, his case was done. We have here the clearest possible example of Justice Douglas’ observation, “what takes place in the secret confines of the police station may be more critical than what takes place at the trial.”<sup>169</sup>

As Sherwin tells it, the themes are reflected in these ways in this opening paragraph. Miranda’s fate was cast because nothing else could change the outcome after the confession: Miranda’s fate was the result of chance, being in that room at that time; and his fate, determined by chance, was determined in secret.<sup>170</sup> The reader understands that “the accused in police custody is helpless, friendless, at the mercy of forces beyond his control. He faces the force of fate (once his confession is obtained) and the force of chance (in light of the endowments he happens to bring with him into the interrogation

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166. *Id.*

167. Among the law stories in which the judges are cast as heroes, one scholar has identified “the Rehnquist Court’s frequent and dramatic invocation of the image of institutional conflict.” Robert L. Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 84 (2004). As depicted in the First Amendment decisions of *Boy Scouts of America v. Dale* and *Legal Services Corp. v. Velazquez*, Tsai found that the Court activating an interpretive frame of institutional discord to promote its stature. In both instances, the Court employed a conversational script about judicial power and engaged in vivid role-playing, casting itself and other parties in familiar parts. In *Dale*, it was the state supreme court that imperiled liberty if the Boy Scouts could not have their way in expelling a gay Scout leader; in *Velazquez*, Congress posed the fearsome psychological threat to equal justice by preventing lawyers for the poor from challenging “existing law.”

*Id.* (discussing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000)).

168. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 711 (1994), reprinted in 6 J. ASS’N LEGAL WRITING DIRECTORS 88, 114 (2009).

169. *Miranda Brief of Petitioner*, *supra* note 144, at \*10.

170. Sherwin, *supra* note 168, at 713.

room).”<sup>171</sup> The police have created and are exploiting these conditions because they have power and control in secrecy.<sup>172</sup>

To offset “such intolerable inequality and unfairness,”<sup>173</sup> the brief writer counts on the U.S. Supreme Court to reach the correct conclusion:

We have in this galaxy of cases not a series of isolated phenomena, but reflections of basic belief . . . .

This case is not to be decided by the color-matching technique of determining whether one case looks just like another case. We deal with fundamentals of liberty, and so, in consequence, with basic belief.<sup>174</sup>

*Miranda*’s narrative does not depend on the specific facts or specific recommendations of results: “[T]he Justices of the Court know what needs to be done; they have the authority to do it; let it then be done . . . . [The story] casts the decisionmaker in the active role of savior on behalf of the disadvantaged and the helpless.”<sup>175</sup>

#### IV. A GUIDED EXPLORATION

Once the “biasing effects of schema[]” have been raised, persuasion becomes more difficult.<sup>176</sup> As soon as an unconscious and automatic knowledge structure has been activated, judgments are more likely to be based on assumptions derived from categories and schemas than on evidence of individual characteristics.<sup>177</sup>

##### A. Metaphor and Narrative as Problem Setting

Despite this, metaphor and narrative assure us that we can re-envision the settings for problems. Because problems do not present themselves with a particular face and frame, metaphor and narrative can be used imaginatively, both to change perceptions and to persuade.<sup>178</sup> Once we recognize that problems are constructed by people who are trying to make sense out of trouble or complexity, we are better able to uncover the kinds of constructions that exert unintended control over the range of our imagined responses.<sup>179</sup> By describing a *breakdown* in family structure, rather than change, evolution, or growth,

171. *Id.*

172. *Id.*

173. *Id.*

174. *Miranda* Brief of Petitioner, *supra* note 144, at \*34–35.

175. Sherwin, *supra* note 168, at 714.

176. Chen & Hanson, *supra* note 22, at 1223.

177. *Id.* at 1228–31.

178. George Lakoff garnered attention and criticism for his proposals to reframe major political questions around metaphors that would lead to different means of reasoning and concluding. See generally GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002); GEORGE LAKOFF, *DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE* (2004).

179. See KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM I* (1973) (“Critical and imaginative works are answers to questions posed by the situation in which they arose . . . . [The strategies that we adopt to encompass the situations] size up the situations, name their structure and outstanding ingredients, and name them in a way that contains an attitude toward them.”).

we turn demographic trends into social problems.<sup>180</sup> In the child custody context, when we talk about families that have *split up* or about single or working or welfare mothers, the words we choose lead to seemingly natural solutions: we need to repair the family, marry off the mother, get some mothers back to nurturing, and paradoxically, get other mothers back to work.

Problem construction is shaped not only by metaphoric frames but also by the stories we use to describe “what is wrong and what needs fixing.”<sup>181</sup> Because these stories shape our recognition of the problem, they control the directions we tend to follow in solving it. So, for instance, when a father is described as a *deadbeat dad*, the Trouble (the disruption in the normal state of things) driving the plot can be overcome by requiring him to pay his debt and meet his financial obligations (rather than by requiring him to take responsibility for parenting his children). When a mother is characterized as aggressive and career oriented, the conflict is resolved by declaring her role to be that of primary wage earner, rather than the caregiver who should win custody.

Although metaphors and stories shape problem construction, they support problem reconstruction and problem solving as well. Donald Schön gave an example of the use of metaphor to resolve problems when he described the way that manufacturers of synthetic-bristle paintbrushes might have imaginatively determined how to make their paintbrushes work more like natural-bristle ones.<sup>182</sup> Once they realized that the paintbrush could be *seen as* a pump, they could redesign the synthetic bristles to work in the same way.<sup>183</sup>

A new metaphor can make the target experience understandable in a different light by highlighting some aspects and suppressing others. The new metaphor may entail very specific aspects of the source concept and give the target a new meaning, sanctioning different actions, justifying revised inferences, and leading to different goals and results.<sup>184</sup> Cognitive theory suggests some ways to re-view a current metaphor. So, for example, the marketplace of ideas metaphor need not resemble the economic market but could instead

180. Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 16 (2004).

