

Eve Was Right to Eat the “Apple”: The Importance of Narrative in the Art of Lawyering

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I. INTRODUCTION

Every litigator uses narratives in his or her work. Yet many may not recognize the extent of their use of narrative or the creative ways in which they can deploy narratives. Without an examination of how people tell and understand stories, lawyers may be missing opportunities to convince others of their clients' positions. One way to demonstrate how stories change depending on the facts a lawyer emphasizes and a lawyer's theory of the case would be to take a story known to all and to “retell” it as a criminal defense lawyer might.

The Biblical narrative of Eve is just such a story.¹ Eve has long been advanced as a prototypical woman. There have been allegations to the effect that Eve was ignorant and easily duped into eating an apple² by a wily serpent. She then used her feminine wiles to seduce her husband, Adam, into eating the fruit as well. In so doing, Eve is said to have brought about the fall of humanity.

Men in Western culture have used this story for millennia to explain and justify the subservient position of females in society. They have claimed that women, like Eve, are easily duped into committing wrongful acts and should therefore be under tight control of their husbands or fathers.³ Many also view women as dangerous temptresses who will lead men into wrongdoing.⁴ To

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1. *Genesis* 2:22-3:24. All quotes from the Hebrew Scriptures, unless noted otherwise, are from TANAKH, THE HOLY SCRIPTURES (Jewish Publication Soc'y 1985). I, however, make all references to God gender-neutral.

2. In Hebrew, the word for what Eve ate is *mepero*. Although its proper translation is “from the fruit” rather than “apple,” I use the word apple in this title because popular culture understands her to have eaten an apple. The Rabbis of the Talmud disagreed about what fruit was eaten, suggesting it may have been wheat, grapes, an etrog, or figs. Rabbi Joshua Ben Levy, however, argued that it was improper to try to guess the type of tree. THE BOOK OF LEGENDS, SEFER HAAGGADAH 21-22 (Hayim Bialik & Yehushua Ravnitzky eds., 1992) [hereinafter SEFER HAAGGADAH]. The debate about what fruit was eaten continued nonetheless. Rashi, for instance, explained that the fruit was a fig. 1 PENTATEUCH & RASHI'S COMMENTARY, GENESIS 30 (1949).

3. 1 *Timothy* 2:11-15; see also ELAINE PAGELS, ADAM, EVE, AND THE SERPENT 24 (1989).

4. Augustine, among others, held this view. PAGELS, *supra* note 3, at 114. The Talmud states, “[D]o not converse much with women as this will ultimately lead you to unchastity. R. Aha of the school of R. Josiah said: He who gazes at a woman eventually comes to sin, and he who looks even at a woman's heel will beget degenerate children.” TALMUD NEDARIM 20a. Another view, however, notes that the serpent

bolster this argument, they point to the “fact” that Eve used her wiles to get Adam to eat the apple. Men are thus urged to mistrust even their own wives.⁵ Similarly, women have at times been barred from testifying on the theory that they, like Eve, cannot be trusted.⁶ Women are also viewed as weak in will and in thought.⁷ People have pointed to God’s statement to Eve, “[Y]our urge shall be for your husband, And he shall rule over you,”⁸ to explain and justify the argument that husbands should rule over all in their households, including their wives. Eve is the source and symbol of many of the negative traits assigned to women; the story of Eve has been used to justify the punishment of women throughout history. Given an opportunity to stand before a tribunal herself, it seems unlikely that Eve would be able to escape punishment.

In terms of common perceptions and popular opinion, the deck is certainly stacked against Eve. If the creative use of narrative theory can provide a defense for Eve, then lawyers should be able to defend many other clients through similar means. The uses of storytelling and methods of understanding stories that I will describe in this article show that both the perspective of the audience as well as substantive factors affect the perceived validity of the viewpoints and arguments about Eve and the women who came after her. The validity of a particular story depends not only on the perspective from which a person approaches the facts of the story, but also the additional facts provided in subsequent interpretations of the original story to which a person decides to give credence. Theories of narrative suggests that one’s predispositions, ideology, position and connection to culture at any given time determine the substance of stories—which facts will be included and which will be excluded from the stories a person tells. Storytelling is not a simple act of the presenter dispassionately relating everything that has occurred. Rather, the storyteller chooses, according to his or her own perspective and biases, which facts to present as well as how to package those facts. Additionally, the perspective of the listener will affect how those facts are heard and understood.

Thus, in this project, my perspective as the storyteller is an important aspect of the stories I will tell. I am a Jewish feminist lawyer. At times I have practiced criminal law and have always been interested in creative criminal defenses. This has especially been the case when I have represented political activists in cases of civil disobedience. Such cases have given me a strong interest in the justification defense. Accordingly, I approach the Eve narrative as a feminist with a view towards vindicating her. I also feel comfortable

used the plural form in speaking to Eve and that Eve did not have to persuade Adam to eat the fruit. Adam ate it immediately after Eve gave it to him. This analysis concludes that Eve was not a temptress and that Adam may have heard the entire conversation between Eve and the serpent. NAHUM M. SARNA, *THE JPS TORAH COMMENTARY, GENESIS 25* (1989) [hereinafter *JPS COMMENTARY*].

5. See PAGELS, *supra* note 3, at 64 (explaining that some of Philo’s work warns men against women).

6. THE MIDRASH SAYS, *THE BOOK OF BERAISHIS 56* (1980) [hereinafter *THE MIDRASH SAYS*]; see also SEFER HAAGGADAH, *supra* note 2, at 625, 627.

7. SEFER HAAGGADAH, *supra* note 2, at 625; TALMUD KIDDUSHIN 80b.

8. *Genesis* 3:16.

exploring and expanding on the story in ways that are traditionally used in Jewish *Midrashim* as commentary on the texts. The method I will be using to vindicate Eve will involve criminal defense theories, drawn from my experience as a lawyer and a criminal defense attorney.

There are limits to what any storyteller may present. Some of those limits flow from the presenter's attempts to have the story believed by the reader or listener. In nonfiction storytelling, far greater limits are imposed. The historian must choose which items to include in the work, but cannot ignore evidence contrary to his or her position nor invent facts. Similarly, lawyers have a wide range of options when choosing the narrative they present at a trial, but they are restricted by the rules of ethics⁹ from fabricating evidence or arguing facts that cannot be gleaned or logically extrapolated from the evidence.¹⁰

The goal of this article is to explore issues of narrative and the limitations on nonfictional storytelling, to suggest their relevance to the legal profession where storytelling is a crucial part of the lawyer's duties, especially in advocacy, to encourage the teaching of narrative theory to lawyers and law students, to examine the ethical limitations on lawyers as they reconstruct and redefine narratives while they prepare and present their cases, and finally to subject this theory to a most stringent test: whether Eve can be vindicated for her actions through a creative use of narrative. In turn, such vindication would cause a questioning of many of the cultural repercussions that have been rooted in the Biblical creation narrative.

II. NARRATIVE IN LAW

Lawyers use narrative in every aspect of their work, yet few are cognizant of some of the fundamental principles involved in understanding narratives. Considering how stories are told and understood would help lawyers in framing their representation of their clients. Thus, a brief discussion of narrative theory is appropriate here.

There are a variety of ways to approach a narrative. Understanding may be gained from examining a narrative's structure or from scrutinizing the process by which it is structured. Narrative may be understood to flow in an order from one end to another,¹¹ or analysis may focus on the "cracks and fissures" in the narrative.¹² After analyzing the structure/construction of a

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(4) (1980) ("In the representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (Draft 1982) ("A lawyer shall not knowingly offer evidence that the lawyer knows to be false.").

10. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(5) (1980) ("In his [or her] representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.") MODEL RULES OF PROFESSIONAL CONDUCT 3.3(a)(1) (Draft 1982) ("A lawyer shall not . . . knowingly make a false statement of material fact or law to a tribunal.").

11. Roland Barthes, *The Structuralist Activity*, in *THE STRUCTURALISTS FROM MARX TO LEVI-STRAUSS* 148, 149-51 (Richard T. DeGeorge & Fernande M. DeGeorge eds., 1972).

12. Cassandra Amesley, *Star Trek as Cultural Text: Proprietary Audiences, Interpretive Grammars*,

narrative, the next step might be to examine the overt content of a narrative. This, however, reveals only part of what a narrative has to offer.¹³ One might also unpack the presuppositions to see choices of perspective within the narrative,¹⁴ extrapolating the “greatest number of possible givens, and . . . the most diverse givens.”¹⁵ Alternatively, a reader may also closely examine a text without going so far as to deconstruct the story.

Yet another way of understanding narratives is to observe how they affect others. Stories often create a link between the exceptional and the ordinary.¹⁶ The narrative obtains its meaning by explaining the deviation from the ordinary in an understandable manner.¹⁷ The stories that lawyers tell, for example, are specifically intended to explain and justify this deviation in order to obtain the result the client desires.

Michel Foucault writes of interpretation as based on discourses of power.¹⁸ Everyone who encounters the discourse must react to or interpret that story in his or her own way. This includes the storyteller, who cannot avoid taking a moral stance regarding the story.¹⁹ The protagonists in the narrative—the many witnesses a lawyer might interview—react to the events that have occurred and inevitably interpret and retell those events according to their beliefs regarding what should be.²⁰ The witnesses’ desires inform their telling of a past event.

Depending on how the story is approached and who approaches it, many different “truths” can be ascertained.²¹ Yet, many listeners or readers of a narrative believe that they can find a single “truth” in a story. This is particularly the case when narrative is used in law—either religious or secular. In proposing defenses for Eve, I will show that the traditional truths that have been garnered from the story of Adam and Eve can and should be questioned.

and the Myth of the Resisting Reader 11 (1989) (unpublished Ph.D. dissertation, University of Iowa).

13. *Id.* at 46-47.

Thus work always has this theoretical result among others: a criticism concerned only with content (that is, a thematic criticism, be it in philosophy, sociology, or psychoanalytic style, that takes the theme—manifest or hidden, full or empty—as the substance of the text, as its object or as its *illustrated truth*) can no more measure itself against *certain* texts (or rather the structure of certain textual *scenes*) than can a purely formalistic criticism which would be interested only in the code, the pure play of genetic effects or the ('historical' if you will) inscription of the text *read and* of the new text this criticism itself writes. These two insufficiencies are rigorously complementary. They cannot be defined without a deconstruction of classical rhetoric and its implicit philosophy.

Id.

14. JEROME BRUNER, *ACTS OF MEANING* 27 (1990) [hereinafter BRUNER, *ACTS OF MEANING*].

15. JACQUES DERRIDA, *POSITIONS* 94 (1981).

16. BRUNER, *ACTS OF MEANING*, *supra* note 14, at 47.

17. *Id.*

18. MICHEL FOUCAULT, *POWER/KNOWLEDGE passim* (1980).

19. BRUNER, *ACTS OF MEANING*, *supra* note 14, at 51.

20. *Id.*

21. FOUCAULT, *supra* note 18, at 133. “‘Truth’ is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation, and operation of statements. ‘Truth’ is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it.” *Id.*

I will propose alternative “truths,” thus showing the difficulty of finding a single “truth” in a story. This multiplication of truths does not only disrupt the meaning of the old “truth,” but also generates new meanings and opens up a new social space as a result. A vindicated Eve, for instance, forces a reconsideration of the negative traits assigned to women on Eve’s behalf.

How then can a person arrive at a “true meaning” of a narrative? It may well be impossible if one is looking for a single truth to constitute the “true meaning.” “[O]ne *can* read and interpret texts in various ways, indeed in various ways simultaneously.”²² An understanding of the meaning of a narrative is often culturally bound.²³ The very narrative itself can constitute an account of a state of affairs affected by a normative force field.²⁴ The reader interprets the story based on that reader’s own culture and the resources of his or her imagination. The reader then assimilates the narrative into the drama of his or her own life.²⁵ The subjectivity of the reader is developed both by his or her position in society and his or her personal history.²⁶

Accordingly, when people encounter a narrative, they view it from their own perspective, which is shaped by their culture, their identity, and various aspects of their individual lives. Within a given audience, therefore, there are multiple perspectives and multiple realities from which to interpret a text.²⁷ These perspectives will change as society changes and as listeners themselves change. Lawyers must take all of this into account when listening to the stories of their clients and their witnesses, when constructing their own persuasive narratives, and when reconstructing the narrative of their clients to present to a judge or jury.

On rare occasions, the flexibility enjoyed in the construction of narrative rises to the surface of a text and becomes obviously apparent. For example, Justice Stewart wrote the majority opinions for the United States Supreme Court in two cases that arose from the same civil rights march in Birmingham, Alabama, led by the Reverend Martin Luther King, Jr. on April 12, 1963.²⁸ The first case, *Walker*, discussed the validity of the state court injunction that enjoined the defendants from participating in or encouraging mass street parades without a permit.²⁹ The defendants violated the injunction and the Court upheld its validity. In that case, Justice Stewart described the demonstration:

22. JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 5 (1986) [hereinafter BRUNER, *ACTUAL MINDS*] (citing Nicholas of Lyra, Roman Jakobson, and Roland Barthes).

23. BRUNER, *ACTS OF MEANING*, *supra* note 14, at 13.

24. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

25. BRUNER, *ACTUAL MINDS*, *supra* note 22, at 35-36.

26. JOHN FISKE, *TELEVISION CULTURE* 49-50 (1987).

27. BRUNER, *ACTUAL MINDS*, *supra* note 22, at 109.

28. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

29. *Walker*, 388 U.S. at 309-21.

