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2013

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#### Recommended Citation

13 Conn. Pub. Int. L.J. 43 (2013).

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# Where Do the Prophets Stand? *Hamdi*, Myth, and the Master's Tools

LINDA H. EDWARDS<sup>†</sup>

## I. INTRODUCTION

Imagine an ancient walled city. Inside the walls, the city's inhabitants busily go about their work. They have routines. They have a common language. They do not always agree with each other, but they meet in common places and use accepted methods and procedures to decide the city's issues. Outside the wall stands a small group of prophets. The prophets have messages for the city's people, and they are trying to be heard over the city's walls. Occasionally a few city dwellers become aware that someone is shouting from outside the walls, but the words fall strangely on city dwellers' ears. The distant voices, barely audible, are lost among the background sounds of ongoing city life. Occasionally, a city leader looks over the walls, notices the prophets, and lobs a verbal assault in their direction, but city life is unaffected. Year after year, the prophets speak, and year after year, the city ignores them.

Does this image of the ancient walled city and the prophets excluded from it describe the relationship of oppositionists with law? Have people like Patricia Williams, Robin West, Kimberlé Crenshaw, Richard Delgado, Mari Matsuda, and the late Derrick Bell been standing outside the gates for over thirty years, critiquing the city of law and the work of its inhabitants? Many traditionalist<sup>1</sup> leaders seem to think so. Inside the city, they have been going about their work unaffected,<sup>2</sup> using the same language and methods they learned from their mentors. Occasionally a traditionalist defender reacts to the prophets, usually with name-calling derision. Consider this from Richard Posner:

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<sup>1</sup> For purposes of this article, "traditionalist" refers to those committed wholeheartedly and perhaps exclusively to traditional methods of legal analysis described. See Nancy Levit, *Critical of Race Theory: Race Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1999).

<sup>2</sup> Larry Catá Backer authored a ten year study of judicial citation rates for oppositionist scholarship. According to the study, what stands out most is the silence. "The most striking general pattern that emerges from this study of citations is the lack of any significant engagement with the work of outsider scholars." Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship into the Court: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173, 1182, 1210 (2000).

What is most arresting about critical race theory is that . . . it turns its back on the Western tradition of rational inquiry, forswearing analysis for narrative. Rather than marshal logical arguments and empirical data, critical race theorists tell stories – fictional, science-fictional, autobiographical, anecdotal – designed to expose the pervasive and debilitating racism of America today. By repudiating reasoned argumentation, the storytellers reinforce stereotypes about the intellectual capacities of nonwhites.<sup>3</sup>

Posner goes on, using terms like “lunatic core,” “postmodernist virus,” “loony Afrocentrism,” and “goofy ideas and irresponsible dicta.”<sup>4</sup> He calls critical race theorists “whiners and wolf-criers,” coming across as “labile and intellectually limited.”<sup>5</sup> He says, “Their grasp of social reality is weak; their diagnoses are inaccurate; their suggested cures . . . are tried and true failures. Their lodgment in the law schools is a disgrace to legal education, which lacks the moral courage and the intellectual self-confidence to pronounce a minority movement’s scholarship bunk.”<sup>6</sup> Having hurled his attack over the city walls, he goes back to his own work, unaffected by oppositionist critique.

Posner and other traditionalists thus maintain that oppositionists stand outside the gates of law. If they are on law faculties, they should not be.<sup>7</sup> Whether this view is accurate depends, in large part, on what we mean by law. Some of history’s best scholars and judges have been tramping around in that field for a long time, so one might wonder how much ground remains untrod. Still, we need to find some new territory, because we are far from a satisfactory answer. What’s worse is that we do not seem able to have a productive conversation, as Posner demonstrates. The loudest traditionalist voices ridicule both critical theory’s narrative methods,<sup>8</sup> and critical theorists themselves.<sup>9</sup> To the traditionalist eye, critical theorists repudiate traditional legal discourse as nothing more than domination and power politics.<sup>10</sup> It is as if the two camps are speaking

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<sup>3</sup> Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40–43. Although not typical, some oppositionists choose narrative methodology. See, e.g., Levit, *supra* note 1, at 811–13.

<sup>4</sup> Posner, *supra* note 3, at 40–43.