181. Schön, *supra* note 15, at 138.

182. *Id.* at 139–43.

183. *Id.* To use metaphor to resolve problems, Professor Schön, suggested the problem solver must attend to new features and relationships of the situation, and then rename the pieces, regroup the parts, reorder the frameworks, and try to see one situation as other situations. *Id.* at 150–61.

Schön’s advice is akin to the metaphor-generating advice of Kenneth Burke: “If we are in doubt as to what an object is . . . we deliberately try to consider it in as many different terms as its nature permits: lifting, smelling, tasting, tapping, holding in different lights, subjecting to different pressures, dividing, matching, contrasting . . .” KENNETH BURKE, *A GRAMMAR OF MOTIVES* 503–04 (1962) (discussing metaphor, metonymy, synecdoche, and irony in connection “with their role in the discovery and description of ‘the truth’”). Similarly, John Dewey wrote: “The elaborate systems of science are born not of reason but of impulses at first sight and flickering; impulses to handle, to move about, to hunt, to uncover, to mix things separated and divide things combined, to talk and to listen.” JOHN DEWEY, *HUMAN NATURE AND CONDUCT* 196 (1922).

184. LAKOFF & JOHNSON, *supra* note 2, at 338.

be depicted as the Greek agora, which served both as a market and as a central meeting place.<sup>185</sup> As a public assembly for the exchange of views, the marketplace must include diverse and plural voices rather than a few overpowering ones.<sup>186</sup> Such a conception of the market might focus on protecting the process of the exchange, thus sanctioning government regulation to assure effective access to the market, to guard against monopolization, and to avoid the unequal results that flow from formal equality.

Because embedded narratives represent past stories and events, they cannot be proven wrong. Instead, advocates must discover or imagine alternative accounts. By invoking individual situations and contexts, imaginative advocacy can overcome constraining stereotypes and enable lawyers and judges to examine actual experience.<sup>187</sup> Moreover, narrative can transform audiences by allowing them to experience other worlds.<sup>188</sup> For example, rather than the typical theme in a child custody case that divorce is a tragedy for lovers or a battleground for combatants, an advocate could depict the theme as a challenge to overcome common obstacles by parties working together or as a passage to a different stage in the life of a family.

Similarly, Kenneth Burke's pentadic analysis might guide advocates to more flexible narratives.<sup>189</sup> In the usual child custody narrative, the Scene or the setting is the breakup of a marriage; that setting often controls the other elements of the story. If the Scene is the breakup of a marriage, the primary Agents or actors most likely will be viewed as Husband and Wife, their Acts will be those associated with a breakup, and their Purpose will be to bring about an ending, not a beginning. Instead, the story could be reconfigured so that the dominant element in the pentad is the Purpose of preserving relationships between the children and the many important people in their lives. With that Purpose dominant, the Agents would include the parents (rather than the Husband and Wife), the children, and all the other individuals who have important relationships with the children. These Agents would be engaged in Acts designed to preserve relationships rather than interrupt them.

### *B. The Boykin v. Alabama Briefs: Storytelling and Framing*

In 1966, in Mobile County, Alabama, Edward Boykin, a twenty-seven-year-old African-American man, pleaded guilty to five counts of robbery and was sentenced to death.<sup>190</sup> The attorney who represented him was appointed

185. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 894 (1986).

186. *Id.*

187. Brown et al., *supra* note 29, at 539.

188. WINTER, A CLEARING IN THE FOREST, *supra* note 6, at 123.

189. Kenneth Burke's pentad, a tool or method of analysis, identified the elements in the drama (act, agent, agency, scene, and purpose) and analyzed the relationships among them. BURKE, *supra* note 183, at xxii–xxiv.

190. Brief for Petitioner at \*3, *Boykin v. Alabama*, 395 U.S. 238 (1969) (No. 68-642).

three days before Boykin entered the five guilty pleas that led to five death sentences.<sup>191</sup> The record of the guilty plea hearing was brief:

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment in these cases charging him with the offense of robbery and plead guilty.<sup>192</sup>

In 1969, in *Boykin v. Alabama*, Justice Douglas declared for a majority of the U.S. Supreme Court that due process required reversal of Boykin's death sentences. Because the record was *silent*, it was insufficient to serve as evidence that Boykin voluntarily and knowingly waived his constitutional rights when he pleaded guilty.<sup>193</sup>

### 1. The Facts

In the brief filed with the U.S. Supreme Court, Boykin's attorney recounted Boykin's experience with the criminal justice system in Alabama:

Edward Boykin, Jr., a twenty-seven (27) year old Negro, son of a tenant farmer from Wilcox County, Alabama, was convicted on his pleas of guilty to five (5) separate indictments of robbery. One jury heard all five (5) cases simultaneously and sentenced him to death by electrocution for each offense.<sup>194</sup>

Boykin had been "indicted by a grand jury on June 29, 1966 on five counts of robbery, and bail was set at \$2,500.00."<sup>195</sup> He was found to be indigent, and an attorney was appointed on July 11, 1966.<sup>196</sup> Three days later, he was arraigned and entered guilty pleas to the robbery indictments.<sup>197</sup> At the subsequent jury trial, the significance of which was that the jury decided Boykin's sentence, the prosecutor presented testimony on each offense:

1. James V. Loper, manager of a grocery-chain store, testified that on May 8, 1966, at about 11:00 P.M., the accused and another Negro came in the store, pulled a gun and made the witness and another employee lie down on the floor while money was removed from the cash register (A 11). The witness further testified that:

"A. Well, after he (the accused) got the money, he turned and goes out the door and shoots back to see that we don't get up and follow him, I guess." (A 12)

The witness went on to testify that the bullet entered the door and went up into the ceiling. (A 13)

The Defense did not question the witness.<sup>198</sup>

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191. *Id.* \*3-4.