[On] Good Friday, a large crowd gathered in the vicinity of Sixteenth Street and Sixth Avenue North in Birmingham. A group of about 50 or 60 proceeded to parade along the sidewalk while a crowd of 1,000 to 1,500 onlookers stood by, clapping, and hollering, and whooping. Some of the crowd followed the marchers and spilled out into the street.³⁰

The second case, *Shuttlesworth*, involved the defendants' rights to demonstrate on public property. The Supreme Court reversed the convictions of the protesters on First Amendment grounds.³¹ Justice Stewart described the facts:

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers. . . . They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. . . . As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.³²

The differences between these two narratives by the same Justice about the same event can be explained in several ways. First, it is possible that the evidence actually produced at the two separate trials could have been different. Second, Justice Stewart may have intentionally emphasized different aspects of the case for effect. He may have wanted to place an emphasis on the risk of violence in the first case to show the importance of obeying injunctions, while placing the emphasis on the orderliness of the demonstration in the second case to show why demonstrations are not a threat and therefore should be protected. Third, he may have employed a relevance screen, that is, he may have thought of himself as relating only those facts he believed to be relevant to the particular case at issue. Whatever the reason, and whether consciously or unconsciously exercised by single or multiple agents, these two opinions illustrate the flexibility that lawyers and judges may enjoy in constructing narratives.

Discussions of the use of narrative in law generally focus on two very different areas. The first applies literary narrative theory to an understanding

30. *Id.* at 310-11.

31. *Shuttlesworth*, 394 U.S. at 148.

32. *Id.* at 148-49. The differences between these two statements of facts were first brought to my attention by Professor Oscar Chase in a course he taught at New York University School of Law.

of how lawyers and judges act within their profession.³³ Often these theorists apply the lessons of literary criticism, referred to above, to show how judges reach decisions.³⁴ This is common among those in the Critical Legal Studies (CLS) movement. The CLS scholars argue that judges reach decisions based on their previously held political and class interests.³⁵

Critical Race theorists and those who apply and develop feminist jurisprudence use narrative in a somewhat different way, but toward a similar purpose. These theorists frequently use stories (or narratives) from their own lives or the lives of others to explore how the law operates and its effects on individuals.³⁶ These stories are aimed at exposing how the law and our society reinforce prejudice and discrimination.

As a different way of exploring the use of narrative, I will focus on the vital importance of narrative in the actual practice of law. In litigation, narrative is intimately involved at every step. Typically, clients present problems to lawyers in the form of stories full of characters, acts, and the consciousness of their plight. The clients tell the lawyers what happened and ask for advice.³⁷

The story the client tells may not be complete, however, because the client may filter out information that he or she believes is irrelevant. The client may also have other reasons for not telling the complete story. If Eve approached a lawyer, she might be reluctant at first to tell about the role of the snake, for instance, out of embarrassment for having followed the snake's advice. On the other hand, Eve might try to say that everything was done by the snake in order to minimize the appearance of her own responsibility. If the lawyer were not already familiar with the general facts, as would most often be the case, the lawyer would have to labor with the client to get as much of the story from the client's perspective as possible, working through the filters that the client might initially place on the story.

At this point, the lawyers begin to construct alternative possible narratives, otherwise referred to as themes or theories of the case.³⁸ Each narrative encompasses alternative legal positions that might be taken and different pieces

33. See, e.g., Naomi Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2485 (1993); Stanley Fish, *Don't Know Much About the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777, 778 (1988); Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57, 60-61 (1993); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 916 (1992).

34. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991).

35. Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays"*, 71 N.C. L. REV. 201, 230-31 (1992).

36. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 1-12 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127-28 (1987).

37. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 3 (1991).

38. RONALD L. CARLSON & EDWARD J. IMWINKELRIED, *DYNAMICS OF TRIAL PRACTICE, PROBLEMS AND MATERIALS* § 3.2 (2d ed. 1995).

of evidence that might be discovered.³⁹ In developing each possible narrative, lawyers should keep the client's interests and desired outcomes at the forefront of their considerations, even if these conflict with the lawyers' interests or desired outcomes.⁴⁰

One way that lawyers construct narratives from the beginning of their work on the case is by formulating potential closing arguments as early as the initial client interview.⁴¹ Lawyers then continue this activity throughout the case by considering possible theories of the case and testing them as they proceed.⁴² In this way, the narrative precedes the complete set of facts; this enables lawyers to determine what facts they need to discover.⁴³ Lawyers may need to revise theories and themes of the case as they learn more facts and apply them to the law.⁴⁴ Eventually, at the trial, the elements of the client's narrative should unfold in a cohesive and consistent manner. The elements are presented by witnesses, the characters in this plot, and brought together into a patterned whole by the lawyer in summation.⁴⁵ At that point, the lawyer tells the story of the case in a manner that the lawyer hopes will convince the audience—the fact finder of the merits of his or her client's case.⁴⁶

In constructing a summation, the lawyer must consider the law and the facts as related by the various witnesses. He or she needs to tell a narrative that encompasses those facts while setting the scene and providing a vision of the characters and acts that have taken place. At the same time, the lawyer must also consider the characteristics of the fact finders—the lawyer's audience or readers. If it is a trial before the judge without a jury, the lawyer tries to learn all he or she can about the judge's predispositions. Such knowledge influences what narrative the lawyer presents and how the lawyer tells the story.

If it is a jury trial, while the lawyer is conducting voir dire the lawyer should have in his or her mind a profile of the types of people he or she would ideally like to have on the jury.⁴⁷ Lawyers rarely obtain the perfect jury. They usually use voir dire more to eliminate jurors that would be harmful to their case than to select jurors that would be perfect.⁴⁸ During voir dire,

39. *Id.*

40. This approach has come to be called client-centered lawyering. BINDER ET AL., *supra* note 37, at 17. This is not to say that a lawyer can pursue every outcome the client may desire. If the outcome desired or the client's interest would force the lawyer to violate the law or the Code of Professional Responsibility, the lawyer is obligated to refuse to abide by that desire. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(d), 3.3(a)(1) & 3.3(a)(4) (Draft 1982).

41. ROGER HAYDOCK & JOHN SONSTENG, *ADVOCACY, PLANNING TO WIN: EFFECTIVE PREPARATION* § 3.02 (1994).

42. J. ALEXANDER TANFORD, *THE TRIAL PROCESS: LAW, TACTICS, AND ETHICS* 50-51 (2d ed. 1993).

43. CARLSON & IMWINKELRIED, *supra* note 38, § 3.2.

44. HAYDOCK & SONSTENG, *supra* note 41, at 37.

45. THOMAS A. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 1.4 (2d ed. 1988).

46. HAYDOCK & SONSTENG, *supra* note 41, at 11.

47. MAUET, *supra* note 45, § 2.6.

48. TANFORD, *supra* note 42, at 111-12.

however, lawyers can learn a great deal about the jurors' interests, backgrounds, and perspectives.⁴⁹ As discussed above, different people hear narratives in different ways and are persuaded differently. For this reason, lawyers use the information culled during voir dire to shape the telling of their clients' stories to the jury.

Lawyers often have a great deal of leeway in deciding what story to construct. Frequently, opposing lawyers produce very different narratives using the same set of basic facts. For instance, a few years ago, there was an unusual murder in Iowa that evoked a fair amount of publicity. The agreed-upon facts were that a woman shot and killed her husband and then cut out his heart and dismembered his body.⁵⁰ She was charged with first degree murder in the death.⁵¹ The prosecution's narrative was that she killed her husband with premeditation and intent for his life insurance money.⁵² It used her acts (selling her husband three life insurance policies naming her as beneficiary for a total of \$250,000) to explain her purpose.⁵³ The defense narrative was that of the plight of a battered woman who had suffered severe abuse and was conscious of her plight.⁵⁴ It argued that she shot her husband in self-defense and went into a disassociative state during which she cut out his heart.⁵⁵ At the end of the trial, she was acquitted.⁵⁶ Assuming that the defense story was constructed by the attorney in collaboration with the client, both the defense and prosecution did their jobs well in constructing a narrative that was very different from the narrative told by the other side. They presented the characters and scenes in a way that produced a narrative fully supporting their positions.

The work of constructing the story does not end when a jury reaches its verdict. Rather, it continues if either side decides to appeal. At that point, both sides are required to include in their briefs a statement of the case that includes a summary of the facts and the prior legal proceedings.⁵⁷ Good lawyers shape their telling of the trial court proceedings by emphasizing those facts presented at trial which support their client's position on appeal.⁵⁸ Lawyers who can

49. CARLSON & IMWINKELRIED, *supra* note 38, § 4.5.

50. Cynthia Hubert, *Charged in Husband's Death: Woman's Murder Trial Will Begin Monday*, DES MOINES REG., Feb. 29, 1992, at 5M; Gene Raffensperger, *Jury Hears About Dismemberment: The Legs, Right Arm, a Piece of Chest Cavity and a Section of Abdomen Were Cut from the Victim's Torso*, DES MOINES REG., Mar. 12, 1992, at 6M.

51. Raffensperger, *supra* note 50.

52. Cynthia Hubert, *"You Can Get Away with Murder:" Betty Frieberg's Acquittal Was Barbaric, The Prosecutor Says*, DES MOINES REG., Mar. 25, 1992, at 1A.

53. Gene Raffensperger, *Palm Print Is Found on Only One Gun*, DES MOINES REG., Mar. 11, 1992, at 5M.

54. Cynthia Hubert, *Self-Defense? Lawyer: A Year of Abuse Sparked Killing Of Husband*, DES MOINES REG., Mar. 5, 1992, at 1A.

55. Cynthia Hubert, *Psychiatrist Testifies Past Abuses Pushed Frieberg*, DES MOINES REG., Mar. 18, 1992, at 3M.

56. Hubert, *supra* note 54, at 1A.

57. See, e.g., IOWA R. APP. P. § 14(a)(4).

58. Jordan B. Cherrick, *Issues, Facts, and Appellate Strategy*, in APPELLATE PRACTICE MANUAL 79 (Priscilla A. Schwab ed., 1992).

learn the identity of the particular judges hearing the appeal also allow this knowledge to inform the way in which they frame their arguments.⁵⁹

Judges deciding the case also include a section on the facts presented. The judges may choose to present the narrative in a manner similar to the way one of the lawyers described it, or they may choose a totally different path. In all cases, however, the way the judge chooses to describe the facts frequently relates to the conclusion the judge has already reached. This is particularly obvious when the facts as related in the majority opinion are very different from those presented in the dissent.⁶⁰ The elements of both sets of facts are present in the record; the difference stems from an act of interpretive choice, motivated by the desire to justify a particular decision.

While lawyers have a wide range of options in presenting narratives, they are not altogether free to spin any story they please. If a lawyer knows that a witness will lie under oath, he or she may not allow the witness to testify.⁶¹ Lawyers also may not make factual statements that they know are untrue.⁶² They are limited in their summations to using the facts presented, the inferences that can be drawn from those facts, and the questions that are left unanswered by the evidence. Lawyers are also prohibited from telling the jury what they personally believe during arguments.⁶³ Doing so is considered to be testifying, which lawyers may not do in trials where they are acting as counsel.⁶⁴

It is the job of lawyers to work with narratives. As they develop trial strategies and find evidence, their narratives constantly evolve. Finally, at trial, lawyers tell stories through the witnesses and in summation in final form to support whatever legal position they take in the case. The ability to shape and reshape narratives is, therefore, essential to the practice of law.

59. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 854. With the advent of computer research, this search has been greatly facilitated. Lawyers can easily access a computer database to review all of the decisions by a particular judge on particular issues.

60. See, e.g., *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 614-15, 618 n.3, 623-25 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). In this case the majority opinion glosses over the degree of harassment and discrimination the plaintiff had suffered, while the dissent goes into horrific detail regarding these events. The plaintiff was denied relief.

61. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1980).

62. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(1) (1995); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (Draft 1982). In criminal cases, however, lawyers may present arguments that are not true, such as contending that their clients are not guilty even when they know their clients are guilty. See, e.g., Gerald S. Gold, *Split Loyalty: An Ethical Problem for the Criminal Defense Lawyer*, 14 CLEV. MARSHALL L. REV. 65, 66-67 (1965); Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 50-57 (1994); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 38-39 (1993).

63. Lawyers often get around this prohibition by asking rhetorical questions, altering their tone of voice, or using another strategy that implies what the lawyer believes without stating the belief. PETER L. MURRAY, *BASIC TRIAL ADVOCACY* 50-51 (1995).

64. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(c), DR 5-102 (1980).

III. THE APPLICATION OF NARRATIVE THEORIES TO THE BIBLICAL STORY OF EVE

In the sections above, I have shown that storytelling emerges in many different fields. I have explained the elements of stories and some of the factors that affect people's understandings of those narratives. I have shown that storytelling is an essential element in the practice of law. Lawyers first hear from their clients a narrative that is both more and less than what ultimately will be presented in court. They then shape those narratives by applying the relevant law to facts learned from their clients and others in order to present new and fuller narratives to fact-finders.

In this section, I apply these theories to the biblical narrative of Eve.⁶⁵ I imagine that Eve has come to a lawyer's office in the present time seeking vindication after 5756 years of vilification.⁶⁶ While she has never been tried for the "crime" of eating the fruit of the tree of knowledge, popular culture has denounced her for millennia. She wants a lawyer to prepare a defense that could be offered at a criminal trial before a modern, human jury.