<sup>5</sup> *Id.* at 43.

<sup>6</sup> *Id.*

<sup>7</sup> See Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (describing critical theorists as preaching “antilaw” and arguing that they should leave the legal academy).

<sup>8</sup> See Backer, *supra* note 2, at 1209–10 (stating that oppositionist scholarship is diverse and certainly not limited to storytelling, but debates about methodology tend to be the most difficult; thus, this article focuses on the debate about narrative).

<sup>9</sup> *Id.* at 1210.

<sup>10</sup> Posner, *supra* note 3, at 42.

different languages. In fact, in some important ways, they are.

The twenty-fifth anniversary of the publication of Peter Goodrich's *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis*<sup>11</sup> offers an appropriate opportunity to revisit this topic. This article's modest goal is to suggest that narrative theory and cognitive science<sup>12</sup> can help traditionalists better understand the language of critical theory<sup>13</sup> – specifically, why critical theory insists on telling stories and why those narrative critiques are legitimately a part of law.<sup>14</sup> Since the article's primary goal is to speak to traditionalists, it begins by using what Posner wants—logical argument—to “reason” its way to the conclusion that critical theory critiques law from the inside. A key part of that deductive argument is the premise that cultural myths and other master stories operate at a largely hidden and unconscious level beneath the language of traditional law talk. To explain and demonstrate that premise, the article offers a short course in myth and then looks at the role of one myth—the myth of redemptive violence—in legal decision-making. The article explains the myth and how it is pervasively reinforced through movies, video games, and other media and then shows how it affected the deliberations in *Hamdi v. Rumsfeld*, the saga of an American citizen imprisoned without due process by his own government.<sup>15</sup>

Deductive argument cannot be the end of the matter, however, because naïve reliance on “reason” is actually the antithesis of this article's primary point and certainly inconsistent with critical theory itself. What we mean by “law” is not a matter of some seemingly preordained logical structure—

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<sup>11</sup> PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* (1987).

<sup>12</sup> These two areas are examples of the kinds of rhetorical studies that can offer “a place to stand” between critical theory and formalism, and perhaps also a deeper theoretical explanation for legal realism. Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 J. LEGAL WRITING INST. 3 (2010). More relevant for the purposes of this article, rhetorical analysis, positioned as it is between critical theory and more traditional legal discourse, can help traditionalists better understand the narrative methods of oppositionists. That understanding is a critical first step toward a civil and perhaps even productive conversation.

<sup>13</sup> I speak from the ranks of neither critical theorists nor traditionalists but rather as a rhetorician with oppositionist sympathies. As Nancy Levit wisely observed, it is dangerous to try to speak on behalf of another's perspective. Levit, *supra* note 1, at 795 (“A hazard lurks in any but the most careful representation of another's viewpoint. Call it ‘slippage’ perhaps, or the ‘essentialist error,’ the point is basically the same: communication rarely does complete justice to its object.”). I fear that I am in double-danger here, because my goal is to help one group of which I am not a member better understand another group of which I am also not a member. I hope readers from both groups will forgive the necessary lack of nuance here and there, understanding that my goal is not to fully describe all the many diversities in either group but rather to provide a starting point for better understanding between them.

<sup>14</sup> It is another question entirely to ask whether oppositionists are willing to come inside the city walls or whether, fearing assimilation, they would prefer to remain outsiders. See generally Sylvia R. Lazos Vargas, “*Kulturkampf(s)*” or “*Fit(s) of Spite?*”: *Taking the Academic Culture Wards Seriously*, 35 SETON HALL L. REV. 1309, 1345–48 (2005).

<sup>15</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

this one or any other. Rather, it is a matter of human choice, and as with all matters of human choice, it is driven by contested values, frames, power, and politics. This article, therefore, offers some non-deductive reasons for *choosing* to define “law” broadly enough to include critical theory’s critiques. First, though, a deductive argument:

## II. DEFINING “LAW” DEDUCTIVELY: A FOUR-STEP DANCE

### *A. Step One: Law includes legal outcomes and the articulated reasons for those outcomes.*

To start simply, law includes constitutions, statutes, regulations, and judicial decisions. Traditional law talk interprets and applies these texts using a cadre of traditional methods: semantic interpretation of authoritative text; reliance on canons of statutory construction; the use of careful or creative analogies; and the support of relevant social policy, economic theory, or moral principle.<sup>16</sup> These methods have long been treated as legitimately part of “law” because they claim to account for legal results, shaping how the law is applied and how it may change. When lawyers and judges use these methods, no one would dispute that they are using the methods of the law. When Richard Posner finishes his tirade against critical race theory and returns to his normal daily work, these are his tools.<sup>17</sup>

### *B. Step Two: These tools are the stated reasons for legal decisions, but they do not fully or fundamentally account for legal outcomes.*

As both oppositionists and rhetoricians have pointed out, legal results are not simply the result of adherence to authority or policy.<sup>18</sup> Rather, they are the product of underlying values and assumptions about human nature

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<sup>16</sup> See WILSON HUHNS, THE FIVE TYPES OF LEGAL ARGUMENT (2d ed. 2008).

<sup>17</sup> Since these articulated reasons are the tools of traditional legal analysis, one can see why, to an oppositionist, they seem like the “master’s tools.” The “master’s tools” metaphor was introduced by oppositionist poet Audre Lorde in *The Master’s Tools Will Never Dismantle the Master’s House*. Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in SISTER OUTSIDER 112 (Nancy K. Bereano ed., The Crossing Press 2000) (1984). Lorde argued that feminism suffered from unrecognized dependence on the patriarchy, therefore passing on the very oppression it sought to overcome. She wrote, “[T]he master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.” *Id.* Lorde’s metaphor has become part of critical legal discourse, particularly in discussions of essentialism and intersectionality. See, e.g., Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 17 (1995); Zanita E. Fenton, *The Paradox of Hierarchy – Or Why We Always Choose the Tools of the Master’s House*, 31 N.Y.U. REV. OF LAW & SOC. CHANGE 627 (2007) (and also as part of the explanation of critical theory’s supposed juxtaposition of story against traditional legal analysis).

<sup>18</sup> E.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparation*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); GOODRICH, *supra* note 11, at 209.

and the world, what Peter Goodrich calls “preconstructions, preferred meanings, rhetorical and ideological dimensions.”<sup>19</sup> Among these preconstructions are the cultural myths,<sup>20</sup> metaphors, and meta-narratives that frame the way those in power see the world. Far more effectively than authorities or policies, these implicit but largely unrecognized<sup>21</sup> frames (values, assumptions, social and political structures) account for where we are and how we got here.<sup>22</sup> Thus, myths and other frames operate silently but powerfully beneath traditional law talk about objective reasons.

*C. Step Three: If cultural myths and other preconstructions guide and constrain legal decisions (step two), then surely these preconstructions are also part of law.*

It would be a curious position to say that law includes the reasons that claim—perhaps inaccurately—to account for legal results but not the actual, though unstated, reasons for those same legal results.<sup>23</sup> Powerful forces cultivate these preconstructions and are simultaneously captured by them, as will be discussed below. Their problematic operation is or should

<sup>19</sup> GOODRICH, *supra* note 11, at 204.

<sup>20</sup> A myth is a traditional story of ostensibly historical events that serves to unfold part of the world view of a people or explain a practice, belief, or natural phenomenon. Webster’s Ninth New Collegiate Dictionary 785 (1987). Often it is a story about a hero or a powerful being, which may or may not have a historical basis in fact. The term “myth” in its technical sense, which is how it is used here, implies nothing about historical truth or falsity. Myth is certainly not the only preconstruction operating in law, but for the purposes of this discussion, it will be quite enough.

<sup>21</sup> Law “appropriates the meaning of other discourses and of social relations themselves, while specifically denying that it is doing so. It is, in short, politically necessary to take seriously the character of law as a social discourse.” GOODRICH, *supra* note 11, at 204.

<sup>22</sup> See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

[M]indset [is] the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves.”). Audre Lorde surely would agree. She wrote, “Somewhere on the edge of consciousness, there is what I call a *mythical norm* . . . In America, this norm is usually defined as white, thin, male, young, heterosexual, Christian, and financially secure. It is with this mythical norm that the trappings of power reside within this society.” Lorde, *supra* note 17, at 112.

<sup>23</sup> GOODRICH, *supra* note 11, at 159.