192. *Id.* at \*27 (quoting from A 4 of the record).

193. *Boykin v. Alabama*, 395 U.S. 238, 245 (1969).

194. Brief for Petitioner, *supra* note 190, at \*3.

195. *Id.*

196. *Id.* at \*3-4.

197. *Id.*

198. *Id.* at \*4.

The petitioner's brief then described the second robbery that was the subject of testimony. Although the petitioner's brief does not point it out, this apparently was the only cross examination of a witness:

2. Annette Fawcett, a drug store owner, testified on May 6th at about 9:00 P.M., two customers came into her store (one of whom she identified as the accused), produced a gun and took money from her cash register (A 18). When the accused had difficulty with the car keys, the gun went off and went into the floor; it ricocheted and hit the calf of a girl's leg, who was in the store. The witness testified on direct examination:

"A. I think maybe he intended to shoot just to frighten because the officer said it hit the floor and, you know." (A 20)

The cross examination focused on the discharge of the weapon wherein the witness again testified:

"A. I don't believe that he really intended to kill her, but . . ." (A 21)<sup>199</sup>

Next came the third and fourth robberies on which testimony was presented:

3. Jerry Smith, an employee of a retail ice cream business, stated that on April 23, 1966, at about 11:40 P.M., he was met by the accused at the rear door of the establishment. The accused produced a gun and after entering the place, took money from the cash register. (A 23)

The Defense did not question the witness.

4. John E. G. Campbell, operator of a combination service station, grocery and general merchandising store, stated that on May 5, 1966, at about 8:00 P.M., the accused and an accomplice entered his store. They held him up and took some money from the cash register. Frustrated in an attempt to take the witness's car, the accused and his accomplice ran down the street away from Mr. Campbell's place of business. (A 27)

The Defense did not question the witness.<sup>200</sup>

Finally, the fifth robbery:

5. Sylvester Pugh, a service station operator, testified on May 3, 1966, he was about to close for the night when two individuals (one being the accused) produced a 45 caliber pistol and took money from the cash register where he was counting it. After having the witness walk away from the station (one-half block), the accused departed. (A 30)

The Defense did not question the witness.<sup>201</sup>

And backtracking to the third robbery:

6. Walter Hersh, the owner of the ice cream parlor, testified that he was not present during the robbery, but because it was his property that was taken, he was called to his place of business. (A 25)

The Defense did not question the witness.<sup>202</sup>

In the fact statement, the petitioner's brief focuses first on the shortcomings of Boykin's trial attorney, who "offered no evidence for the accused as to any of the offenses, nor was any evidence offered by defense counsel

199. *Id.* at \*4-5.

200. *Id.* at \*5.

201. *Id.* at \*5-6.

202. *Id.* at \*6.



in mitigation or extenuation of the offenses.”<sup>203</sup> After pointing out that the jury returned five verdict-sentence pronouncements of guilty and death by electrocution,<sup>204</sup> Boykin’s appellate attorney shifts the focus to the failure of the court system to provide or to allow appellate counsel for Boykin: an appeal was “automatically ordered by the Court as is required in capital sentences, but no attorney was appointed, by the Court order, to prosecute the appeal although indigency had previously been determined.”<sup>205</sup> An American Civil Liberties Union staff lawyer “voluntarily undertook the appeal on behalf of the Petitioner, but was notified . . . by the Deputy Clerk of the Supreme Court of Alabama, that he was not authorized to practice before that Court.”<sup>206</sup> Another lawyer agreed to undertake the appeal, briefs were submitted, and the Supreme Court of Alabama affirmed.<sup>207</sup> “During that time and until now, Edward Boykin, Jr. has been on death row in Kilby Prison, Montgomery, Alabama awaiting execution for robbery.”<sup>208</sup>

In contrast to this detailed account of the trial court process in the petitioner’s brief, the entire focus of the fact statement of the state’s brief is on the record showing that the barebones requirements of the judicial process were satisfied. Here is the entirety of the “Statement” in Alabama’s brief:

The petitioner was tried and convicted in the Circuit Court of Mobile County, Alabama, of robbery.

The record discloses that defendant was represented by court-appointed counsel and pleaded guilty to five separate indictments charging him with committing five separate robberies respectively. Jury verdict was guilty of robbery, as charged in the indictment, on his plea of guilty and finding that he suffer death by electrocution. Sentence of death by electrocution was pronounced by the Court (R. pp. 6–8).<sup>209</sup>

From the point of view of Alabama, all the relevant facts appear here. The record discloses that Boykin was properly tried and convicted—he had a lawyer, he pleaded guilty, there was a jury verdict based on the plea, a jury finding of the sentence, and a sentence by the court.

## 2. The Legal Arguments

After telling a story about Alabama’s criminal justice system in the fact statement, the petitioner’s brief frames its primary legal argument with a theme that suggests that the death penalty is unconstitutional because it strikes so randomly.

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203. *Id.*

204. *Id.*

205. *Id.* at \*7.