She tells the lawyer that she has hopes for vindication because another figure from her time has gained a measure of rehabilitation in the Jewish popular mind in recent years. That person is known as Lilith. Lilith is the name given by the Rabbis to the woman in the first biblical creation story ("male and female [God] created them").⁶⁷ The Rabbis said that Lilith had been created in the same way as Adam but had left the Garden of Eden rather than sleep under Adam.⁶⁸ She had insisted on complete equality.⁶⁹ For centuries, Lilith was viewed as a Queen Demon who attacked pregnant women and newborn babies, but in recent years, Jewish feminists have viewed her as a heroine for her resistance to subordination.⁷⁰

Initially, through the interview with Eve and a preliminary investigation, the lawyer learns the facts as told in Genesis. These facts are the basis of the charges and the defenses. They set the scene of the story that will be told. In the ordinary case, a lawyer would interview as many characters (the participants and witnesses to an incident) as possible to develop a fuller array

65. *Genesis* 3:1-23.

66. The Jewish calendar year 5756 is the equivalent of the 1995-96 year on the modern calendar used in the United States. For an explanation of how the Jewish calendar works, see 5 *ENCYCLOPEDIA JUDAICA* 43-54 (1971).

67. *Genesis* 1:27. There are two creation stories: one in which man and woman were created at the same time in the same manner, and one in which woman was created after man, from his rib. In naming Lilith and differentiating her from Eve, the Rabbis reconciled the two creation stories in Genesis.

68. MORRIS B. MARGOLIES, *A GATHERING OF ANGELS* 166 (1994).

69. 1 LOUIS GINZBERG, *THE LEGENDS OF THE JEWS* 65 (1968). Because Lilith left the Garden, Adam was lonely and God needed to create a helpmate for him. *Genesis* 2:18-20.

70. See, e.g., *LILITH* (a Jewish feminist magazine). In the eyes of commentators in the Middle Age, any woman who would give up the Garden rather than sleep under a man must have been Queen Demon. Modern Jewish feminists have rehabilitated Lilith, however, honoring her as a woman who would give up the Garden rather than be subjugated by a man.

of facts for a case. Here, because the participants and witnesses cannot be interviewed, I am imagining a set of additional "facts" and the participants' "states of mind or reasons for acting" based on those provided in various commentaries that postulate additional facts. I am using these additional facts as if they were gleaned from interrogating various witnesses, including God. Thus, I am treating stories related in the commentaries as the facts of this case.⁷¹ The lawyer approached by Eve would ultimately work with the facts as Eve related them, the facts set forth in Genesis, and useful additional facts presented in the commentaries in order to develop a defense strategy and case.

First, there is the law that Eve is accused of violating. "And the [Eternal] God commanded the man, saying, 'Of every tree of the garden you are free to eat; but as for the tree of knowledge of good and bad, you must not eat of it; for as soon as you eat of it, you shall die.'"⁷²

Next is the actual incident constituting the alleged crime. The Bible states:

[The serpent] said to the woman, "Did God really say: You shall not eat of any tree of the garden?" The woman replied to the serpent, "We may eat of the fruit of the other trees of the garden. It is only about fruit of the tree in the middle of the garden that God said: 'You shall not eat of it or touch it, lest you die.'" And the serpent said to the woman, "You are not going to die, but God knows that as soon as you eat of it your eyes will be opened and you will be like divine beings who know good and bad." When the woman saw that the tree was good for eating and a delight to the eyes, and that the tree was desirable as a source of wisdom, she took of its fruit and ate. She also gave some to her husband, and he ate.⁷³

The last segment of the given facts is God's response to Adam and Eve in the Biblical narrative:

And to the woman [God] said, "I will make most severe [y]our pangs in childbearing; [i]n pain shall you bear children. Yet your urge shall be for your husband, [a]nd he shall rule over you."

To Adam [God] said, "Because you did as your wife said and ate of the tree about which I commanded you, 'You shall not eat of it,' [c]ursed be the ground because of you; [b]y toil shall you eat of it [a]ll the days of your life: Thorns and thistles shall it sprout for you. But

71. My approach encompasses a typical Jewish technique of biblical interpretation. As early as the Talmudic Era, Rabbis were filling in the gaps in the biblical texts by creating stories or sermons of *exegesis* that would provide a deeper understanding of the text. This method is called Midrash. See 11 ENCYCLOPEDIA JUDAICA, *supra* note 66, at 1507; MIDRASH RABBAH (GENESIS) (1939) [hereinafter GENESIS R.].

72. *Genesis* 2:16-17.

73. *Genesis* 3:1-6.

your food shall be the grasses of the field; [b]y the sweat of your brow [s]hall you get bread to eat, [u]ntil you return to the ground—[f]or from it you were taken. For dust you are, [a]nd to dust you shall return.” . . . And the [Eternal] God said, “Now that the man has become like one of us, knowing good and bad, what if he should stretch out his hand and take also from the tree of life and eat, and live forever!” So the [Eternal] God banished him from the garden of Eden, to till the soil from which he was taken. He drove the man out, and stationed east of the garden of Eden the cherubim and the fiery ever-turning sword, to guard the way to the tree of life.⁷⁴

These elements constitute the basic narrative that has been heard for millennia. The narrative has been understood differently in different times depending on the culture of the times, the questions the audience posed, and even the composition of the audience. This can be seen clearly by a review of some of the traditional views of Eve and the Garden of Eden narrative.

A. *Ways the Garden of Eden Narrative Has Been Seen in the Past*

Commentators for millennia have agreed that Eve was guilty of a significant sin. Yet many have come to their conclusions about the details, the moral issues raised, and the meaning of the passages describing the events in the Garden of Eden based on the “truths” that they seek. Their answers are based on the questions that they choose to ask as well as their cultural, religious, political, and other predispositions. Thus, a review of some of the analyses of the narrative provided through the ages will help a lawyer determine how to construct a case for Eve in the present time.⁷⁵

Traditional Jewish thought often tracks the Biblical text in viewing Eve as the one guilty of having brought about the disapproval of God. Some of the legends around the Genesis account have the serpent tricking Eve rather than Eve purposely disobeying God.⁷⁶ The legends explain that the serpent acts because it is jealous of Adam and wants to cause his death.⁷⁷ Since tradition assumes that Eve is less intelligent than Adam, she is the one the serpent targets for deception.⁷⁸

Louis Ginzberg’s *Legends of the Jews*, summarizing the many Jewish *midrashim* that explain the biblical text, provides Eve with an excuse for

74. *Genesis* 3:16-24.

75. In doing this analysis, I do not claim to cover every view of the narrative ever presented. While this is not a complete exegetical analysis, it does present a variety of representative positions and important interpretations of the story.

76. GINZBERG, *supra* note 69, at 72.

77. *Id.*

78. *Id.* Another possible explanation for the reason why the serpent approached Eve instead of Adam was because God spoke the command to Adam, not to Eve. Thus, Eve might have been more susceptible to the serpent’s misinterpretations. JPS COMMENTARY, *supra* note 4, at 24.

following the serpent's suggestions. The serpent reminds Eve that God said not even to touch the tree, although in fact, it was Adam who forbade Eve from touching the tree. God merely forbade them from eating the fruit of the tree.⁷⁹ The serpent uses Adam's exaggerated instruction against Eve, by pushing Eve against the tree.⁸⁰ When nothing happens, the serpent convinces Eve that she has been mistaken and really may eat the fruit without adverse consequences.⁸¹ Ginzberg relates that Eve then convinces Adam to eat the fruit to ensure that, if she dies from eating the fruit, Adam will not be able to marry another woman.⁸² She then persuades all other living creatures to eat the fruit, except the phoenix.⁸³ Thus, Eve is responsible for bringing death into the world.⁸⁴

John Milton's account in *Paradise Lost* places far more blame on Eve. From his perspective, the serpent is acting on behalf of the Devil to cause humanity to fall as the Devil had fallen. God sends the angel Raphael to warn Adam and Eve to be very careful. He cautions them not to be tricked into violating God's law because the Devil will attempt such trickery.⁸⁵ Adam then wants Eve to stay with him because he fears she will easily fall into any trap Satan might lay.⁸⁶ Milton views Adam as far more intelligent than Eve. Eve insists on wandering alone, leaving Adam's side, and enjoying the Garden of Eden despite the warnings of Raphael and Adam.⁸⁷ The serpent convinces Eve that God will not really punish her for eating the fruit unless God is unjustifiably jealous. Satan tells her that God only feared that Adam and Eve would become like God and suggests that Eve should desire such an outcome.⁸⁸ When Adam learns that Eve has eaten the fruit, he does so as well because he cannot bear to live without her.⁸⁹ As soon as he eats the fruit, however, he blames Eve mercilessly for causing his downfall.⁹⁰

Some people look to the story of Adam and Eve to help discover why there is evil in the world when God is all-knowing, all-powerful, and good. One

79. GINZBERG, *supra* note 69, at 72.

80. *Id.*

81. *Id.* at 73-74.

82. *Id.* at 74. Similarly, the Rabbis explain that Eve warned Adam that if she died he would be alone and that she cried to convince him to eat the fruit. GENESIS R., *supra* note 71, at 151.

83. GENESIS R., *supra* note 71, at 151-52. Although the commentary states that all animals but the phoenix ate the fruit, no commentary implies that the animals gained any knowledge from the fruit, although they did become mortal. Only human beings are seen as possessing knowledge of good and evil.

84. *Id.*

85. JOHN MILTON, *PARADISE LOST*, bk. V, ll. 224-45 (Heritage Press 1940) (1686).

86. *Id.* at bk. IX, ll. 226-375.

87. *Id.*

88. *Id.* at ll. 679-733.

89. *Id.* at ll. 896-916.

90. *Id.* at ll. 1163-86. One crescendo of the rebuke occurs at lines 1182-86:

Thus it shall befall
Him who to worth in women over trusting
Lets her will rule; restraint she will not brook,
And left to herself, if evil thence ensue,
She first his weak indulgence will accuse.

answer developed in a time of great hardship provided, "If God has absolute mastery, and God is always good, then evil and hardships must always be due to the evil of humanity."⁹¹ Many in the early centuries of the common era thus read the creation story as showing that God gave to humanity the gift of freedom to choose between good and evil.⁹² Many Christians interpreted the culmination of that choice to involve the acceptance of Jesus.⁹³ Religious philosophers differed, however, on the question of whether the world was created perfect and Adam and Eve brought suffering into the world, or if pain and suffering always existed as a by-product of the freedom to choose.⁹⁴

Augustine answered the problem of evil by developing the concept of original sin.⁹⁵ This fourth-century Catholic theologian responded to the question by reading the text to explain that Adam and Eve introduced sin into the world.⁹⁶ Original sin, Augustine concluded, was transmitted to all human beings at birth. Only baptism and belief in Jesus could cleanse a person of that original sin,⁹⁷ although not completely. Augustine believed that original sin took away some of humanity's free will and prevented people from being able to exist without government.⁹⁸ He explained that sexual desire was a sign of the original sin.⁹⁹

Jewish sources believe that evil is not inherent in God's creation but rather the result of human choice.¹⁰⁰ They explain, "Human beings possess free will but free will is beneficial only insofar as its exercise is in accordance with divine will."¹⁰¹

These analyses can be broadened to accuse woman of bringing both sin and death into the world,¹⁰² despite Paul's attribution of blame to Adam.¹⁰³ If woman, through Eve, is guilty of such a tremendous wrong, a great deal of subordination can be justified. This gives man an excuse to take control.¹⁰⁴

Some readers of the scripture ask what—if any—metaphysical meaning the tree has. Their answers depend on their religious perspectives. One response

91. TIKVA FRYMER-KENSKY, *IN THE WAKE OF THE GODDESSES: WOMEN, CULTURE, AND THE TRANSFORMATION OF PAGAN MYTH* 106 (1992).

92. PAGELS, *supra* note 3, at 73.

93. *Id.* at 77.

94. *Id.* at 76.

95. *ENCYCLOPEDIA OF THEOLOGY: THE CONCISE SACRAMENTUM MUNDI* 1149 (Karl Rahner ed., 1975).

96. He supported this view from the New Testament, in which Paul states that Adam brought sin and death into the world. *Romans* 5:12-21. Thus, Paul blamed Adam but not Eve for the sin. "Augustine emphasizes humanity's enslavement to sin. Humanity is sick, suffering, and helpless, irreparably damaged by the fall." PAGELS, *supra* note 3, at 99.

97. *ROMAN CATHOLIC CHURCH, CATECHISM OF THE CATHOLIC CHURCH* Nos. 402, 405 (1994).

98. PAGELS, *supra* note 3, at 109.

99. *Id.* at 112.

100. *JPS COMMENTARY, supra* note 4, at 16.

101. *Id.* at 24.

102. GERDA LERNER, *THE CREATION OF PATRIARCHY* 198 (1986).

103. *Romans* 5:12-21.

104. Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 *COLUM. J. GENDER & L.* 67, 69-72 (1991); David A. Richards, *Public Reason and Abolitionist Dissent*, 69 *CHI.-KENT L. REV.* 787, 820 (1994).

is to see the tree as “the physical means of a spiritual transaction.”¹⁰⁵ In this view, the fruit “confronts man [and woman] with God’s will . . . and gives man [and woman] a decisive Yes or No to say with his [or her] whole being.”¹⁰⁶ Another commentator understands knowledge of good and bad to be “the capacity to make independent judgments concerning human welfare.”¹⁰⁷ Ibn Ezra, on the other hand, interprets the tree of knowledge to be one that gives sexual knowledge.¹⁰⁸

Some read about Adam and Eve in the hopes of understanding men’s and women’s roles in society. For them, the text dictates women’s subordination to men. Depending on the culture and age of the society, the ways women are subordinated and the justifications drawn from the Eve narrative have differed. Some argue that women cannot manage their business affairs because they are too gullible, as proven by Eve’s being tricked by the serpent.¹⁰⁹ Others say that a man must rule the household using God’s words of punishment as justification.¹¹⁰

The Gnostics, a group of dissenting Christians who lived early in the second century of the common era, however, read the story differently. They saw it in allegorical terms as a narrative about the separation and then unity of the “psyche” and “the spiritual self.”¹¹¹ Thus, they took a radically positive view of the text. “[I]nstead of blaming the human desire for knowledge as the root of all sin, they did the opposite and sought redemption through gnosis

. . . . [G]nostics often depicted Eve—or the feminine spiritual power she represented—as the source of spiritual awakening.”¹¹²

More recent feminist interpretations of the narrative also take a more favorable or sympathetic view of Eve. One writer, while accepting that Eve committed a sin, thanks Eve for bringing about the desire to come closer to God and to improve conditions we face.¹¹³ Poet Miriam Oren “clearly admires Eve, portraying her as a model of righteousness, strength, and courage.”¹¹⁴ Anda Amir believes that Eve’s actions bring sexual knowledge and pleasure to the world, which she sees as a positive change.¹¹⁵ Phyllis

105. DEREK KIDDER, *GENESIS: AN INTRODUCTION AND COMMENTARY* 62 (1967).

106. *Id.*

107. *JPS COMMENTARY*, *supra* note 4, at 19.

108. *Id.* This view began in Hellenistic times and appears in the Apocrypha, where “the serpent . . . becomes a snake, the snake becomes a phallus of Satan, and Eve is seduced sexually so that lust enters the world.” FRYMER-KENSKY, *supra* note 91, at 210. Some early Christians also accepted this view and therefore promoted celibacy. PAGELS, *supra* note 3, at 26-28.

109. Padilla & Winrich, *supra* note 104, at 70-72.

110. *Id.* at 74-76.

111. PAGELS, *supra* note 3, at 66.

112. *Id.* at 68.

113. Barbara Grizzuti Harrison, *A Meditation on Eve*, in *OUT OF THE GARDEN: WOMEN WRITERS ON THE BIBLE 1-2* (Christina Büchmann & Celina Spiegel eds., 1994).

114. Ellen M. Umansky & Dianne Ashton, *Contemporary Voices: Introduction*, in *FOUR CENTURIES OF JEWISH WOMEN’S SPIRITUALITY* 196 (Ellen M. Umansky & Dianne Ashton eds., 1992) (referring to Miriam Oren, *Eve*, in *FOUR CENTURIES OF JEWISH WOMEN’S SPIRITUALITY*, *supra*, at 227).

115. Anda Amir, *Eve*, in *FOUR CENTURIES OF JEWISH WOMEN’S SPIRITUALITY*, *supra* note 114, at

Trible writes that woman is the “culmination” of creation.¹¹⁶ She argues that the serpent spoke to Eve rather than Adam because Eve was capable of engaging in philosophic and theological discussions, whereas Adam was not.¹¹⁷ Finally, she sees God’s response differently than some other commentators. “They describe; they do not prescribe. They protest; they do not condone This statement is not a license for male supremacy, but rather it is a condemnation of that very pattern. Subjugation and supremacy are perversions of creation.”¹¹⁸

B. A Modern Lawyer’s Approach to Eve’s Defense

The lawyer reviewing the narrative and understanding the cultural implications of the story must consider the place of women in contemporary society. Using the changes that have occurred as a result of the first and second waves of the feminist movement,¹¹⁹ the lawyer can review different criminal defenses for Eve and shape them and the facts to the current society and culture of a modern audience. In so doing, the lawyer should take the narrative apart piece by piece and consider the underlying messages and themes that exist. The lawyer should then rebuild the narrative, emphasizing the parts that fit his or her theory of the case.¹²⁰

With this in mind, the lawyer considers the wide variety of criminal defenses available to see if any one of them can be applied to the facts as given and any other facts that the lawyer might develop while investigating the case by interviewing the characters, or, in this case, reviewing the commentaries.¹²¹ In the following sections, I examine several possible

168-69.

116. Phyllis Trible, *Depatriarchalizing in Biblical Interpretation*, 41 J. AM. ACAD. RELIGION 30, 36 (1973).

117. *Id.* at 40.

118. *Id.* at 41.

119. Regarding the accomplishments of the first wave of the feminist movement, see CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS* (9th ed. 1920); Akhil Reed Amar, *Women and the Constitution*, HARV. J.L. & PUB. POL’Y 465 (1995); Mary A. Glendon, *Marrimonial Property, A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21 (1974); Joellen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA WOMEN’S L.J. 103 (1994). Regarding the second wave of the modern women’s movement, see Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 482 (1995); Reva B. Siegel, *Home As Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

120. This is a method lawyers use to present a case. It is not generally the method of Biblical scholarship. Theologians and Biblical scholars do not see themselves as picking and choosing which facts they like and presenting those facts. Lawyers at trials, however, do choose which facts to present. They introduce only those facts that are helpful to them or cannot be avoided and account for the harmful facts that will be presented by the other side.

While many may feel that it is improper to extrapolate from the text of the Bible, it is a traditional Jewish method of biblical interpretation. Commentators question each word of the text and try to find meaning in each word, the placement of the word, and even the empty spaces of the text. Thus, an exploration like the one that follows is both in accordance with some modern theories of literary interpretation and more than a millennium of Jewish Biblical interpretation. See 11 ENCYCLOPEDIA JUDAICA, *supra* note 66, at 1510.

121. Some might find it offensive to suggest that Eve might have defenses when they understand the text to say that God punished Adam and Eve for defying God’s first commandment to them. Yet, in Jewish

defenses for Eve. I present summations that can be used with each defense to show how lawyers build narratives around the theories and themes of the case.¹²² In doing so, I draw on the original narrative in Genesis as well as a wide variety of interpretations from religious and secular sources. I then analyze each summation for its strengths and weaknesses. This process does not assume that there has been a trial yet. It is part of a lawyer's trial preparation, in that lawyers test possible narratives and summations to determine which theory and themes to present at a possible trial. The analyses of each summation give indications of which approach might work best at a future trial.

C. General Defenses

Before proceeding to the defenses that might be most useful in defending Eve, I will discuss some of the strategies that would be ruled out under any plausible construction of Eve's story. The lawyer would quickly rule some of them out because there are no facts to support them as the law currently stands or as the law could likely be argued to be expanded. These defenses I do not discuss more thoroughly in this article.

tradition, it is common to argue with and question God. The roots of this practice can be found in the Bible when Abraham argues with God against the destruction of Sodom and Gomorra. God eventually agrees not to destroy the cities if there are ten just people in them. *Genesis* 18:20-32. The Rabbis later criticized Noah because Noah did not argue with God when God told him that God would destroy all of humanity. THE MIDRASH SAYS, *supra* note 6, at 100. Moses also frequently argued with God, yet he was viewed as the greatest prophet. While God denied entry into the promised land to Moses, God attributed the punishment to Moses's failure to carry out one of God's orders during the wandering in the desert, not to his arguments with God. *Numbers* 27:12-14. Later Job questioned God, and although God rebuffed his attempts to understand God's ways, Job was ultimately rewarded with a full new life. *Job*.

In later days, many famous Rabbis have argued to God or with God or questioned God's ways. For example, Rabbi Levi Yitzhak of Berdichev, a major nineteenth-century Hasidic Rabbi, took the opportunity of the Passover Seder to question God about the past and current persecution of the Jews. He noted that at Passover the parent is to explain the story to the child who knows not how to ask about it.

[H]e said: 'The one who knows not how to ask,' that is myself, Levi Yitzhak of Berdichev. I do not know how to ask you, [God] of the world, and even if I did know, I could not bear to do it. How could I venture to ask you why everything happens as it does, why we are driven from one exile into another, why our foes are allowed to torment us so. But in the Haggadah, the father of him 'who knows not how to ask,' is told: 'It is for you to disclose it to him.' And the Haggadah refers to the Scriptures, in which it is written: 'And thou shalt tell thy [child].' And, [God] of all the world, am I not your son? I do not beg you to reveal to me the secret of your ways—I could not bear it! But show me one thing; show it to me more clearly and more deeply: show me what this, which is happening at this very moment means to me, what it demands of me, what you, [God] of the world, are telling me by way of it. Ah, it is not why I suffer, that I wish to know, but only whether I suffer for your sake.

MARTIN BUBER, *TALES OF THE HASIDIM* 212-13 (1991).

Christian tradition also permits arguing with God. In *Paradise Lost*, Milton has Adam argue with God for God to create a companion for Adam. MILTON, *supra* note 85, at bk. VIII, ll. 380-436.

122. Each will be only a partial summation dealing with the particular defense presented. I will not repeat the parts of the summations that would be given in any case such as thanking the jury for its attention, speaking of reasonable doubt and the presumption of innocence, and calling attention to the fact that the prosecutor has the last word.

Duress is not applicable to Eve's situation, even for the most creative of lawyers.¹²³ To make a claim of duress, a lawyer must show that a third party threatened serious harm to the defendant or another unless the defendant committed the act in question.¹²⁴ This principle is very old in secular law. The concept exists in Jewish law as well. People are permitted to violate any commandment except three to save a life or a person's health. The three commandments that cannot be violated are the killing of an innocent third person, idolatry, and certain sex crimes.¹²⁵ This writer has uncovered no evidence or commentary that supports the notion that Satan or the serpent threatened anyone in order to convince Eve to eat the fruit. Thus, duress cannot be applied as a defense for Eve.

Self-defense is another form of justification defense that does not apply to the facts of Eve's case. To prove self-defense, a defendant must show that force against another person was "immediately necessary" in order to protect herself against the use of "unlawful force" by that person.¹²⁶ Eve faced no threat of harm. Also, self-defense is generally used in instances of assault where death, injury, or at least unwanted contact between people has occurred. Eve's is not that kind of case. For the same reasons, defense of a third party is not relevant here.

Another frequently used defense not applicable to this situation is a complete denial either that the event occurred or that the suspect committed the action. (The latter is often called the SODDI defense meaning "Some Other Dude Did It.") These defenses cannot be used by Eve because the Biblical narrative contradicts them. The lawyer would counsel Eve against using these defenses if she were so inclined, because her testimony would be perjury. Moreover, Eve is not interested in either defense because she is seeking vindication, which requires an admission that she committed the actions.

These are only a few of the defenses that are applicable in certain situations but which are not useful for defending Eve. Any defense attorney has a full range of defenses in mind and will consider each one before settling on an approach to a given charge against a particular client.

123. KIDDER, *supra* note 105, at 67 ("Eve must not be under duress: her temptation comes through a subordinate, which strengthens its appeal to pride but carries no compulsion.") (citation omitted).

124. The Model Penal Code states:

It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he [or she] was coerced to do so by the use of, or a threat to use, unlawful force against his [or her] person or the person of another, that a person of reasonable firmness in his [or her] situation would have been unable to resist.

MODEL PENAL CODE § 2.09(1) (Proposed Official Draft 1962). One case also held:

[A]ll persons are capable of committing crimes except those "... who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." ... [The defense of duress] is established only if one acted out of fear of imminent death or great bodily harm.

California v. Pitmon, 216 Cal. Rptr. 221, 226 (Ct. App. 1985) (first omission in original).

125. SEFER HAAGGADAH, *supra* note 2, at 457-58.

126. MODEL PENAL CODE § 3.04(1) (Proposed Official Draft 1962).

C. *Insanity Defense*

The insanity defense absolves a person for having committed a crime because the person is understood to be not responsible for his or her actions. The Model Penal Code definition of the insanity defense reads:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he [or she] lacks substantial capacity either to appreciate the criminality [wrongfulness] of his [or her] conduct or to conform his [or her] conduct to the requirements of law.
- (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.¹²⁷

Thus, to argue that Eve should be acquitted based on the insanity defense, a lawyer would need to show that Eve suffered from a mental disease or defect that prevented her from knowing the difference between right and wrong or prevented her from understanding the nature and quality of her actions. Such an argument might be made as follows:

You have heard the evidence that has been presented. Let us begin by discussing what is not in dispute. The prosecution has alleged and we concede that God ordered Adam and Eve not to eat the fruit from the tree of knowledge of right and wrong. We also concede that Eve in fact ate of the fruit of that tree despite God's command.

What then is at issue in this case? The only issue is whether Eve is responsible for her actions. The judge will tell you that a person is not legally responsible for his or her actions if that person has a mental disease or defect that prevented him or her from distinguishing between right and wrong. The evidence has shown that Eve did have a mental disease or defect. She has testified that she only ate the fruit because a snake told her to do it. When was the last time that a snake spoke to you? Can you possibly believe that a snake actually spoke to Eve? Or is it more likely that Eve's encounter with the snake was the hallucination of a disturbed mind?

In the entire Hebrew scriptures, there is only one other claim of an animal speaking to a person,¹²⁸ when Balaam believes that his ass has spoken to him.¹²⁹ You remember Balaam. He was the prophet

127. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) (second alteration in original).