[L]aw is a social practice formally tied to particular institutions or apparatuses and primarily, though by no means exclusively, defined by its use of particular types of discourse. . . . [T]he refusal to allow any intrinsic or essentialist definition of law opens the way to a view of law as a process or set of processes, and consequently also, as a discourse which is inevitably answerable or responsible . . . for its place and role within the ethical, political, and sexual commitments of its times. *Id.*

be a target of oppositionist critique of law.<sup>24</sup> Dominant myths and other such frames have been instrumental in building and maintaining the master's house and are among the master's most important tools.<sup>25</sup> Therefore, logically, they are part of "law," just as the unseen foundation is part of a house.

*D. Step Four: If myths and other stories are part of law when used implicitly by the masters in making law (step three), they are surely part of law when used explicitly by those who critique law.*

Quite rightly, early oppositional critique used those same tools—especially stories—to challenge the way the world looks to those inhabiting the halls of power.<sup>26</sup> The turn to narrative was part of the early brilliance of critical theory, made at a time when few others had realized the significance of narrative in law. Are these myths, metaphors, and outsider stories part of law? If narrative is part of law when it is used by the dominant group to justify particular legal results (step three), it is surely also part of law when used by critical theory to critique those same results. It would seem, then, that Goodrich is right.<sup>27</sup> Oppositional critique is within law, not external to it.

The key difference between traditional law-talk and oppositionist critique is that those controlling myths, metaphors, and meta-narratives are kept implicit in traditional law-talk. We don't speak of those things. We confine the discourse to rationalist, scientific, putatively objective language. As oppositionists and rhetoricians have pointed out, it is in the interests of those in power to limit law to this "self-protective" view. But to oppositionists and at least some rhetoricians, such traditional law talk is

<sup>24</sup> Mari Matsuda has observed that critical theory considers law to be a process of legitimizing what might otherwise seem illegitimate. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 329 n.27 (1987). Neither an announced legal result nor traditional legal analysis can legitimate an outcome inconsistent with a widely-adopted cultural metaphor or story. Witness, for instance, the public outcry against the Supreme Court's ruling in *Kelo v. City of New London*, 545 U.S. 469 (2005), the notorious eminent domain case that sparked a national furor to protect private property rights. If Matsuda is right, then law must include cultural myths and metaphors, for only such cultural frames can legitimate a legal outcome.

<sup>25</sup> Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 885 (2010).

<sup>26</sup> See, e.g., Derrick Bell, *The Supreme Court, 1984 Term – Foreward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 385 (1985); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

<sup>27</sup> GOODRICH, *supra* note 11, at 7–8. "I have been concerned . . . to challenge, from within the legal discipline itself, the manner in which the legal text is constructed or produced . . . so as to recapture an essentially social discourse from the interstices of a discipline that has all too easily and frequently defined itself by means of a near total social amnesia." *Id.* "[T]he dominant paradigm of legal language and legal text cannot account for the semantic content of the legal text as judgment or linguistic practice – the diversity of meanings and usages which are actually realised." *Id.* at 205–06.

only an attempt to justify a result chosen for other and often unstated reasons.<sup>28</sup> In a way comparable to a psychoanalyst looking for what lies beneath an explicit behavior, oppositionists try to look deeper to ask what is really going on. Is that permissible in the discourse community? Can such things be said inside the wall? Law is clearly, even in the most traditionalist view, the product of argument. I will contend here that justificatory argument in rationalist objectivist language is half of an argument with oppositionist critique constituting the other half. For law to progress, for it to live in dynamic tension, we need both sides of the argument inside the wall. The rationalists are free to deny and refute oppositionist critique, but not to silence or exile it.

Like any deductive argument, this little four-step dance is subject to challenge at several key points. It might be vulnerable in step two, for instance, in the face of skepticism about admitting a legal role for the myths and other frames that support the power of the dominant group. It is certainly vulnerable in step three, for one could fairly say that once we include in “law” the largely unconscious cultural frames that operate within us, then law includes everything and the question loses its meaning. Perhaps these more foundational but unconscious myths and other frames are not part of law because their effects are ubiquitous, defining, and constraining our views of the world in every part of life. One might argue, then, that oppositionist critique both originates from outside law and critiques something other than law.<sup>29</sup> With these two legitimate challenges on the table, it is fair to require me to say more about the legal role of myths and other frames and about what is at stake when we choose a definition for law.