206. *Id.*

207. *Id.*

208. *Id.*

209. Brief and Argument of Respondent at \*2–3, *Boykin*, 395 U.S. 238 (No. 68-642).

Edward Boykin, Jr., awaiting execution in a death row cell at Kilby Prison in Montgomery, Alabama, is a unique person—few are similarly situated and few could be.

Edward Boykin, Jr. was not sentenced to death because he committed five (5) robberies—many others do as much and more without being sentenced to die for it. Nor was he sentenced to death because he (i) committed five (5) robberies (ii) in Alabama—although there are very few other places where it would be possible, let alone probable, that he would be so sentenced for such a crime. He probably was not sentenced to death because he (i) committed five (5) robberies (ii) in Alabama and (iii) is poor and black—although all these elements were important. The additional indispensable elements are probably known, consciously or subconsciously, only by the jury which condemned him to die.

The point is that Edward Boykin, Jr. is unique because today the imposition of the death penalty is unique.

As this brief will show, there is a growing realization that the death penalty is unwarranted in principle and requires so rare a combination of people, places and prejudice as to border on a grotesque fluke.

And because the death penalty is today both unwarranted and a fluke, it is “cruel and unusual” and unconstitutional as applied to Edward Boykin, Jr.<sup>210</sup>

In response, Alabama framed the death sentence as a rational decision justified by state statute and the circumstances. First, the brief claimed, it is not cruel and unusual punishment to impose the death penalty “when the sentence is within the limits set by State statute.”<sup>211</sup> The brief continues, “The people of Alabama and most of the rest of the people of the United States regard robbery as a very serious crime. Alabama regards it as a capital offense.”<sup>212</sup> Characterizing the case as one in which aggravating circumstances might have been found, the state’s brief contends that: “Boykin shot one little girl and showed a flagrant disregard for human life by firing into the stores when leaving. He and the people of Mobile are fortunate that he did not kill anyone.”<sup>213</sup> Finally, Alabama argues that executing Boykin “will serve as a deterrent to those who regard such things as robbery, arson, looting, etc. as a way of life and an exercise of their ‘rights.’”<sup>214</sup>

Rather than the framing of the legal arguments used by either of the parties, the U.S. Supreme Court addressed the first of the three questions posed by the amicus brief of the NAACP Legal Defense Fund:

1. Whether the Supreme Court of Alabama erred in affirming Boykin’s capital conviction and sentence of death upon a guilty plea, where the record does not reflect that the trial court made appropriate inquiry to assure that the plea was voluntary and understanding as required by the Fifth and Fourteenth Amendments?<sup>215</sup>

210. Brief for Petitioner, *supra* note 190, at \*8–9.

211. Brief and Argument of Respondent, *supra* note 209, at \*3.

212. *Id.* at \*8.

213. *Id.* at \*9.

214. *Id.*

215. Brief for the NAACP Legal Defense Fund et al. as Amici Curiae Supporting Petitioner at 11, *Boykin*, 395 U.S. 238 (No. 68-642). The petitioner’s brief phrased the questions as statements:

According to the amicus brief, the relevant facts pertaining to that question presented are those surrounding the appointment of Boykin's counsel and the record of Boykin's trial court appearances:

July 11, 1966, Boykin was interrogated by the court and found to be unrepresented and indigent. He said he did not want counsel, but the court deemed counsel necessary and appointed a lawyer. App. 2-3. July 14, Boykin appeared with appointed counsel for arraignment on the five robbery charges, pled guilty to each, and was remanded for sentencing. The minute entry for this date consists of eleven lines reciting his appearance, the presence of his lawyer, and his plea. App. 4. Unlike the minute entry of July 11, it does not reflect that Boykin was addressed or questioned by the court, or that he said a word.<sup>216</sup>

The amicus brief then described the Alabama Supreme Court's affirmance of the death sentence that rejected the claim of cruel and unusual punishment but made no mention of the other federal claims.<sup>217</sup>

In the face of the silent record, the brief then asks the reader to fill in the blanks, to imagine what circumstances might possibly have led Boykin to plead guilty to offenses that carried the possibility of a death sentence:

Three days after the first appointment of counsel, this indigent defendant was arraigned on five separate capital charges and pleaded guilty to all of them. These circumstances alone are cause for the gravest concern.<sup>218</sup>

Why does the short period of time between appointment and arraignment matter? The brief suggests that the outcome, the entry of the guilty pleas, makes no sense:

In the absence of some deal or understanding that excludes the death penalty, it is simply inconceivable that—on three days total time to investigate five distinct robbery charges—a plea could be entered which exposes the defendant to electrocution.<sup>219</sup>

What does the silence of the record suggest? The brief invites the reader to imagine the circumstances:

One cannot say, and cannot imagine, what could have been in the mind of Boykin or his appointed lawyer. The record contains not one word concerning

1. The imposition of the death penalty for robbery constitutes a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

2. The Supreme Court of Alabama failed to protect petitioner's right to due process with regard to his plea of guilty.

3. The sentence of death imposed on the petitioner by the Alabama jury violates the Due Process Clause of the Fourteenth Amendment.

Brief for Petitioner, *supra* note 190, at \*3 (modified typeface). The state's brief phrased the questions this way:

1. Does imposition of the death penalty upon conviction for robbery violate the Eighth and Fourteenth Amendments?

2. Did the trial court fail to protect petitioner's right to due process with regard to his plea of guilty?

3. Does the finding of guilty and punishment within the limits set by the statute violate due process in the absence of a statute providing for separate juries to render verdicts and assess punishment?

Brief and Argument of Respondent, *supra* note 209, at \*2.

