Battle & Betrayal, Tricksters & Champions: The Stories We Tell About Law
# Readings in Persuasion: Briefs That Changed the World

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Narrative Foundations

We see the world in narrative terms.

From those narratives, we construct principles (rules and policies).

Rules and policies are by-products of underlying narratives.
Major Components of Narrative:

Characters
- protagonist & antagonist

Plot
- Steady State, Trouble, Struggle, Restoration or Transformation
- Starting with work to be done
Legal Ideas As Metaphors

- a legal doctrine
- a statute
- a case holding
- a Constitutional principle
- a policy
Archetype

- collective unconscious (Carl Jung)

- close to universal

- encoded at birth
Some Archetypal “Frames”

- Birth
- Death
- Re-birth
- Journey
- Sacrifice
- Protection
Some Archetypal Characters

- The Champion
- The Child
- The Trickster
- The Demon
- The Sage
- The Damsel-in-distress
- The Mother
- The King
- The Mentor
Summary

- Stories need characters & plot.
- Entities & ideas can be characters.
- Entities & ideas can act or be acted upon (a plot).
- Characters & plots can fit archetypal blueprints.
- Archetypes are unconscious and therefore powerful.
Common Legal Narratives

- **Creation / Birth story** (Miranda v. Arizona)
- **Rescue story** (Bowers v. Hardwick)
- **Trickster story** (San Antonio School Dist.)
- **Journey story** (Furman v. Georgia)
- **Battle story** (Mickens v. Taylor)
- **Betrayal story** (Mickens v. Taylor)
To Change:

- Creation / Birth
- Journey
- Any of the others (as part of Creation or Journey)

To Resist Change:

- Rescue
- Trickster
- Battle
- Betrayal
Earnest Miranda’s Story

He was brought to station and taken into Interrogation Room 2.
The door was closed, and he was alone with two officers.
Two hours later he came out, having signed a confession.
A lawyer was appointed then, but his fate was already sealed.
“We deal here with growing law, and look to where we are going by considering where we have been.”
Telling the Law’s Story

- Johnson
- McNabb
- Upshaw
- Mallory
- Powell
- Brown
- Chambers
Haley v. Ohio

“We assume that the opinion in Haley, had it been five Justices, would totally control the instant situation…. But there were not five. Justice Frankfurter concurred specially…. He concluded that the confession should be barred because of specialized circumstances in the particular case, without reaching the broader question.”
“In 1957, two new voices were added in this Court .... The case was *In Re Groban’s Petition*. The majority opinion, by Justice Reed, on his last day on the Court, found distinctions ... and therefore did not reach the principal question. [Justices Black, Warren,] Douglas, and Brennan did ....”
And Continues …

“These same dissenting Justices expressed their views again in *Crooker* …”

“And [then again in] *Cicenia*.”

“[Justices Douglas, Warren, Black, and Brennan] gave an emphatic and detailed analysis of the absolute need for counsel at the pretrial stage ….”
“Soon after *Crooker* and *Cicenia*, the tide which was to overrule *Betts* began to flow with new vigor. ... Justices Douglas and Brennan called outright for the overruling of *Betts*. ... Justices Frankfurter and Stewart ... held that a confession should not be admitted [when...]. Justices Douglas and Black ... wished to rest frankly on the principle that .... These Justices felt that all defendants are entitled to know their constitutional rights.”
“As of the spring of 1963,” the right to counsel was this:

1. Defendants were entitled to counsel at all trials in the federal courts. *Johnson*

2. Defendants were entitled to counsel in all trials in state courts. *Gideon*

3. Defendants were entitled to counsel in all federal arraignments and in all arraignments or analogous proceedings under state law at which anything of consequence can happen. *Hamilton & White*

4. Several Justices believed that in all cases, a person who requested counsel at a pre-trial arraignment investigation was entitled to it. *Crooker*

5. Several Justices believed that, requested or not, a person has a right to counsel upon interrogation unless he intelligently waived that right. *Goban, Crooker, and Cicenia.*

Situation 5 is that presented in the instant case.”
Several Pages Later

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

Our story: The journey of a civilized people

- the world
- the U.S.
Summary of Arg.