### III. A SHORT COURSE IN MYTH AND OTHER MASTER STORIES

Years ago, Robert Cover began to teach us the world-creating role of narrative in law. He wrote:

We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every

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<sup>28</sup> *Id.* at 204.

<sup>29</sup> Even step four can be challenged. Perhaps one could identify some salient distinction, though I am not sure what, between preconceptions that prevail in deciding a legal question and those that do not.



constitution there is an epic, for each decalogue a scripture.<sup>30</sup>

At the time, little cognitive work had been done to understand how this normative universe works, but such is not the case today. As Steven Winter writes:

There is a virtual revolution going on within the cognitive sciences. Basic-level categorization, radial categories, image-schemas, conceptual metaphor – these and other findings are transforming our fundamental understanding of the mind. . . . By far the most important conclusions to emerge from this recent work on cognition are two: first, that imagination is central to the cognitive process; and, second, that imagination is embodied. . . . On the one hand, we are discovering that human thought is irreducibly imaginative. On the other, we are learning that – contrary to the conventional wisdom – human imagination operates in an orderly and systematic fashion. This insight alters the contours of entire debates in disciplines such as law . . . . The promise of cognitive theory lies precisely in its ability to make explicit the unconscious criteria and cognitive operations that structure and constitute our judgment. It is by laying bare these cognitive structures and their impact on our reasoning that we can best aid legal actors – whether advocates or decision-makers – who wish to understand the law better so that they can act more effectively.<sup>31</sup>

The unconscious operations Winter describes take the form of cognitive structures known as schemas—preexisting mental patterns and images that provide interpretive frameworks through which people perceive the world and make judgments about it.<sup>32</sup> A schema functions as a blueprint that organizes people, places, and events into roles made

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<sup>30</sup> Robert M. Cover, *The Supreme Court 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

<sup>31</sup> STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* xi–xvii (2001).

<sup>32</sup> The term “schema” can have different meanings in different disciplines. Here, the term is used in its rhetorical sense as an embedded knowledge structure rather than, for instance, as an “expert” schema referring to a heuristic or framework used as a shortcut by experts in a specific field. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 717 (1994); see generally, Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259 (2009).

familiar by that particular schema.<sup>33</sup> The resulting cognitive organizations and perceptions seem to the individual as the natural and “true” state of affairs. Once within the frame of such a cognitive structure, escape is difficult. The operative schema both highlights and hides information.<sup>34</sup> It highlights information that seems consistent with the schema’s pattern, and it hides inconsistent information. Thus, the structure reinforces the societal or cultural values encoded within it.

Cultural myths and other master stories are among the most pervasive of these unconscious schemas.<sup>35</sup> Human beings are hard-wired to organize the world narratively, with abstract reasoning and deductive processes only arising derivatively from the preexisting narrative structure.<sup>36</sup> Myths and master stories operate widely within cultures to mediate new events and infuse them with shared social meaning.<sup>37</sup> These cultural myths function as templates to channel other potentially similar events into a well-worn path.<sup>38</sup> The outcome suggested by the myth or master story will seem both true and inevitable.<sup>39</sup>

These cognitive operations should come as no surprise to critical theorists, who have observed schemas in action for years. Consider, for instance, Richard Delgado’s well-known description of six competing stories of a hypothetical but painfully familiar law school hiring process.<sup>40</sup> What may be less well-known, however, is the startling cognitive finding that a schema’s world-creating work precedes conscious perception, so that it simply may not be biologically possible to perceive new facts free of the unconscious operation of a schema. Here is a description of research done by University of Texas neurobiologist Dr. David Engleman:

Engleman’s research has shown that the brain lives just a little bit in the past. A human brain collects a lot of information and then pauses for a moment to organize it before releasing the processed information to the

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<sup>33</sup> Berger, *supra* note 32, at 265.

<sup>34</sup> See, e.g., WINTER, *supra* note 31.

<sup>35</sup> Berger, *supra* note 32, at 268; Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 UCLA WOMEN’S L.J. 457, 457–58 (1996).