216. *Id.* at \*12.

217. *Id.* at \*14-15.

218. *Id.* at \*16.

219. *Id.* at \*16-17.

the circumstances of the plea, except that Boykin was in court and also “There-upon in open court on this day, Defendant’s Attorney, Evan Austill, was in court.” App. 4. No inquiry was put on the record as to whether the plea was entered understandingly or ignorantly, freely or under inducement. The inference is strong that no such inquiry was made, for the minute entry reciting Boykin’s plea reflects no interrogation of the defendant by the court, while a similar minute entry on the occasion of Boykin’s earlier appearance for appointment of counsel relates in detail questions put by the court and answers by Boykin. App. 2–3, 4. On the date of his plea, there is no indication that the court addressed Boykin, or that he himself said anything.<sup>220</sup>

And the brief then raises the most problematic conclusion that might be drawn from the silent record:

For aught that appears, the judicial confessions by which his life became forfeit were made on his behalf without his personal participation.<sup>221</sup>

In response, the Alabama brief barely acknowledged this framing of the issue. Responding to the argument that the trial court should have made an affirmative showing on the record of a knowing and voluntary guilty plea, the state’s brief quotes a Mississippi case: “The judgment itself raises a presumption that what ought to have been done by the trial judge with respect to receiving such plea was done.”<sup>222</sup> Moreover, Alabama has no explicit statutory requirements pertaining to the trial court’s duty to admonish the defendant of the consequence of his guilty plea.<sup>223</sup> Rather, the statutory duty of the trial court in Alabama is to “cause the punishment to be determined by a jury, except where the punishment is by law required to be fixed by the court.”<sup>224</sup> Finally, the state relies on Justice Lawson’s concurrence in the Alabama Supreme Court, in which he wrote:

Of course, a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant. But neither the Howard case, *supra*, nor the Mississippi cases, *supra*, hold that the record must affirmatively show that the trial judge made such a determination. The effect of the dissenting opinion is to presume that the trial judge failed to do his duty.<sup>225</sup>

And finally, as had the Alabama Supreme Court, the state’s brief notes that the defendant theoretically could raise the same points in other proceedings.<sup>226</sup>

### C. *The Boykin v. Alabama Opinions*

Next, a guided tour of the U.S. Supreme Court opinions, using the tools of narrative and metaphor analysis to illustrate their use in helping lawyers

220. *Id.* at \*17.

221. *Id.*

222. Brief and Argument of Respondent, *supra* note 209, at \*10.

223. *Id.*

224. *Id.*

225. *Id.* at \*11 (quoting *Boykin v. Alabama*, 207 So. 2d 412, 415 (Ala. 1968) (Lawson, J., concurring)).

226. *Id.* at \*12.

persuade, first by uncovering and then by reframing the issues and arguments and re-charting the paths of characters and plots.<sup>227</sup>

Having adopted the Legal Defense Fund's question presented—whether the record was sufficient to assure that the plea was voluntary and understanding as required by the Fifth and Fourteenth Amendments—the majority and the dissenting opinions envision the trial court proceedings. First, the facts as presented by Justice Douglas in the majority opinion:

[¶ 1] In the spring of 1966, within the period of a fortnight, *a series of armed robberies occurred* in Mobile, Alabama. The *victims, in each case, were* local shopkeepers open at night *who were forced* by a gunman to hand over money. While robbing one grocery store, *the assailant fired* his gun once, sending a bullet through a door into the ceiling. A few days earlier in a drugstore, *the robber had allowed his gun to discharge* in such a way that *the bullet, on ricochet from the floor, struck a customer* in the leg. Shortly thereafter, *a local grand jury returned* five indictments against petitioner, a 27-year-old Negro, for common-law robbery—an offense punishable in Alabama by death.<sup>228</sup>

Analyzing the narrative structure of this opening paragraph—in particular, the named characters and their actions—the reader is left with the impression that the petitioner was not actively involved in the crimes for which he was convicted. He did not rob the victims, a series of armed robberies occurred; he did not force the shopkeepers to hand over money, they were forced by a gunman to do so.<sup>229</sup> Although “the assailant,” not identified as the petitioner, did fire a gun, it was only once, and the bullet went through a door into the ceiling.<sup>230</sup> In another robbery, the petitioner did not shoot a customer but allowed his gun to discharge so that the bullet ricocheted from the floor to strike the customer.<sup>231</sup>

In the second paragraph, the Court determined that the petitioner was indigent, and the petitioner entered a plea, but beyond that, no characters were active agents. So far as the record shows, no questions were asked and no statements were made:

[¶ 2] Before the matter came to trial, the *court determined* that petitioner was indigent and appointed counsel to represent him. Three days later, at his arraignment, *petitioner pleaded* guilty to all five indictments. So far as the record

227. The narrative analysis is based on the use of Kenneth Burke's pentad to identify the elements in the drama (act, agent, agency, scene, and purpose) and analyze the relationships among them. See BURKE, *supra* note 183, at 503–04. For purposes of this discussion, I have identified only the characters (agents) and their actions (acts).

The narrative reconstruction relies on Amsterdam and Bruner's plot elements described in AMSTERDAM & BRUNER, *supra* note 3, at 113–14. The metaphor analysis relies on cognitive metaphor theory; the re-imaging draws on Laura E. Little, *Characterization & Legal Discourse*, 46 J. LEGAL EDUC. 372 (1996), reprinted in 6 J. ASS'N LEGAL WRITING DIRECTORS 121 (2009) (Little suggests reviewing the impetus for the dispute through four lenses: expanding or contracting universe, rival components, common denominator, and competing worldviews.).