First Paragraph:

“The penalty of death ... is cruel and unusual ... because it affronts the basic standards of decency of contemporary society.... Worldwide and national abandonment of [its] use during this century has accelerated dramatically, and has now become nearly total.”
“Lord Chancellor Gardiner made the basic point of our argument. ‘When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because…it was a punishment no longer consistent with our self-respect.’ Today the death penalty…is inconsistent with the self-respect of a civilized people.”
Argument

- World-wide trend
- Reasons: Shared moral debate
- Values close to the root of the American concept of a free & civilized society
- US has nearly stopped (numbers)
- Secrecy means we’re repulsed
- Same for rarity
- We can only bear to kill if we kill rarely & mostly only the poor, uneducated, & minorities
“The conclusion is inescapable…that this rare penalty…is no part of the regular criminal-law machinery….It is a freakish aberration, a random extreme act of violence, visibly arbitrary & discriminatory—a penalty reserved for unusual application because, if it were usually used, it would affront universally shared standards of public decency. …
End of Argument

… Such a penalty – not Law, but Terror – has no place in a democratic government. It is a cruel and unusual punishment, forbidden by the Eighth Amendment.”
List of Former U.S. Punishments (Appendix)

- cutting off one or both ears
- boring hole through tongue with hot iron
- nailing both ears to a wooden plank
- typing to cart & whipping through streets
- burning a letter into the skin (face/hand)
- the pillory
- public lashings on bare body (50)
Other Appendices

- prose descriptions of old punishments
- history of the 8th Amendment Cruel & Unusual Clause (told as a story)
- details & authorities showing worldwide & national trend rejecting death penalty
- facts about who is sentenced to death
- evidence of little deterrent effect
- prose description of executions by gas & electrocution
Bowers v. Hardwick

Steady State:

There is a right to privacy in intimate relationships.
“The State of Georgia urges this Court to overturn that ruling and declare that a law reaching into the bedroom to regulate intimate sexual conduct is to be tested by no stricter a standard than a law that regulates the community environment outside the home: namely, a standard of minimal scrutiny. In the State’s view, the most private intimacies may thus be treated as public displays . . . .”
"... The State of Georgia has criminalized certain sexual activities defined solely by the parts of the body they involve, no matter who engages in them, with whom, or where. Georgia threatens to punish these activities with imprisonment even if engaged in by two willing adults — whether married or unmarried, heterosexual or homosexual — who have secluded themselves behind closed bedroom doors in their own home, as Michael Hardwick did. All that is at issue is whether a state must have a substantial justification when it reaches that far into so private a realm."
Magic Child

- Powerless
- Comes from an unlikely source
- Often a low social status or scandal
- Evil forces are trying to kill the Child
- But if the Child is saved, the Child saves us all.
Rescue Story

The Divine Child (the right to privacy)
is under attack by the Evil Villain (the State of Georgia)
and its only savior is the story’s Champion (the Supreme Court).
San Antonio School Dist. V. Rodriguez

- Equal protection challenge

- System of school funding resulted in significant disparities between poor districts and wealthy districts

- Court below had held the funding plan unconstitutional
- The Court is going about its normal (“legitimate ordinary”) approach to Equal Protection, staying on a reliable, well marked path.

- The Pied Piper comes along and plays a new and magical tune. It sounds so good.

- The tune lures the listeners off the safe, well marked path and into a swamp they’ll soon regret but will have trouble escaping.
“In a book published two years ago, three scholars announced what they called Proposition I, “the quality of public education may not be a function of wealth other than the total wealth of the state.” Coons, Clune, & Sugarman, *Private Wealth and Public Education* (1970). The District Court has held that that proposition is required by the Equal Protection Clause….It held that Proposition I was violated and that the Texas system of school finance, which is…the same as that used in at least 48 other states, is unconstitutional.”
The Tune is Magic: Continuing the Summary of Arg.