128. W. GUNTHER PLAUT, *THE TORAH, A MODERN COMMENTARY* 1175 (1991) (commenting on *Numbers* 22:28).

129. *Numbers* 22:28.

whom Balak, King of Moab, asked to curse the Israelites.¹³⁰ Balaam agreed to come to Balak's camp.¹³¹ Along the way, Balak's ass stopped three times because it saw an angel of God in the road.¹³² Balak beat the animal until finally the ass explained to Balaam why it stopped. Then Balaam saw the angel.¹³³ That story, however, is intended to show that though some thought Balaam was a prophet, he really lacked any great insight.¹³⁴ After all, his ass could see what he could not, namely an angel of God in their path.¹³⁵ Thus, you, members of the jury, cannot believe that the snake actually spoke to Eve, even though she sincerely believes that she heard it.

That hallucination constitutes the evidence of a mental disorder.¹³⁶ The disorder prevented Eve from understanding the nature and the quality of her actions. The snake told Eve that her information was wrong and that she really could eat the fruit of the tree.¹³⁷ Eve followed that advice.

We may never know what caused Eve to believe that a snake was speaking to her, but that hallucination is what caused her to violate the law. She cannot be held responsible for her actions when they were caused by a hallucination.

This argument has many problems. First, if we understand the facts as given in the Biblical narrative to be undisputed and basic to this case, then a lawyer may not legitimately argue that Eve hallucinated.¹³⁸ Rather, we must accept that the snake in fact spoke to Eve. While a lawyer may argue the inferences from the evidence and lack of evidence, a lawyer may not allege facts that the lawyer knows are untrue.¹³⁹

There is a second problem as well. Mere hallucination may not be enough to prove insanity in that it may not establish a mental disease or defect.¹⁴⁰ People have been convicted even when there has been strong evidence of hallucination. For example, Mark David Chapman, the man who killed John

130. *Numbers* 22:4-6.

131. *Numbers* 22:21.

132. *Numbers* 22:22-26.

133. *Numbers* 22:27-31.

134. PLAUT, *supra* note 128, at 1182-83.

135. *Id.*

136. AMERICAN PSYCHOLOGICAL ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 100-03, 398 (3d ed. 1987); *see also* *United States v. Cox*, 826 F.2d 1518, 1520 (6th Cir. 1987). In an actual trial, psychiatric experts would be called by both sides to testify whether the defendant was insane in their opinion.

137. *See* *Genesis* 3:4; GINZBERG, *supra* note 69, at 73-74.

138. While, of course, many people do not accept the Bible literally and others do not even believe in God, for purposes of this Article, we must assume such facts. Otherwise, there is no Eve to defend.

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-102(A)(5) (1980). Even in criminal cases, the lawyer is limited in how far he or she can go in arguing things that are knowingly false.

140. The second element of the insanity defense, that Eve could not distinguish between right and wrong or could not understand the nature and quality of her actions, might be easier to prove. I discuss those issues more fully in terms of the infancy defense in Section D, *infra*.

Lennon, initially pled not guilty by reason of insanity.¹⁴¹ He later changed his plea to guilty, explaining that God had visited him in his jail cell and told him to take responsibility for his actions.¹⁴² The judge accepted the guilty plea.¹⁴³

A third problem with the insanity defense is that it goes against Eve's wishes. Eve has requested of her lawyer not that she be acquitted of the charge but that she be vindicated. While insanity might, if it were a stronger defense, serve to have her acquitted, it would not vindicate her. It would only make her appear to be a sick person.¹⁴⁴ Insanity is not a defense of justification, which acknowledges that the person did the right thing or at least an acceptable act in the face of a difficult choice. Rather, insanity is a defense of excuse.¹⁴⁵ Society deplores the crime that was committed but understands that because of the frailties of the defendant, i.e., possession of a disturbed mind, it would not be just to punish the person.¹⁴⁶ Anyone acquitted through the use of an excuse is not vindicated.

A fourth problem with an insanity defense based on the argument that Eve hallucinated her encounter with the serpent is that Eve and Adam both believe that God speaks to them regularly. We must accept that belief if any charge will stand, for they committed no crime if God did not order them to refrain from eating the fruit of the tree. Once one has heard the voice of God, a speaking serpent does not seem so unreasonable or unbelievable.

Finally, the lawyer must consider the views of the fact finders. The public has a negative view of the insanity defense generally.¹⁴⁷ Even judges may have some reluctance to accept it.¹⁴⁸ Thus, in considering the audience that would hear the narrative, the lawyer should choose insanity only as a last

141. *Chapman's Prison Background*, Gannett News Service, Dec. 1, 1990, available in LEXIS, Nexis Library, Arcnws File.

142. *A Matched Pair of Gunmen: Hinckley and Chapman Have Their Days in Court*, TIME, Sept. 7, 1981, at 14.

143. *20/20: The Man Who Killed the Music: When the Walls Came Down* (ABC television broadcast, Dec. 4, 1992).

144. This raises serious ethical issues for a lawyer who truly believes that his or her client is insane and was so at the time of the commission of the crime if the client does not want to plead insanity. A lawyer is required zealously to represent the client's interests as the client conceives of those interests within the bounds of the law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1980). If the client is insane and cannot understand the proceedings but argues against an insanity defense, a lawyer must decide whether or not to follow the client's wishes. One option the lawyer might have is to ask the court to appoint a guardian *ad litem* to stand in place of the client in making decisions. This still is fraught with ethical difficulties because the client would not want that outcome, either.

145. See Note, *Feasibility and Admissibility of Mob Mentality Defenses*, 108 HARV. L. REV. 1111, 1115-16 (1995). Self-defense, by contrast, would be a justification defense.

146. Cf. Book Note, *Madness and the Criminal Law*, 96 HARV. L. REV. 1991 (1983).

147. See Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1553 n.28 (1985) (relating how ABC News poll found 83% of those surveyed believed John Hinckley's acquittal on insanity grounds was unjust) (citing LINCOLN CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 116 (1984)).

148. See Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 965 (1987) (citing Nancy M. Burton & Henry J. Steadman, *Legal Professionals' Perceptions of the Insanity Defense*, 6 J. PSYCHIATRY & L. 173 (1978)).

resort. The lawyer also considers the consequences if the case is won on the basis of insanity.¹⁴⁹ Since insanity is a weak defense in this case and one that the defendant does not wish to use, and because other defenses are available, the lawyer should reject this option.

D. *Infancy Defense*

Young children usually cannot be considered guilty of a crime even when they have performed acts that would be serious crimes if committed by an adult. The law has viewed young children as incapable of fully understanding their actions or of distinguishing right from wrong since Biblical times.¹⁵⁰ Thus, children below an age set by the law are beyond the reach of criminal or juvenile law. At common law, the age was seven.¹⁵¹ Between that minimum age and an older age set out in a statute, a minor can argue for relief from the criminal law by showing that he or she does not know the difference between right and wrong.¹⁵²

Other aspects of the legal system are also affected by the concern that children may not have the ability to distinguish right from wrong. For example, courts require special hearings before children are permitted to testify to ensure that they understand the oath to which they will swear or affirm and that they understand the importance of being truthful.¹⁵³ Children of a very young age are often considered too immature to take the oath.¹⁵⁴

The question of a child's criminal responsibility for murder has arisen recently. In England, two ten-year-old boys murdered a toddler.¹⁵⁵ Before they could be convicted, the court had to find that they could distinguish between right and wrong despite their young age. In that case, the jury convicted them of the murder, meaning that the jurors found that the boys knew that their actions were wrong.¹⁵⁶

149. Because a successful insanity defense can lead to the client being institutionalized in a mental hospital indefinitely, lawyers and clients often will not use the defense if the charge is minor and would lead to only a short prison sentence. Cf. Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 108 n.175 (1988). The result of a conviction would, in that circumstance, be less serious than the results of an acquittal by reason of insanity. See MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).

150. *Deuteronomy* 1:39. According to the Rabbis, "[Y]ouths under twenty were not punished for transgressions judged by the divine court." PLAUT, *supra* note 128, at 1320; cf. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 559 (1984).

151. See Kerin Bischoff, Comment, *The Voice of a Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse Is Alleged*, 138 U. PA. L. REV. 1383, 1385 n.7 (1990).

152. Helene B. Greenwald, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. CRIM. L. & CRIMINOLOGY 1471, 1473 (1983).

153. See CAL. EVID. CODE § 701 (West 1995); *California v. McIntyre*, 64 Cal. Rptr. 530 (1967).

154. CAL. PENAL CODE § 1321 (West 1988).

155. *Boys Knew Killing Tot Was Wrong, Jury Is Told*, CHI. SUN TIMES, Nov. 12, 1993, at 31.

156. Steve Olafson, *Answers Elude Numbing Account of Boy's Murder*, HOUS. POST, Feb. 26, 1995, at G11.

To relate this defense to Eve, a lawyer has to show that Eve was very young when she ate the fruit and that she could not distinguish right from wrong at the time. The Biblical narrative implies that Adam and Eve were created as adults, not infants.¹⁵⁷ Commentary on the narrative, however, places their transgression of eating the fruit on the first day of their lives, before the Sabbath began.¹⁵⁸ Moreover, at least one commentator interprets the knowledge given by the tree of knowledge to imply that "not to know good and bad means to be innocent, not to have attained the age of responsibility."¹⁵⁹ Thus the defense lawyer could make the following summation:

Members of the jury, you have heard the facts presented. Now you have the opportunity to determine what occurred and whether Eve should be held criminally responsible for her actions. Let me first discuss what is not in dispute. We agree with the prosecution that a commandment was issued which prohibited Eve and Adam from eating the fruit of the tree of knowledge of right and wrong. We also agree that Eve violated that law and ate from that tree.

The sole issue in dispute in this case is whether Eve, because of her youth and immaturity, was unable to distinguish right from wrong to such an extent that she should be acquitted of this charge. When you look at Eve, you see a fully grown woman. This might make it hard for you to think of her as young. Yet the evidence showed that Eve ate the fruit on the very same day that she was created. God created man and woman on the sixth day of creation.¹⁶⁰ On the seventh day God created the Sabbath by resting.¹⁶¹ Eve ate the fruit before that first Sabbath.¹⁶² Thus, Eve was less than one day old when she committed the offense charged in this case.

That is only part of the story here, though. The other question is whether Eve understood the difference between right and wrong. Members of the jury, that is the easy question. Let us look back closely at the evidence. God ordered Adam not to eat of the fruit of the "tree of the knowledge of good and evil."¹⁶³ After Adam and Eve both ate that fruit God said, "See, the man has become like one of us, knowing good and evil."¹⁶⁴ Adam and Eve had to leave the Garden. From this

157. The Rabbis interpreted the text to mean that Adam and Eve were created fully developed and at age 20. GENESIS R., *supra* note 71, at 114.

158. On the tenth hour of the sixth day, Adam ate the fruit of the tree of knowledge. GINZBERG, *supra* note 69, at 82; *see also* THE MIDRASH SAYS, *supra* note 6, at 59-60. God delayed expelling them from the Garden, however, until after the first Sabbath ended. GENESIS R., *supra* note 71, at 81.

159. JPS COMMENTARY, *supra* note 4, at 19.

160. *Genesis* 1:27-31.

161. *Genesis* 2:2-3.

162. THE MIDRASH SAYS, *supra* note 6, at 59-60.

163. *Genesis* 2:17.

164. *Genesis* 3:22.

comment by God, you can see that Eve did not know good from evil until after she ate the fruit. It was at that point that God said she knew the difference. Before Eve ate the fruit, she was like most young children. She was told not to do something but did not understand the difference between right and wrong or good and evil and so she did it anyway.

Thus, it is clear that Eve was a young child at the time of this incident, one who could not distinguish right from wrong until after she committed her offense. Eve therefore asks you to find her not guilty of this crime.

This defense has more evidence and substance for Eve than the insanity defense discussed above. The major drawback to the defense is Eve's appearance as an adult.¹⁶⁵ Yet, the commentaries are helpful on that point by describing Adam and Eve as young.

That, however, may not be enough to acquit Eve. The defense would likely receive a very mixed reaction from its audience. Many people in urban areas have become terribly frightened by juvenile crime. New laws are regularly being passed to increase the penalties for crimes by juveniles and to decrease the age at which they can be tried as adults.¹⁶⁶ At the same time, most people do not see the very young as criminals. Thus, the jury would need to be convinced of Eve's extreme youth for it to be sympathetic to this defense.

There is a second problem with the youth defense, similar to the problem with the insanity defense. It does not vindicate Eve; rather, it makes her into an unthinking, impulsive child. Indeed, not only does this defense fail to justify Eve, it affirmatively undermines the equality of women. If part of Eve's motive for seeking vindication is to discredit the use to which she has been put to justify women's subordination to men, this defense would hinder her attainment of this goal.

Women have a long history of being treated like children, especially under the law. Under Biblical law, a woman could not be bound by an oath without the approval of her father or husband.¹⁶⁷ Under the common law, women could not sign contracts without the approval of their fathers or husbands.¹⁶⁸ Their property was also put under the control of their husbands or fathers.¹⁶⁹

165. Of course, the lawyer could argue that she has grown a great deal in the 5756 years since the incident. The evidence, however, is that Adam and Eve were created with adult bodies and married immediately after their creation. *THE MIDRASH SAYS*, *supra* note 6, at 40-41.

166. Mike Flaherty, *GOP Leaders Want Harsh Penalties for Youth Crime; 16 Year Olds Would Be Tried as Adults*, *WIS. ST. J.*, July 11, 1995, at 1B; Tina M. Perez, *New Juvenile Laws Take Effect Today*, *IDAHO STATESMAN*, July 1, 1995, at 3B; Meg Vaillancourt, *Focus Turns to Crime: Lawmakers Vow Tough New Laws*, *BOSTON GLOBE*, July 2, 1995, at 19.