228. *Boykin*, 395 U.S. at 239 (emphasis added). I have added paragraph numbers in brackets, and I have italicized characters and actions so that I can more easily describe the analysis.

229. *Id.*

230. *Id.*

231. *Id.*

shows, the *judge asked no questions of petitioner concerning his plea, and petitioner did not address the court.*<sup>232</sup>

Both the characters and the record remain silent in the third paragraph:

[¶3] *Trial strategy may of course make a plea of guilty seem the desirable course. But the record is wholly silent on that point and throws no light on it.*<sup>233</sup>

In the fourth paragraph, the state of Alabama provides a rule, but the petitioner and his counsel remain uninvolved and inactive.

[¶4] *Alabama provides that when a defendant pleads guilty, “the court must cause the punishment to be determined by a jury” (except where it is required to be fixed by the court) and may “cause witnesses to be examined, to ascertain the character of the offense.” In the present case a trial of that dimension was held, the prosecution presenting its case largely through eyewitness testimony. Although counsel for petitioner engaged in cursory cross-examination, petitioner neither testified himself nor presented testimony concerning his character and background. There was nothing to indicate that he had a prior criminal record.*<sup>234</sup>

Finally, in the fifth paragraph, Justice Douglas introduces some characters who act with purpose. The judge and jury stress the petitioner’s record, find him guilty, and sentence him to die:

[¶5] In instructing the jury, *the judge stressed that petitioner had pleaded guilty in five cases of robbery, defined as “the felonious taking of money from another against his will by violence or by putting him in fear (carrying) from ten years minimum in the penitentiary to the supreme penalty of death by electrocution.” The jury, upon deliberation, found petitioner guilty and sentenced him severally to die on each of the five indictments.*<sup>235</sup>

Not until the sixth paragraph do we find any characters who might be characterized as heroic actors. Four justices of the Alabama Supreme Court discuss the constitutionality of the process and three dissent from affirming the death sentences:

[¶6] Taking an automatic appeal to the Alabama Supreme Court, *petitioner argued that a sentence of death for common-law robbery was cruel and unusual punishment within the meaning of the Federal Constitution, a suggestion which that court unanimously rejected. On their own motion, however, four of the seven justices discussed the constitutionality of the process by which the trial judge had accepted petitioner’s guilty plea. From the order affirming the trial court, three justices dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty. The fourth member concurred separately, conceding that “a trial judge should not accept a guilty plea unless he has determined that such a plea was voluntarily and knowingly entered by the defendant,” but refusing “(f)or aught appearing” “to presume that the trial judge failed to do his duty.” We granted certiorari.*<sup>236</sup>

In the seventh paragraph, Justice Douglas focuses attention on the Alabama statute that requires the reviewing court to comb the record.

232. *Id.* (emphasis added).

233. *Id.* at 240 (emphasis added).

234. *Id.* (emphasis added) (citation omitted).

235. *Id.* (emphasis added)

236. *Id.* at 240–41 (emphasis added).

[¶ 7] *Respondent does not suggest* that we lack jurisdiction to review the voluntary character of petitioner's guilty plea because he failed to raise that federal question below and the state court failed to pass upon it. But *the question was raised* on oral argument and we conclude that it is properly presented. *The very Alabama statute* (Ala. Code, Tit. 15, § 382 (10) (1958)) that provides automatic appeal in capital cases also *requires the reviewing court to comb the record* for "any error prejudicial to the appellant, even though not called to our attention in brief of counsel." The automatic appeal statute "is the only provision under the Plain Error doctrine of which we are aware in Alabama criminal appellate review." In the words of the Alabama Supreme Court:

Perhaps it is well to note that in reviewing a death case under the automatic appeal statute, . . . we may consider any testimony that was seriously prejudicial to the rights of the appellant and may reverse thereon, even though no lawful objection or exception was made thereto. Our review is not limited to the matters brought to our attention in brief of counsel.<sup>237</sup>

In Justice Douglas' account of the facts, Boykin played a very minor role: he was not very active in the crimes that were committed and he is much less noticeable in the proceedings in the trial court. So far as the record shows, Boykin was at most a silent presence. The appellate court judges were thus correct when they determined that:

[¶ 8] It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary . . . . A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.<sup>238</sup>

Only then does Justice Douglas explain why it is important to have the trial judge question the defendant on the record:

[¶ 9] We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. **Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.** The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.<sup>239</sup>

The silent record leads Justice Douglas to accept the Legal Defense Fund brief's invitation to fill in the blanks and to imagine what happened beyond what was contained in the record, to conjecture that the defendant might have entered the guilty pleas because of fear, ignorance, or promises. Thus, the silence of the record may be a cover-up for unconstitutional state actions. And so he concludes:

[¶ 12] The three dissenting justices in the Alabama Supreme Court stated the law accurately when they concluded that there was reversible error "because the

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237. *Id.* at 241–42 (citations omitted).

238. *Id.* at 242.