<sup>36</sup> JEROME BRUNER, *ACTS OF MEANING* 45 (1990); ROBERT P. BURNS, *A THEORY OF THE TRIAL* 159 (1999); Berger, *supra* note 32, at 268; Brown et al., *supra* note 35, at 457–58; Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion*, 14 J. LEGAL WRITING 54, 57–59 (2008).

<sup>37</sup> See generally Edwards, *supra* note 25; see also Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259–63 (2010).

<sup>38</sup> WINTER, *supra* note 31, at 106–13; Berger, *supra* note 32, at 268; Steven L. Winter, *Making the Familiar Conventional Again*, 99 MICH. L. REV. 1607, 1629 (2001).

<sup>39</sup> Berger, *supra* note 32, at 265; e.g., David F. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163 (1997).

<sup>40</sup> Delgado, *supra* note 22, at 2418–34.

conscious mind. “Now” actually happened a little while (several milliseconds) ago. . . . To demonstrate this for yourself, tap your finger on a tabletop at arm’s length. Light travels faster than sound. So the sight actually reached you a few milliseconds before the sounds. However, your brain synchronized the two to make them *seem* simultaneous. The same thing happens when you watch someone’s lips move as they speak. During these microsecond pauses the brain/mind constructs a plausible story to make the incoming information make sense. Sensory impressions enter the brain; stories exit to the conscious mind for interpretation and action. A significant part of what the brain does for the conscious mind is structure experience into story.<sup>41</sup>

In other words, from before the first moment of becoming aware of an event, we have already assumed a perspective, most likely by fitting the facts into a familiar narrative pattern. The question is not *whether* we see the world through the lens of a story, but *which* story lens we will use. Nearly twenty-four years ago, Delgado referred to “a war between stories.”<sup>42</sup> Modern cognitive science has proven the truth of that observation.<sup>43</sup> If a lawyer, judge, or law student does not realize that there is more than one “true” story, that lawyer, judge, or student will remain unconsciously captive to a set of unexamined assumptions based on narratives. In the practice of law, the lawyer’s job is to provide the judge and other legal actors the chance to examine those assumptions. Harvard Law School Dean Martha Minow wrote:

Modes of analysis and argument that maintain their exclusive hold on the truth are suspect. By casting doubt

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<sup>41</sup> KENDALL HAVEN, STORY PROOF: THE SCIENCE BEHIND THE STARLING POWER OF STORY 22 (2007).

<sup>42</sup> Delgado, *supra* note 22, at 2418.

<sup>43</sup> See, e.g., ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2002); THE PASSIONS OF LAW (Susan Bandes ed., 1999); JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAW (2012); Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045 (2006); Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237 (2010); Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845 (2007); Laura E. Little, *Negotiating the Tangle of Law and Emotion*, 86 CORNELL L. REV. 974 (2001); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011); Kathryn M. Stanchi, *Playing With Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381 (2008); Kathryn Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305 (2010); Symposium, *Law, Psychology, and the Emotions*, 74 CHI.-KENT L. REV. 1423 (2000); WINTER, *supra* note 31.

on alternative modes, they shield themselves from challenge and suppress alternative ways of understanding. They also render ordinary and explicable all they encounter: “To a hammer, everything looks like a nail.” But some things are extraordinary and call for extraordinary responses. Methods of analysis that smooth out the bumps and subsume all under generalizations risk not only making this mistake but hiding it from view.<sup>44</sup>

Attempting to counteract the world-creating influence of a dominant cultural myth has never been easy, but in recent years, the challenge for oppositionists has become much more difficult. During the era of the Warren Court, many widespread cultural narratives were progressive – narratives of fairness, individual equality, and social liberty. The effects of these progressive narratives were not lost on the strategists of the Right, however. Today, whether by a carefully crafted plan<sup>45</sup> or by a convergence of other forces, many master narratives or world-creating myths support and maintain the forces of domination.<sup>46</sup> The myth of redemptive violence is one such master narrative.