167. *Numbers* 30:3-15.

168. Margaret J. Chriss, *Troubling Degrees of Authority: The Continuing Pursuit of Unequal Marital Roles*, 12 *LAW & INEQ. J.* 225, 227-34 (1993); Glendon, *supra* note 119, at 28-35.

169. Chriss, *supra* note 168. The Rabbis in the Talmud ruled that a wife needed her husband's consent to sell property she obtained during her marriage. *TALMUD, KETHUBOTH* 78a.

Part of the reason was that women were considered incapable of managing their affairs, just as were children.¹⁷⁰ These views carried forward into American law well into the nineteenth century.¹⁷¹ To compare Eve to a child, then, would only reinforce these notions of women's incompetence.¹⁷²

Because of the strength of the infancy defense, the lawyer's ethical obligations, raised above in relation to the insanity defense, are even more unclear. If Eve vetoed infancy as a defense, the lawyer would have to consider Eve's wishes against the likelihood of conviction under any other defense. If Eve were now competent to make her own choices, the lawyer would be bound to follow her wishes despite the likely consequences.¹⁷³ To protect himself or herself from later charges of malpractice, the lawyer would need to make it absolutely clear to Eve what the lawyer viewed her chances to be under this defense and the alternative approaches.¹⁷⁴ If Eve were steadfast, knowing her options, the lawyer would have to follow her wishes or ask to withdraw from the case.

E. *Mistake of Fact*

Mistake of fact can be a defense to criminal charges in which the prosecution must show that the defendant had a specific intent to commit the crime.¹⁷⁵ Arguing that the defendant was ignorant about an important fact

170. Padilla & Winrich, *supra* note 104, at 75 (explaining religious basis of view); Glendon, *supra* note 119, at 28-35 (recounting legal history of women's status as children).

171. The most well-known exposition of this view comes from the concurring opinion in *Bradwell v. Illinois*, 83 U.S. (1 Wall.) 130 (1872):

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. . . . [T]he family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband . . . and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from . . . this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Id. at 141 (Bradley, J., concurring).

172. Of course, this defense would also state that Adam was a child at the time and also did not understand the difference between right and wrong. Regarding both Adam and Eve as children would alleviate the stigma of this defense that would exist if only Eve were regarded as a child.

173. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, -8 (1980) (explaining that although lawyer should advise client using lawyer's best judgment, ultimate decision is always client's).

174. The lawyer may well want Eve to sign a statement to the effect that the options were explained and she chose not to use the stronger defense. This would protect the lawyer later if the case were lost and Eve sued the lawyer for malpractice or brought ethical charges against the lawyer.

175. CAL. PENAL CODE § 26 (West 1988) (asserting incapacity to commit a crime of someone "who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent."); MODEL PENAL CODE § 2.04 (Proposed Official Draft 1962) ("(1) Ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense"); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.1(b) at 407 (2d ed. 1986)

is different from arguing a mistake of law, which is not generally a viable defense under state statutes. A mistake of fact raises a potential defense when, if the facts were as the defendant believed them to be, the defendant's actions would not have been criminal.¹⁷⁶

The Eve narrative itself suggests a specific mistake of fact that might provide a defense for Eve. God ordered Adam not to eat the fruit of the tree of knowledge of good and evil.¹⁷⁷ Yet Eve believed that she was prohibited from even touching the tree of knowledge.¹⁷⁸ Commentators have explained that Adam told Eve that God ordered her not to touch the tree so that she would be less likely to err and eat the fruit.¹⁷⁹ Eve may have been misinformed about another fact as well. God told Adam that "in the day that you eat of [the tree of knowledge] you shall die."¹⁸⁰ The serpent was able to use the fact that it did not immediately die when it ate the fruit to convince Eve that she was mistaken about God's commandment.¹⁸¹ The question for a lawyer trying to argue this defense would be how important that incorrect information was to Eve's act. The lawyer might argue the mistake of fact defense as follows:

This case boils down to a tragic misunderstanding of the facts. You have heard the evidence. God gave Adam a commandment, but Adam had such serious mistrust of Eve that he communicated it to her differently from its original form. If only Adam had recognized Eve as his intellectual equal, none of the troubles we are here about today would have occurred. It is Adam who is the real culprit here. Eve was an unwitting errant. She did not mean to violate any law.

The evidence shows that Adam told Eve that she was forbidden to touch the tree of knowledge when in fact she was only forbidden to eat

(explaining mistake of fact defense negates defendant's liability when a mistake makes it impossible for defendant to have formed requisite criminal intent).

176. For instance, if a person saw another trying to break into a car and the latter told the passerby that she was locked out of her car, the first person might help her get in. If it later turned out that the woman was stealing the car, the passerby would not be guilty of aiding and abetting a car theft, because he or she thought that the woman owned the car.

177. *Genesis* 2:17. God actually made the order only to Adam. An argument could therefore be made that Eve did not violate any commandment. Such a view makes Adam even more culpable for eating the fruit. Cf. ELIZABETH CADY STANTON, *THE WOMAN'S BIBLE* 26-27 (New York, European Publishing Co. 1895) (arguing that Adam's direct knowledge of God's command and attempts to shirk responsibility make him far worse morally than Eve). Paul's accusation that Adam brought sin and death into the world—without including Eve in the statement—could lend further support to this conclusion. *Romans* 5:12-14.

178. *Genesis* 3:3.

179. GINZBERG, *supra* note 69, at 72. In later times, the Rabbis often made a practice of "mak[ing] a fence around the Torah" so that people would not accidentally break a commandment. SEFER HAAGGADAH, *supra* note 2, at 464. The fence would prohibit activities that could lead to violations of a commandment but that were not directly prohibited in the Torah. PIRKEI AVOS 8 (Avrohom Davis trans., 1978) (a tractate of the Mishnah known as "Wisdom of the Fathers").

180. *Genesis* 2:17.

181. GINZBERG, *supra* note 69, at 73. "The word of the serpent ends up putting the word of God in question." 1 THE NEW INTERPRETER'S BIBLE 361 (1994).

the fruit of the tree.¹⁸² The serpent used that misinformation to trick Eve into violating the law. The serpent pushed Eve into the tree, causing her to touch it accidentally.¹⁸³ When she did not die, the serpent ate the fruit himself, and he did not die. The serpent used these facts to convince Eve that her information was wrong and that she was in fact permitted to eat the fruit.¹⁸⁴ After all, Eve had to determine who was telling her the correct facts, Adam or the serpent. God had not given Eve the order; rather, Adam told her the rule. When part of Adam's statement proved untrue, Eve doubted all of it and believed the serpent.

Thus, it is really Adam and the serpent who are to blame. As Paul said, it is Adam who brought sin into the world.¹⁸⁵ Eve was an innocent person who was duped. For that, you should not convict her of any crime.

There are several problems with this defense. First, it may really be an issue of mistake of law posing as a mistake of fact. Eve thought she was not permitted to touch the tree; that is a mistake of the law. It would be hard to convince a jury or judge that Eve should not be culpable. Many people misunderstand the exact scope of a law or its penalties and are still convicted of violating it. The public expects people to be responsible for their actions even if they think that their actions are legal. Moreover, Eve touched the tree even though she thought she was prohibited from doing so. Thus, any argument that she was mistaken in what she thought she was barred from doing shows that she violated the law even as she erroneously thought it was enacted.¹⁸⁶ A jury or judge would probably be unsympathetic to her arguments because she touched the tree. An argument that the touch was accidental and not voluntary could help on this issue,¹⁸⁷ but Eve's continued and expanded violation after that mistaken touch would thoroughly undermine

182. *Genesis* 2:17.

183. GINZBERG, *supra* note 69, at 72.

184. *Id.* at 73-74.

185. *Romans* 5:12-21.

186. The Model Penal Code states:

Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he [or she] supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he [or she] may be convicted to those of the offense of which he [or she] would be guilty had the situation been as he [or she] supposed.

MODEL PENAL CODE § 2.04(2) (Proposed Official Draft 1962).

187. Most criminal laws apply only to people who intentionally commit the criminal acts. *See, e.g.*, CAL. PENAL CODE § 22 notes (West 1988) (discussing the relevance of evidence of voluntary intoxication); CAL. PENAL CODE § 220 (West 1988) (defining assault with intent to commit mayhem). Thus an accidental or involuntary breach could be a defense. For instance, although it is an assault to hit someone, if a person were having convulsions and hit another during the course of the convulsion, the person would not be guilty of assault because it was involuntary. *See, e.g.*, IND. CODE ANN. § 35-41-3-6 (West 1994) (defining irresistible impulse).

an effective mistake of fact defense.

F. Entrapment Defense

Under the defense of entrapment, a person can be found not guilty of a crime if a government agent entices a person who is not otherwise inclined to commit the offense to violate the law.¹⁸⁸ The defense has been established as a matter of due process under the Constitution.¹⁸⁹ As a matter of law, it is repugnant for the government to cause a law-abiding citizen to violate the law when the person would not have done so otherwise.¹⁹⁰

To apply the entrapment defense to Eve, a lawyer must show that the serpent was acting as a government agent; in this case, an agent of God. Further, it must be established that Eve would not have violated the law, that is, would not have eaten the fruit, had it not been for the serpent's actions. There is evidence to support these assertions.

Commentators identify the serpent as Satan or as in league with Satan.¹⁹¹ Satan was originally an angel in God's court. Christians believe that Satan rebelled against God, was banished from Paradise, and then tried to turn humans away from God's ways and laws.¹⁹² Jews, however, view Satan differently; his role is that of the prosecuting angel.¹⁹³ He only acts with God's approval and then attempts to entrap humans to show God that humans are not as good as God thinks they are.¹⁹⁴

This was precisely what Satan did with Eve in the garden. God told Adam not to eat the fruit of the tree of knowledge in order to test how humans would use the free will that God gave them.¹⁹⁵ Satan then put pressure on Eve to entice her to violate that law, thereby showing God that humanity was not as well-behaved as God believed. Thus, the lawyer's summation for Eve could be as follows:

Members of the jury, you have standing before you a woman who is a victim. She is a victim of a plot by a wily agent of God to trick her into violating God's law. Eve was in the Garden of Eden pleasantly enjoying her surroundings and being with Adam. This was their beautiful home. Adam had just named the animals,¹⁹⁶ met Eve, and

188. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962); *see, e.g.*, Illinois v. Gullely, 36 Ill. App. 3d 577 (1976).

189. U.S. CONST. amend. V, XIV.

190. Greene v. United States, 454 F.2d 783, 787 (9th Cir. 1971).

191. *See, e.g.*, GINZBERG, *supra* note 69, *passim*; MILTON, *supra* note 85, *passim*. Satan is accused of instigating Eve's offense in THE MIDRASH SAYS, *supra* note 6, at 53. This identification of the serpent with Satan did not occur until the first century BCE. JPS COMMENTARY, *supra* note 4, at 24.

192. Revelations 12:7-9.

193. He plays this role in the biblical book of Job. MARGOLIES, *supra* note 68, at 102.

194. *Id.* at 103-04.

195. J.H. HERTZ, THE PENTATEUCH AND HAFTORAH 8 (1988).

196. Genesis 2:19-20.

married her.¹⁹⁷ All of the world was new to them, and they were experiencing life as only newborns can. Everything they saw was a wonder. All that they encountered was a thrill. They understood God's commandment to them, prohibiting them from eating of the fruit of the tree of knowledge of right and wrong, and they intended to obey that law.

Then Satan came along and destroyed everything. He was jealous of Adam and his relationship with Eve.¹⁹⁸ He wanted to find a way to destroy Adam, so he picked on Eve. Satan only had this power because God allowed him to perform the role of prosecuting angel.¹⁹⁹ In this instance, Satan went too far. It is an old story. One we've seen too often. An officer of the law decides that he or she wants to get someone, so he or she uses the power of the office to get the person to commit a crime the person would not have committed otherwise. It is not the fault of those who hired the police officer. Rather, it is that officer's fault.

Here it is not God's fault that Satan decided to use his powers in an abusive fashion. The fault lies solely with Satan. Yet, as the judge will instruct you, regardless of whether Satan had God's approval to entrap Adam and Eve, if you find that they were in fact entrapped, you must find Eve innocent of the crime.²⁰⁰

Satan, in the form of the serpent, tricked Eve into believing that she was mistaken, that God had not ordered her as she had believed. How did he do this? First, he brushed her against the tree. When she did not die, as she thought she would, she began to question whether Adam had correctly relayed God's commandment to her. This questioning became greater when the Serpent ate the fruit and nothing happened. Finally, Eve convinced herself that she could eat the fruit without consequence.²⁰¹ Without Satan's trickery, Eve would never have committed this offense. Eve asks, therefore, that you find her not guilty of the crime.

There are several problems with this defense. First, any jury or judge would be reluctant to find that Satan was acting as God's agent in causing Adam and Eve to eat the fruit. It conflicts with the view held by most people in our society that God is good. Current religious and philosophical conceptions of God are that the Almighty upholds the good and would not participate in a wrongful scheme like entrapment.²⁰²

197. *Genesis* 2:22-23; THE MIDRASH SAYS, *supra* note 6, at 40-41.