239. *Id.* at 242–43 (emphasis added).

record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty.”<sup>240</sup>

In contrast to Justice Douglas, Justice Harlan describes the trial court proceedings as being remarkable only because of the defendant’s failure to allege that his guilty plea was involuntary or made without knowledge of the consequences. The facts as presented by Justice Harlan in dissent:

[¶ 1] The Court today holds that petitioner Boykin was denied due process of law, and that his robbery convictions must be reversed outright, solely because “the record (is) inadequate to show that petitioner intelligently and knowingly pleaded guilty.” [T]he Court does all this at the behest of a petitioner who has never at any time alleged that his guilty plea was involuntary or made without knowledge of the consequences. I cannot possibly subscribe to so bizarre a result.<sup>241</sup>

In Justice Harlan’s account, the grand jury returned an indictment, the petitioner pleaded guilty, and the record merely neglects to show what questions the arrainging judge asked:

[¶ 2] In June 1966, an Alabama grand jury returned five indictments against petitioner Boykin, on five separate charges of common-law robbery. He was determined to be indigent, and on July 11 an attorney was appointed to represent him. Petitioner was arraigned three days later. At that time, in open court and in the presence of his attorney, petitioner pleaded guilty to all five indictments. The record does not show what inquiries were made by the arrainging judge to confirm that the plea was made voluntarily and knowingly.<sup>242</sup>

In his third paragraph, Justice Harlan indicates that the petitioner had the opportunity to withdraw his plea, but repeatedly took no action. He made no attempt to withdraw the plea in the months between his plea and the trial, and he made no effort to withdraw the plea after hearing the judge announce the plea and the possible death sentence.<sup>243</sup>

[¶ 3] Petitioner was not sentenced immediately after the acceptance of his plea. Instead, pursuant to an Alabama statute, the court ordered that “witnesses be examined, to ascertain the character of the offense,” in the presence of a jury which would then fix petitioner’s sentence. That proceeding occurred some two months after petitioner pleaded guilty. During that period, petitioner made no attempt to withdraw his plea. Petitioner was present in court with his attorney when the witnesses were examined. Petitioner heard the judge state the elements of common-law robbery and heard him announce that petitioner had pleaded guilty to that offense and might be sentenced to death. Again, petitioner made no effort to withdraw his plea.<sup>244</sup>

Again in the fourth paragraph, Justice Harlan describes a petitioner who repeatedly failed to make any claims or raise any questions about whether his plea was voluntary and knowing.

240. *Id.* at 244 (quoting *Boykin v. Alabama*, 207 So. 2d 412, 415 (Ala. 1968)).

241. *Id.* at 244–45 (Harlan, J., dissenting) (emphasis added).

242. *Id.* at 245 (emphasis added).

243. *Id.*

244. *Id.* at 245–46 (emphasis added) (citations omitted).



[¶ 4] On his appeal to the Alabama Supreme Court, *petitioner did not claim* that his guilty plea was made involuntarily or without full knowledge of the consequences. In fact, *petitioner raised no questions* at all concerning the plea. In his petition and brief in this Court, and in oral argument by counsel, *petitioner has never asserted* that the plea was coerced or made in ignorance of the consequences.<sup>245</sup>

Without an assertion that the plea was involuntary or unknowing:

[¶ 5] The Court's reversal is therefore predicated entirely upon the failure of the arraiging state judge to make an "adequate" record.<sup>246</sup>

Because he views the silent record much differently than Justice Douglas, Justice Harlan concludes that:

[¶ 6] I would hold that petitioner Boykin is not entitled to outright reversal of his conviction simply because of the "inadequacy" of the record pertaining to his guilty plea. Further, I would not vacate the judgment below and remand for a state-court hearing on voluntariness. For even if it is assumed for the sake of argument that petitioner would be entitled to such a hearing if he had alleged that the plea was involuntary, a matter which I find it unnecessary to decide, **the fact is that he has never made any such claim.** Hence, I consider that petitioner's present arguments relating to his guilty plea entitle him to no federal relief.<sup>247</sup>

From the construction of their fact statements, it is clear that the two justices have filled in the blanks in the record by imagining very different worlds confronting criminal defendants. Faced with an incomplete record, Justice Douglas imagines that a number of improper influences and pressures might have caused the defendant to plead guilty: "Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality."<sup>248</sup>

Justice Harlan, on the other hand, imagines a world in which had such improper influences or pressures been involved in the guilty plea—had there been promises, threats, coercion, or inducements—the petitioner would have complained. The petitioner would have objected that he did not really want to plead guilty or that he did not really know the consequences of doing so. Given the petitioner's silence, Justice Harlan assumes that the trial court judge followed the constitutionally sound process.

Although the worlds they imagine are so different, both Justices adopt the same governing image: the metaphor of the record as a stand-in for what actually happened to Boykin. Justice Douglas depicts the current record as impenetrable or incomplete, a means of making possible a cover-up of unconstitutional actions. Still, Justice Douglas appears to believe that a more complete record, one that reflects the trial judge's questioning of the defendant, would be a clear reflection of Boykin's circumstances. For Justice Harlan,

245. *Id.* at 246.

246. *Id.* at 247 (emphasis added).

247. *Id.* at 248–49 (emphasis added).

248. *Id.* at 244. Several years earlier, Justice Douglas had concluded that "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker v. California*, 357 U.S. 433, 444–45 (1958).

with or without the trial judge's questioning, the record is both transparent and complete, a window revealing reality.

*D. Re-Imagining the Law's Frames and the Judges' Paths*

The *Boykin* stories are not stories of crime and punishment. Instead, they are stories of appellate review in which appellate judges act as heroes or troublemakers when they comb the record. Is it possible for lawyers to use metaphor and narrative to re-imagine the *Boykin* stories and images in a way that would allow them to persuade the judges to fill in the blanks differently and reach a different outcome?<sup>249</sup>

In Justice Douglas' story, the Trouble that sets the plot into motion is the trial court's failure to provide an adequate record so that an appellate court can judge whether constitutional standards were met. Using the tool provided by the statute requiring that they comb the record, the Trouble prompts the only heroic characters, three dissenting Alabama Supreme Court justices, to make efforts to overcome the Trouble, resulting in their opinion that the trial court sentence should be reversed. In Justice Harlan's story, the Trouble that sets the plot in motion is the appellate courts' discovery and later review of a grounds for reversal that was never raised by the petitioner. This Trouble could be overcome if the reviewing courts stay within the appropriate boundaries of appellate review and refuse to countenance so "bizarre a result."