“… There is, as the inventors of Proposition I recognize, no direct authority that education is a ‘fundamental’ interest … or that wealth is a ‘suspect classification.’…”
"… To impose on Texas and the other states a constitutional straitjacket that would prevent localities from spending additional sums on education as they see fit would destroy the important value of local autonomy and would have dangerous consequences for the public schools."
Characterizing the Pied Pipers

- “the inventors of Proposition 1”
- “the imaginative scholars”
- “the critics”
- “Professor Coons & his associates”
- “the authors”
- “the prophets, seers, and revelators”
- “Professor Coons and his collaborators”
- “the reformers”
- “Professor Coons & his friends”
- “professional educationists”
- “the Coons plan”
Describing the Magical Tune

- “those who…hunt for a short-cut…[to change society]”
- “in their book, they make a sophisticated argument that it is not necessary to [show] a relationship…”
- “almost certainly an illusion”
- book dedicated “to nine old friends of the children”
- “A recent Pres. Commission could not make the leap” to Proposition 1
- “so it is said”
- authors are “charmingly candid about the new constitutional requirement they have discovered”
- “Some of the huzzahs that greeted [Prop 1] …”
“Because of the unusual background of this case, and of the constitutional principle it announces, it does not lend itself readily to the usual form of appellate brief, in which Roman-numbered topic sentences proceed in syllogistic splendor to the inevitable conclusion....
“…. Instead, after stating the nature of the problem and of the critics’ argument …, we will consider the unsound factual assumptions on which that argument is based, the fatal weakness of the legal analysis offered in its support, and the dangerous consequences that would follow if it were to be read into the Constitution.”
The Well-Trodden Constitutional Path

- Constitution doesn’t enshrine the latest fad

- “Periodic reexamination of school finance system”

- Scholarly positions constantly changing

- American tradition:
  New ideas are legislative matters
Describing the Swamp

- education would be worse off (shows how)
- would take vast sums from other vital programs
- “flight away from the public schools [which] are the principal hope of achieving a society … not divided by artificial barriers of race or class or wealth.”
- “buying future litigation”
- “redistribution” of wealth
- money from districts would dry up
- local freedom of choice (Am. Tradition) destroyed
- studies show plan wouldn’t work anyway
- “exacerbate the problems of … urban schools”
- “bad news for taxpayers, no change for school children, & a cause of jubilation for school teachers.”
Mickens v. Taylor Cert. Petition (Battle & Betrayal)

1. Story About the State’s Agents: Battle

   The habeas lawyers realized that there had been an outrageous conflict of interest and tried time and again to exercise their clear right to the necessary information. Each time, the State’s employees refused, hid the file, and argued misguided interpretations in order to conceal the conflict and therefore preserve the death conviction.
Betrayal

2. Story about the 4th Circuit: Betrayal

The 4th Circuit disagrees with the Supreme Court’s decision in *Wood v. Georgia* and has, at every turn, interpreted it in ways intended to undermine its plain meaning and thus eviscerate the Supreme Court’s decision.

Done largely by quoting the 4th Circuit, comparing those quotes to *Wood*, and reciting the procedural history. Never explicit. Possible because of history of ‘bad’ conduct by 4th Circuit.
Characterization & Motivation

- Recitation of the tortured procedural history in which the defendant lost time and again before the 4th Circuit, each time wrongly. Bam, bam, bam. Sets the stage and functions as characterization.

- The appeal from the most recent ruling: Then the “The [4th Circuit] majority [held] that Wood … does not mean what it says explicitly.”

- “Yet the 4th Circuit glossed Wood’s conspicuous 1-issue instruction to the trial court as ‘amounting to no more than shorthand for an explicit 2-part test that the Wood Court did not even have the occasion to quote’.”
Different Stories About Different Characters

- stories are consistent with each other and with the facts
- but they focus on different characters
- key characters have different responsibilities
- and different motivations
- creating the opportunity for different stories
Law’s Stories & Clients’ Stories

- Do both when possible (good story about law doesn’t detract from good story about client)

- But not always possible
  - Judges are jaded against sob stories
  - Much less conscious of stories about law
THE END