198. GINZBERG, *supra* note 69, at 72.

199. MARGOLIES, *supra* note 68, at 103-04.

200. MODEL PENAL CODE § 2.13 (Proposed Official Draft 1962).

201. GINZBERG, *supra* note 69, at 73-74.

202. This was certainly not always the view of God. In the Hebrew scriptures God is emphasized more as awesome than as good. For instance, God lashed out and killed Uzziah when he touched the ark to

The effort in the summation to distinguish legal responsibility from moral responsibility is aimed at this problem. Under entrapment law, the government and prosecution are legally responsible for entrapment and other violations of rights even if a police officer acts without the approval of any superior.²⁰³ In such an instance, the government is legally responsible for the officer's behavior even if it is not morally responsible because he or she is acting independently. The summation attempts to draw a similar distinction between God's moral and legal responsibility for Satan's actions, but that would probably not be enough to overcome jurors' reluctance to criticize God. It is even hard to convince jurors that an agent of the government has acted improperly for an entrapment defense,²⁰⁴ let alone an agent of God.

A further difficulty, and one common in any entrapment defense, would be to show that Eve was not otherwise inclined to commit the crime. In addition to the serpent's claim that Eve had misunderstood the law, he explained that if she ate the fruit, she would have the Godlike power of knowledge: "You are not going to die, but God knows that as soon as you eat of it your eyes will be opened and you will be like divine beings who know good and bad."²⁰⁵ The prosecution would, therefore, argue that Eve ate the fruit because she envied God's knowledge, not because she was tricked by Satan. Being an envious woman, Eve was inclined to violate the law. Satan only encouraged her to do what she wanted to do anyway. Under those circumstances, the entrapment defense would fail.

A further difficulty with the entrapment defense lies in its very formulation. Jurors like to see people responsible for their actions. It is unlikely that a jury would respond favorably to anyone who argues, "The devil made me do it." Yet, that is precisely the argument Eve must use to make this defense. Thus, although the defense has merit, it is probably doomed to fail.

G. *Necessity or Justification Defense*

The justification or necessity defense permits individuals to break a law when a more important value is at stake.²⁰⁶ Courts often require that there

prevent it from falling. 2 *Samuel* 6:6-7. I am thankful to Tykva Frymer-Kensky for pointing out this example. God's treatment of Job would also imply a less than always benevolent God. *See Job*.

203. *Sorrells v. United States*, 287 U.S. 435, 448-50 (1932); Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations*, 36 *EMORY L.J.* 75 (1987); Erich Weyand, Comment, *Entrapment: From Sorrells to Jacobson—The Development Continues*, 20 *OHIO N.U. L. REV.* 293, 303 (1993).

204. Cheney C. Joseph, Jr., *Criminal Procedure*, 49 *LA. L. REV.* 329, 347 (1988). In areas where there is great mistrust of police, it is easier to convince jurors of police misconduct. For instance, a few years ago in the Bronx, defense attorney William Kunstler was able to convince a jury that his client acted in self-defense when he shot police officers. Kunstler argued that the officers were out to kill his client. Manuel Perez-Rivas, *Davis Trial Awaiting an Appeal*, *NEWSDAY*, Aug. 4, 1988, at 7. In other jurisdictions where police community relations are better, such a defense might be very difficult.

205. *Genesis* 3:4.

206. Conduct that the actor believes to be necessary to avoid a harm or evil to himself [or herself] or to another is justifiable, provided that: (a) the harm or evil sought to

be an emergency, that the problem can only be remedied by illegal means,²⁰⁷ and that the illegal act be indeed likely to ameliorate the situation.²⁰⁸ The defense will usually fail when the defendant is responsible for causing the problem.²⁰⁹

This defense has ancient roots. In the Bible, the Egyptian midwives violate Pharaoh's command that they murder all male Jewish babies at birth. They claim to Pharaoh that they cannot do so because the Jewish women give birth too quickly, before the midwives arrive. For this defiance of Pharaoh's law, God rewards them.²¹⁰

Ancient Greek literature also contains stories of civil disobedience and attempts to argue a justification defense. Perhaps the most famous of these is the story of Antigone, familiar to us in the play by Sophocles.²¹¹ King Creon orders that one of Antigone's two dead brothers lie unburied after his death during a rebellion against the king.²¹² Still, she buries her brother, arguing that she is required to do so by a higher law of the gods.²¹³ She has many arguments with the King about her responsibilities.²¹⁴ The King sentences Antigone to death by enclosure in a cave without food or water.²¹⁵ Creon then learns that the law of the gods indeed supervenes his law.²¹⁶ When he goes to free Antigone, however, it is too late. Antigone has already hanged herself in the tomb.²¹⁷ Other members of Creon's family then kill themselves.²¹⁸ Creon is overcome with grief. The final words of Sophocles' drama are:

There is no happiness where there is no wisdom;
 No wisdom but in submission to the gods.
 Big words are always punished,
 And proud men in old age learn to be wise.²¹⁹

be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962).

207. *New York v. Craig*, 78 N.Y.2d 616, 621 (1991).

208. *Id.* at 623.

209. MODEL PENAL CODE § 3.02(2) (Proposed Official Draft 1962).

210. *Exodus* 1:15-21.

211. Sophocles, *Antigone*, in GREEK PLAYS IN MODERN TRANSLATION 457 (Dudley Fitts ed. & trans. & Robert Fitzgerald trans., 1947).

212. *Id.* at 460-61.

213. *Id.* at 471-72.

214. *Id.* at 473.

215. *Id.* at 482-83.

216. *Id.* at 493.

217. *Id.* at 496.

218. *Id.* at 497-98.

219. *Id.* at 499.

In modern times, the claim of allegiance to a higher law is still used. The necessity or justification defense arises in cases of civil disobedience. Demonstrators often argue that their sit-ins or blockades are necessary to prevent the greater wrong of the government's actions, often in foreign policy or nuclear development.²²⁰ In support of these claims, the demonstrators may cite the Nuremberg principles requiring individuals to violate orders if necessary to prevent crimes against humanity.²²¹ Frequently, courts have resisted efforts to charge the jury on the justification defense in these cases, finding either that the demonstrators' actions are unlikely to prevent the wrong or that there is no wrong.²²² When juries do hear the evidence on the government's actions or receive the charge on justification, the result is often acquittal or a hung jury.²²³ For Eve to use this defense, her lawyer has to show that she acted in accord with a higher duty when she ate the fruit. Most people, when making such an argument, state that the higher duty was based on God's law or natural law. Here, however, it would seem that God's law requires Eve not to eat the fruit. She may also have difficulty demonstrating the existence of an imminent or emergency situation, a difficulty faced by many protesters. Still an argument can be crafted as follows:

Members of the jury, Eve stands here accused of violating God's law not to eat the fruit of the tree of knowledge of right and wrong. The question you are to determine today is whether that law was, in fact, unbending and intended to last for eternity or whether God wanted that law to pass away eventually. If you come to agree with Eve that this was only a temporary law, you will find that she was justified in eating the fruit.

220. In re Weller, 164 Cal App. 3d 44 (1985); New York v. Gray, 150 Misc. 2d 852, 853 (1991); Henry J. Richardson, *Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 66 (1993). Anti-abortion demonstrators have also tried to use these arguments. See New York v. McDaniel, 154 Misc. 2d 89, 93 (1992).

221. Colman McCarthy, *In Defense of the "Rotunda 18"*, WASH. POST, Feb. 22, 1987, at G6.

222. Kyle Bettigole, *Defending Against Defense: Civil Resistance, Necessity and the United States Military's Toxic Legacy*, 21 B.C. ENVTL. AFF. L. REV. 667, 672, 694 (1994); Bernard D. Lambeck, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 YALE L. & POL'Y REV. 472, 487-88 (1987); James L. Cavallaro, Jr., Case Note, *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351 (1993).

223. Cavallaro, *supra* note 222, at 351. For instance, when Abby Hoffman and Amy Carter were tried for a sit-in at the University of Massachusetts against the CIA and its on campus recruiting activities, they were permitted to introduce evidence of the conduct of the CIA, and they were acquitted. Jonathan Kaufman, *"Necessity Defense" Will Become Commonplace*, BOSTON GLOBE, Apr. 17, 1987, at 19. The defendants in such cases often also argue that the principles developed in the Nuremberg Trials require them to act against the government's criminal actions or they will be complicit in those actions. McCarthy, *supra* note 221; Frank Lawrence, *The Nuremberg Principles: A Defense for Political Protesters*, 40 HASTINGS L.J. 397, 404 (1989) ("[T]he notion of individual responsibility, which forms the core of the Nuremberg Principles, applies not only to government officials, policy makers, and military personnel, but to private citizens as well."). See also POR AMOR AL PUEBLO: NOT GUILTY, THE TRIAL OF THE WINOOSKI 44 (1986) (excerpting transcript of trial in which justification defense was successfully used to win acquittal for group of demonstrators who sat-in at Senator's office to protest United States policy in Central America and to ask for public meeting).

What evidence, you might ask, is there that God did not intend this to be a permanent law? You will recall that God created heaven, earth, and all that is therein in six days. On the seventh day, God rested from these labors.²²⁴ Why did God rest? The most obvious answer was to show humanity the importance of rest and to institute the Sabbath day.²²⁵ Commentary suggests another reason: God stopped the work of creation in order to leave it to humanity to finish that work. The Hebrew words used in Genesis 2:3 actually translate to mean “‘All [God’s] work that God created to do.’” Ibn Ezra and Radak understand this final verb as connoting ‘[for man] to [continue to] do [thenceforth].’²²⁶ Thus, humanity was to become a co-worker with God in completing the work of creation.²²⁷

Eve understood that she and Adam were intended to be God’s co-workers. She faced a question, however. How could she act as God’s partner if she did not know the difference between right and wrong? Eve and Adam were, after all, created in God’s image.²²⁸ Knowing that, Eve agreed with the serpent that she needed the knowledge of good and evil that God had so that she could work with God in perfecting the world and eliminating its evil.

Now you may be thinking, “But Eden was paradise! How could there have been any evil there?” True, Adam and Eve also believed at first that Eden was paradise. They were like young children who had everything they needed provided for them by God, their parent. Most young children at first think that they are in paradise.²²⁹ As they grow older, however, they come to recognize that there are problems in their world.²³⁰ That recognition causes them to seek the wisdom to understand and correct those problems.²³¹

Like a child starting to learn and see the world, Eve sought that wisdom. Eve then saw that “the tree was desirable as a source of wisdom.”²³² She responded by tasting the fruit, hoping to gain the understanding of right and wrong that would let her take her place as a partner with God in the perfection of the world.

224. *Genesis* 2:1-3.

225. *Id.*

226. JPS COMMENTARY, *supra* note 4, at 15 (alteration in original).

227. PLAUT, *supra* note 128, at 22. See also HERTZ, *supra* note 195, at 6:

[T]he work of creation continues, and the world is still in the process of creation, as long as the conflict between good and evil remains undecided. Ethically the world is thus still ‘unfinished’ and it is [humanity’s] glorious privilege to help finish it. [A person] can by his [or her] life hasten the triumph of the forces of good in the universe.

228. *Genesis* 1:27.

229. PATRICIA H. BERNE & LOUIS M. SAVARY, BUILDING SELF-ESTEEM IN CHILDREN 22 (1981); BRYCE B. HUDGINS, EDUCATIONAL PSYCHOLOGY 45-47 (1983).

230. VANCE PACKARD, OUR ENDANGERED CHILDREN 34-40 (1983).

231. *Id.*

232. *Genesis* 3:6.

Now maybe you're thinking, "If that was God's real plan, why did God order Adam and Eve not to eat the fruit?" To understand this order, you should recognize that Adam and Eve were young children at the time. God was concerned that Adam and Eve could not handle the responsibility of knowing right from wrong at their young age. Just as a parent might tell a young child not to touch an oven without intending that the prohibition last a lifetime, God told Adam and Eve not to eat the fruit intending the commandment to last only until they were old enough to handle the responsibility.

With knowledge of right and wrong comes the obligation to choose right, to choose good over evil. God sets out that duty and the consequences of the wrong choice starkly in Deuteronomy as a matter of life and death for humanity. You remember the stirring words from the Bible:

Surely, this Instruction which I enjoin upon you this day is not too baffling for you, nor is it beyond reach. It is not in the heavens, that you should say, "Who among us can go up to the heavens and get it for us and impart it to us, that we may observe it?" Neither is it beyond the sea, that you should say, "Who among us can cross to the other side of the sea and get it for us and impart it to us, that we may observe it?" No the thing is very close to you, in your mouth and in your heart, to observe it.

See, I set before you this day life and prosperity, death and adversity. For I command you this day, to love your God, to walk in God's ways, and to keep God's commandments, God's laws, and God's rules, that you may thrive and increase, and that your God may bless you . . . I call heaven and earth to witness against you this day: I have put before you life and death, blessing and curse. Choose life—if you and your offspring would live—by loving your God, heeding God's commands, and holding fast to God. For thereby you shall have life and shall long endure upon the soil²³³

God hoped that Adam and Eve would not eat the fruit until they were mature enough to be able to choose right over wrong, so that they might live and endure; only then would God be able to determine whether they would use the knowledge to work "with or against

233. *Deuteronomy* 30:11-20.

God.²³⁴ Eve knew that she was ready. In fact, the Bible relates no sins or criminal acts by Eve or Adam after they ate the fruit.²³⁵ Thus, Eve was correct in concluding she could handle the obligations that come with the wisdom to distinguish right from wrong.