### III. THE MYTH OF REDEMPTIVE VIOLENCE

The myth of redemptive violence appeared at least as early as a story told in the *Enuma Elish*, an ancient Babylonian cosmogony<sup>47</sup> from about 1250 B.C.E. According to the story, before the world was created, Apsu, the father god, and Tiamat, the mother god, were the only living beings.<sup>48</sup> Then Tiamat gave birth to younger gods, but these younger gods were loud and irritating, so Apsu decided to kill them.<sup>49</sup> The younger gods, having discovered the plot, managed to kill Apsu before he could kill them.<sup>50</sup> Tiamat – who was also called the Dragon of Chaos – became enraged and vowed revenge.<sup>51</sup> She assembled her forces and prepared for battle. She

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<sup>44</sup> MARTHA MINOW, *Stories in Law, in LAW’S STORIES* 35 (Peter Brooks & Paul Gewirtz, eds., 1996).

<sup>45</sup> GEORGE LAKOFF, DON’T THINK OF AN ELEPHANT!: KNOW YOUR VALUES AND FRAME THE DEBATE (2004).

<sup>46</sup> This is not to say that progressive narratives do not operate today or that more troublesome narratives did not operate in prior years. Rather, it is a matter of cultural emphasis and both intentional and unintentional partisan use.

<sup>47</sup> A cosmogony is a story about the creation of the universe. Webster’s Ninth New Collegiate Dictionary, 294 (1987).

<sup>48</sup> MYTHS FROM MESOPOTAMIA: CREATION, THE FLOOD, GILGAMESH, & OTHERS 228–77 (Stephanie Dalley, ed. and trans., 1989).

<sup>49</sup> *Id.* at 234.

<sup>50</sup> *Id.* at 235.

<sup>51</sup> *Id.* at 237.

created other dragons, poisonous snakes, and terrible weapons.<sup>52</sup> The younger gods were terrified, helpless against Tiamat's impending attack.<sup>53</sup>

In the face of all this fear, the other gods pleaded with one of their number, Marduk, to fight Tiamat.<sup>54</sup> Marduk agreed, but on one condition: the other gods must give Marduk unquestioned obedience.<sup>55</sup> The other gods agreed,<sup>56</sup> so Marduk devised a plan. First, he caught Tiamat in a net. Of course the mighty Tiamat could easily tear her way free, but Marduk knew that the net would make her angry. When she opened her mouth to roar in anger, Marduk drove a mighty wind down her throat. Then he shot an arrow into her distended belly, exploding it and piercing her heart.<sup>57</sup> Marduk split open Tiamat's skull and scattered her blood across the firmament. Then he stretched out her corpse full-length and from it, he created the earth.<sup>58</sup>

The younger gods and all the rest of creation gave homage to Marduk and remained true to the bargain.<sup>59</sup> Their responsibility was to obey Marduk.<sup>60</sup> In exchange, Marduk would protect them from all future Dragons of Chaos. According to this creation myth, human beings have only two options: to unquestioningly obey their leader or be destroyed by the evil forces of chaos.

Myths are powerful teachers, and this one teaches a particular set of lessons. It teaches that in its natural state, the world is in the power of overwhelmingly destructive evil forces. At any moment, these forces may attack and people are powerless to protect themselves. The only hope is a strong leader, who will save vulnerable mortals by defeating the powers that threaten them, thus imposing order and safety. The price, however, is unquestioning obedience to the leader.

The story of the *Enuma Elish*, in various forms, spread throughout ancient Assyria, Phoenicia, Egypt, Greece, Rome, Germany, Ireland, India, and China. Its basic structure and theme remained a part of succeeding cultures. The story is over 3,250 years old now, but its characteristics should still sound familiar. In the last forty years, our culture has been saturated with retellings of what Walter Wink has called "the myth of redemptive violence."<sup>61</sup> Consider nearly any action movie starring Bruce

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 242.

<sup>54</sup> MYTHS FROM MESOPOTAMIA: CREATION, THE FLOOD, GILGAMESH, & OTHERS 237 (Stephanie Dalley, ed. and trans., Oxford Univ. Press 1989).

<sup>55</sup> *Id.* at 244.

<sup>56</sup> *Id.* at 249.

<sup>57</sup> *Id.* at 252.

<sup>58</sup> *Id.* at 255.

<sup>59</sup> *Id.* at 257–58.

<sup>60</sup> MYTHS FROM MESOPOTAMIA: CREATION, THE FLOOD, GILGAMESH, & OTHERS 250 (Stephanie Dalley, ed. and trans., Oxford Univ. Press 1989).