To re-tell these stories, lawyers would focus instead on other Troubles that need to be resolved by other sets of characters. For example, the Trouble might be re-cast as the failure of Boykin's defense attorney to fully investigate the charges against Boykin as well as Boykin's background and the attorney's failure to negotiate a reasonable plea bargain before allowing Boykin to plead guilty. The set of characters who might resolve this Trouble could include both the trial court judge and the Alabama Supreme Court justices, all of whom could be instructed to re-examine the case to determine whether the petitioner's counsel was ineffective. In this version of the story, the record would no longer be silent. Instead, it would reveal that the petitioner's attorney did not sufficiently protect his client.

Both the majority and the dissent in *Boykin* implicitly frame their legal arguments around the appropriate scope and procedures of appellate review. In Justice Douglas' opinion, the dispute appears to center on how federal appellate review can best assure that the trial court process has been sufficiently protective of the defendant's constitutional rights when a defendant pleads guilty. In Justice Harlan's opinion, the dispute appears to center more generally on how best to observe appropriate constraints on the role of appellate judges in reviewing trial court proceedings.

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249. For suggestions on teaching and using creative techniques to solve legal problems, see Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 124-44 (2001).

Re-characterization of the dispute along the lines suggested by Laura Little allows each side's lawyer to cast doubt on the other side's frame of reference.<sup>250</sup> The NAACP's amicus brief is an example of the kind of alternative framing of the issues in which lawyers often engage, focusing first on the question of whether the record was adequate rather than the question of whether imposing the death penalty for robbery was cruel and unusual.<sup>251</sup>

Through re-characterization, Alabama's lawyer might argue that the issue of protecting a defendant's constitutional rights when pleading guilty is broader than Justice Douglas' narrow focus on federal appellate review. From this perspective, a number of other government entities and actors should play a part in assuring protection of the defendant's rights. This re-characterization could shift the responsibility for assuring that the defendant's plea was knowing and voluntary away from the trial judge to other actors. It might also allow the lawyer to argue for alternatives other than questioning on the record as better guarantees that the defendant had in fact knowingly and voluntarily entered the plea.

Alabama's lawyer might also re-characterize the dispute as involving rival components within the parties' joint concern of assuring protection of defendants' due process rights. Then, the state's lawyer might argue that federalism, reliance, and deference to trial judges are the important common denominators that should lead to a result other than having the federal courts overturn the decisions of state trial judges in thousands of cases. Finally, Alabama might argue that Justice Douglas' world view is fundamentally wrong: that is, the state criminal justice system will work well only so long as federal courts respect the integrity and independence of trial court judges and assume, absent claims to the contrary, that they have fulfilled their responsibilities.

To persuade Justice Harlan to view the dispute differently, the petitioner's attorney might re-characterize the impetus for the dispute as assuring recognition of as many genuine constitutional claims as possible while still observing appropriate limitations on the role of appellate review. In that case, the petitioner's attorney might argue, a trial court record is needed to allow appellate review in those rare circumstances when no other government entity or actor has the opportunity to identify and correct the problem. Another way

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250. See generally Little, *supra* note 227.

251. Brief for the NAACP Legal Defense Fund et al. as Amici Curiae Supporting Petitioner, *supra* note 215, at \*17. The NAACP's amicus brief posed the question of cruel and unusual punishment and expressed the belief that that issue was the most important general question raised by the petition:

The issues of widest importance in this case, and those in which *amici* are principally interested, are the questions whether Edward Boykin's sentence of death for simple robbery violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishments, and whether its imposition in the unfettered discretion of a jury, which was empowered by Alabama law to choose between the penalties of death and imprisonment arbitrarily, capriciously, for any reason, or for no reason, violates the rule of law basic to the Due Process Clause. We must note at the outset, however, that in our view the judgment of conviction and sentence below cannot be sustained on this record consistently with the Constitution, and that reversal is required for a reason quite independent of the two important issues presented relating to the validity of the death penalty.

*Id.* (internal citations omitted). The brief nonetheless made the successful argument first and well.

to re-view the dispute would be to acknowledge the common denominator, that both state and federal judges are interested in protecting the constitutional rights of the defendant, and to suggest that their common interest requires a consistent process to be in place in all cases.

#### V. CONCLUSION

Rhetorical analysis is a concretely useful tool for anyone who studies or practices law or legal persuasion. By studying the products of legal rhetoric, we become better interpreters of what we read. As we learn more about how rhetoric works in a particular context, including how to make more effective use of language and alternative meaning frames, we become better composers of effective legal texts. Both interpretation and composition benefit from a rhetorical perspective, that is, a perspective that purposefully adopts different lenses to support the kind of imagination that makes for more effective argumentation and persuasion.

The purpose of this field guide has been to provide a brief introduction to rhetorical analysis in order to illuminate the work of metaphor and narrative in lawyers' briefs and judges' opinions. Though the use of the word rhetoric may still sound like "an indictment" to some, my intention has been to adhere to the "ancient and honorable" meaning associated with Aristotle: to see how persuasion works in the field.<sup>252</sup>

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252. Donald N. McCloskey, *The Lawyerly Rhetoric of Coase's The Nature of the Firm*, 18 J. CORP. L. 425, 425 (1993).