If Eve was only following God's ultimate will to be a co-worker in the ongoing job of completing and perfecting creation, why did God punish her? To answer this question, we need to look closely at God's responses to the serpent and to Adam and Eve. In so doing, it becomes clear that God did not in fact punish Eve. Rather God enunciated what would happen to her regardless of her actions.²³⁶

Only the serpent was cursed.²³⁷ You may ask, "Why was the serpent cursed if he only persuaded Eve to do what God wanted her to do eventually?" The serpent was punished because of his motives. He did not act to enable Adam and Eve to be God's co-workers in completing creation. He acted out of jealousy towards Adam and slandered God when he approached Eve.²³⁸ He wanted to harm Adam and tried to reach Adam through Eve. For that, he was cursed.²³⁹

Now let us turn to Eve's alleged punishment. God first told Eve that she would have pain in childbirth.²⁴⁰ As the first woman, Eve was destined to be the mother of all humanity. In fact, this is implied by her Hebrew name, Kheva, related to Khay, which means "life."²⁴¹ Also, God's first command to humanity was "be fruitful and increase."²⁴² Thus, human sexuality and the procreation that can result from it are "a blessed gift from God woven into the fabric of life."²⁴³ Eve's body was formed in such a way that she would be the one to give birth. God only told her what would naturally occur during birth, namely pain.²⁴⁴

If God wasn't really punishing Eve, why did He say, "Your urge

234. HERTZ, *supra* note 195, at 10. Cf. 1 THE NEW INTERPRETER'S BIBLE, *supra* note 181, at 361 ("The command seems to forbid an immediate acquisition of knowledge, though without suggesting that humans should not have wisdom. The issue involves *the way in which wisdom is gained.*").

235. Of course, the Bible is replete with the sins of their descendants, starting with Cain killing Abel. *Genesis* 4:8.

236. HERTZ, *supra* note 195, at 12.

237. *Genesis* 3:14.

238. GINZBERG, *supra* note 69, at 62, 72; GENESIS R., *supra* note 71, at 159.

239. Acting out of jealousy constitutes a violation of the last of the Ten Commandments, "You shall not covet your neighbor's house: you shall not covet your neighbor's wife, or [your neighbor's] male or female slave, or his [or her] ox or his [or her] ass, or anything that is your neighbor's." *Exodus* 20:14. Slander is also considered evil. GENESIS R., *supra* note 71, at Chapt. XX, No. 1, 159. One Gnostic writer, however, defended the serpent, and stated that he was "a teacher of divine wisdom." PAGELS, *supra* note 3, at 69.

240. *Genesis* 3:16.

241. *Genesis* 3:20. Although she was given the name after she ate the fruit, the Rabbis in the Talmud explain that there is no chronological order in the Torah. TALMUD PESACHIM 6b.

242. *Genesis* 1:28.

243. JPS COMMENTARY, *supra* note 4, at 50.

244. Julian, a contemporary of Augustine, believed that pain in childbirth was inevitable, but that God increased this pain as a penalty to Eve. PAGELS, *supra* note 3, at 136-37.

shall be for your husband and he shall rule over you?"²⁴⁵ Men saw this story as an excuse to rule over women and took it.²⁴⁶ God recognized that men would do this and warned Eve.²⁴⁷ The medieval philosopher, Rashi, however, understood the passage to mean that women would want sex but would not be able to demand it of men.²⁴⁸ The Rabbis in the Talmud explained the passage as a response to women's possible vows of celibacy during a hard labor²⁴⁹ or to explain women's desire for marriage.²⁵⁰

Many may view mortality as part of the punishment, yet this is not part of the story. Adam and Eve had not eaten the fruit of the tree of life, so they were not immortal when they ate the fruit of the tree of knowledge.²⁵¹ One Christian interpretation is to view the death associated with eating the fruit as both spiritual and physical.²⁵² Jews have rejected this view, which formed the basis of the concept of original sin.²⁵³

Finally, the expulsion from the Garden could also be seen as a punishment, though it was not. As I've already discussed, thinking Eden was paradise was merely an illusion created by youth and naiveté. Once Eve and Adam ate the fruit, they could see the landscape as it really was. They lived not in paradise but in an imperfect world created by God. As adults, they needed to recognize that fact. Eating the fruit enabled Eve and Adam to become "creatures of culture."²⁵⁴ Having obtained knowledge of right and wrong they could work to perfect that world by eliminating the evil they saw. Their departure from the Garden was, therefore, a natural part of maturing rather than a punishment.

Members of the jury, upon understanding the purpose of humanity and Eve's courageous effort to carry out that purpose, Eve hopes that

245. *Genesis* 3:16.

246. FRYMER-KENSKY, *supra* note 91, at 122-23, 129.

247. The statement was a recognition of social reality. "The new state of male dominance is regarded as an aspect of the deterioration in the human condition that resulted from defiance of divine will." JPS COMMENTARY, *supra* note 4, at 28. Moreover, Reb Aha explained that God did not even create Eve until after Adam asked for her to be created because God anticipated that Adam would later blame Eve for his predicament. *GENESIS R.*, *supra* note 71, at 136. The early Christian commentators Julian and Chrysostom believed that male domination was part of nature but "may become, through sin, both painful and oppressive." PAGELS, *supra* note 3, at 137.

248. PENTATEUCH AND RASHI'S COMMENTARY, *supra* note 2, at 33-34.

249. SEFER HAAGGADAH, *supra* note 2, at 627; *GENESIS R.*, *supra* note 71, at 166.

250. SEFER HAAGGADAH, *supra* note 2, at 627.

251. *Genesis* 3:22-24. Only God has immortality. KIDDER, *supra* note 105, at 65. The *JPS Torah Commentary* agrees that humans were originally mortal but "had the possibility of immortality." JPS COMMENTARY, *supra* note 5, at 18-19.

252. KIDDER, *supra* note 105, at 67. Paul goes further, stating that Adam brought death into the world. *Romans* 5:12-21. In this view, Jesus will undo that death and will bring eternal life to those who accept him. PAGELS, *supra* note 3, at 129.

253. KIDDER, *supra* note 105, at 67.

254. FRYMER-KENSKY, *supra* note 91, at 109.

you will find that she acted correctly out of necessity and acquit her of the charges that have been raised against her for millennia.

This defense serves several purposes. If successful, it not only wins Eve's acquittal, but also results in her vindication. Under this theory, Eve can be acquitted only if the jury finds that she was correct in her actions. This defense, therefore, serves Eve's desire for vindication, not just acquittal.

The defense has, however, two kinds of problems. The first is legal: Eve cannot show that there was any imminent harm she was trying to avoid. She may possibly overcome that argument by showing that the status quo could not remain forever. Eventually she would have had to take the stand that she did. Still, some courts would bar the defense without the showing of immanence.²⁵⁵ Moreover, Eve had the opportunity to inquire of God whether or not the law still stood if she was unsure, but she chose to act without asking.

The second problem is how to convince the jurors. It requires them to hear the narrative in a radically different way than they have heard it in the past. Since they, as an audience, are reacting out of their own cultural backgrounds, they would have difficulty overcoming their previous understanding that Eve was responsible for the "fall of man."²⁵⁶ It is hard to persuade any reader to abandon her or his preconceptions and to judge a familiar story anew.

Furthermore, as shown in the summation, the narrative has to be taken apart, piece by piece, to convince the listener or reader of the new perspective being urged. Many people resist this form of literary analysis. For instance, fundamentalists who believe in the literal truth of the accounts in Genesis are unlikely to accept a reinterpretation of that account based on extra-Biblical commentaries and theories. Even those who accept such commentaries would be reluctant to accept the radically different view expressed in the justification defense. Most read Genesis as a depiction of Adam and Eve as sinners who deserve punishment. Those readers who have other biases, however, may be attracted to the newer formulation. Feminists, for instance, may share this writer's impulse to review the story and re-create Eve in a more positive image.²⁵⁷

H. *Implications for Lawyers*

The exercise above shows lawyers and law students the importance of

255. *Craig*, 78 N.Y. 2d at 621.

256. STANTON, *supra* note 177, at 7. The view that Adam and Eve were responsible for the fall of man is supported in the New Testament. *See, e.g., Romans* 5:12-21. Of course, a lawyer would hope that through *voir dire* jurors with ingrained views of the narrative could be eliminated from the jury pool. The potential jurors, however, might not realize how deeply they hold their views. They might claim to be unbiased even though they have preconceived notions about the case.

257. *See* Daniel Boyarin, *Different Eves: Myths of Female Origins and the Discourse of Married Sex*, in *CARNAL ISRAEL: READING SEX IN TALMUDIC CULTURE* 77 (1993).

understanding the use of narrative in their practice. Every case that they encounter presents many possible narratives. Their clients have one story to tell them. That story may change to some extent over time as the client remembers new information, gains consciousness of other purposes or conflicts, or refines the account together with the lawyer. Opponents, in turn, present their own single or multiple narratives.

Lawyers must be facile in their ability to understand the narratives they hear and to shape the stories that they will eventually tell opponents and fact-finders. The narrative that emerges should combine the most helpful elements with the facts the opposition lawyer will undoubtedly present. It should also emphasize a theme consistent with those facts and supported by a legal theory.

While lawyers are deciding which narrative to present to the fact-finder, they must be ever mindful of their own biases and perspectives. Their sensibilities may influence their perspectives on which defense to present. I am a Jewish feminist, and the advice I give to Eve in this article, including the possible alternative narrations of her story, reflects my education, background and perspective as a Jewish feminist. Moreover, because it is unlikely that any jury hearing Eve's trial would be composed exclusively or even primarily of Jewish feminists, the arguments that move me may not move the average juror. As a result, in advising Eve regarding which theory she should use, I would have to explain my own biases and readily admit that infancy would provide a more effective, though not vindicating, defense for her. Eve should have the final decision as to which theme of the case and which defense to present. Likewise, every lawyer should allow the client to make an informed decision about the theory and themes presented in a case.

In shaping any narrative for trial, the lawyer decides which evidence to present. Some of the characters in the story may not be called as witnesses because their information is either irrelevant to the chosen theme and theory or harmful to it.²⁵⁸ Other witnesses may be questioned with great care so that they present only the information desired without bringing up additional facts that the lawyer believes not to be helpful.²⁵⁹

Considerations outside the limited scope of the actual facts of the case must also be raised by a lawyer. The advocate should be aware of his or her possible audience in the jury pool so as to make arguments that are more likely to appeal to the jury.²⁶⁰ This includes information about the age, race, sex,

258. Of course, if the witness is harmful to the theory, the lawyer must be ready for counsel opposite to call that person. That might not happen, however, if opposing counsel does not know of the witness, or if the witness might be harmful to the opposing side for different reasons.

259. Some might complain that this method of presenting a case runs counter to the notion of law as a search for truth. If so, they have a misunderstanding of the lawyer's role in the legal system. It is not the duty of the lawyer to search for the truth. The lawyer's duty is to represent his or her client zealously within the bounds of the law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). If doing so means shading the facts, without perjury or withholding of discovery, the lawyer will and should do so. The truth may emerge as a byproduct of a system in which two or more sides with different perspectives are bringing facts to the attention of a judge or jury, but this not always the case.

260. Lawyers do take this concern seriously. In some high profile cases, lawyers have been known

ethnicity, religion and class of the potential and actual jurors. It is helpful for the lawyer to be aware of aspects of popular culture that might affect the way the juror receives the evidence.²⁶¹ Jurors are no different from any other audience for a narrative. Their response is shaped not only by the law as the judge explains it to them but also by their own feelings and cultural attitudes.²⁶² If a lawyer presents a case without considering these factors, he or she may well lose even a meritorious case.

IV. CONCLUSION

I have shown how a lawyer can take the facts of a well-known case and develop alternative possible narratives to tell the client's story. Each narrative depends on what additional facts the lawyer learns and chooses to emphasize and what legal theories the lawyer intends to invoke. The story that will be told varies with the theory. By showing that Eve can be defended plausibly by a creative lawyer, I have shown that lawyers can develop defenses for even their most vilified clients. If Eve can be vindicated through legal theories, so might other clients if lawyers work creatively with the narratives their clients and witnesses relate to them.

At the same time that this Article has shown how narrative theory can be used to present legal defenses for a client, it has also demonstrated that Eve may, in fact, have done something beneficial for humanity. If others accept the view of Eve's actions presented in the justification defense, women will benefit. The disabilities foisted upon women that are based on the demonization of Eve lose their foundation upon Eve's vindication. Instead of having a criminal foremother, humanity has a mother who is a role model, having risked everything to become a true partner in the work of creation and to take her part in perfecting the world.²⁶³

to poll people who live in the area from which the jury has been selected, or to hold mock trials before people in the same area to receive feedback from people like the jury pool, or to have experts in psychology or sociology on hand to help the lawyers with jury selection. VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY*, 79-94 (1986); Solomon M. Fulero & Steven D. Penrod, *The Myths and Realities of Attorney Jury Selection Folklore and Scientific Jury Selection: What Works?*, 17 OHIO N.U. L. REV. 229, 251-52 (1990).

261. Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401, 429 (1990).

262. See, e.g., Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 522 (1991); Louis N. Smith, *Final Report of the Hennepin County Attorney's Task Force on Racial Composition of the Grand Jury*, 16 HAMLINE L. REV. 879, 901-03 (1993).

263. Or, in the notion of the mystic, doing her part to repair the world. In their view, as God was creating the world, the vessels of divine light shattered. It is the mission of humanity to repair those broken vessels to bring about the perfection of the world. Every action that follows the Commandments helps to repair the vessels and thus the world. RIFAT SONSINO & DANIEL B. SYME, *FINDING GOD* 75-76 (1986).