<sup>61</sup> WALTER WINK, THE POWERS THAT BE: THEOLOGY FOR A NEW MILLENNIUM 42–62 (1998).

Willis or Arnold Schwarzenegger.<sup>62</sup> Almost all modern action movies and many dramas are versions of this same mythical story.<sup>63</sup>

An easy example is the plot of the movie *KINDERGARTEN COP*.<sup>64</sup> Detective John Kimble (Arnold Schwarzenegger) is pursuing Cullen Crisp, a big-time drug dealer.<sup>65</sup> Kimble arrests Crisp for murder, but Kimble's police associates, using traditional police methods, are not able to convince the only witness to testify. She believes the police are incapable of protecting her. Frustrated with the "soft" persuasion techniques of his police associates, Kimble uses threats and violence until the witness finally agrees to testify. The police want a second witness, however, so Kimble goes undercover to find Crisp's estranged wife, who has fled from their marriage, taking their son. Crisp has been looking for her, planning to kill her and retake the boy.<sup>66</sup> Kimble hopes to find her first and threaten her with both exposure to Crisp and criminal prosecution by police unless she will testify. Kimble travels to Astoria, where the estranged wife is living, and pretends to be a kindergarten teacher at the boy's school.<sup>67</sup> Instead of using normal pedagogical methods, he teaches his kindergarten students to be junior police cadets, having them march to his whistle and obey his commands. Soon, Kimble identifies Crisp's wife and son, who are living under the names of Joyce and Dominic Palmieri.<sup>68</sup>

Meanwhile, just as we were meant to expect, back in the city, the

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<sup>62</sup> Or consider the movie, *GET SMART* (Warner Bros. 2008), where Maxwell Smart and Agent 99 work for an agency named CONTROL and fight against an agency named KAOS.

<sup>63</sup> A few examples of "hard action" movies using this plot are: the *LETHAL WEAPON* (Warner Bros. 1987) series, the *TERMINATOR* (Orion Pictures 1984) series, *RAMBO* (Orion Pictures 1982), the *JACK RYAN* (Paramount Pictures 1990) series, the *X MEN* (Twentieth Century Fox 2000) series, *COLLATERAL DAMAGE* (Warner Bros. 2002), the *MISSION IMPOSSIBLE* (Paramount Pictures 1996) series, most Steven Seagal movies, the *KILL BILL* (Miramax Films 2003) series, and *AIR FORCE ONE* (Columbia Pictures 1997). Examples of lighter action movies (ample violence but some humor and designed for broader audiences, including children) are *INDEPENDENCE DAY* (Twentieth Century Fox 1996), the *BATMAN* (Warner Bros. 1989) series, the *SPIDERMAN* (Columbia Pictures 2002) series, the *SUPERMAN* (Warner Bros. 1978) series, the *KARATE KID* (Columbia Pictures 1984) series, *ROBIN HOOD* (Universal Pictures 2010), the *MATRIX* (Warner Bros. 1999) series, *KINDERGARTEN COP* (Universal Pictures 1990), the *MEN IN BLACK* (Columbia Pictures 1997) series, the *INDIANA JONES* (Paramount Pictures 1981) series, and *TRUE LIES* (Twentieth Century Fox 1994). This same plot structure is present in other genre and media, as well, including westerns, monster and vampire movies, science fiction or disaster movies, comedies, cartoons, and video games. The villain does not even have to be a person. Consider the movie *JAWS* (Universal Pictures 1975), for example. Remember how Tiamat is killed: A wind is forced down her throat and then Marduk shoots an arrow into her belly, exploding her. In *Jaws*, the ocean (which, in myth, is often the source of chaos) is home to a shark larger by a third than any known shark. The movie's preview describes the shark: "It is as if nature had concentrated all its forces of evil in a single being." Ultimately, Police Chief Brody defeats the shark by kicking an oxygen tank into the attacking shark's throat, then firing a bullet that explodes the tank, thus exploding the shark. Brody is a hero, danger is subdued, and the people are restored to safety.

<sup>64</sup> *KINDERGARTEN COP* (Universal Pictures 1990).

<sup>65</sup> *KINDERGARTEN COP*, IMDB, <http://perma.cc/GC3Y-JS4N> (last visited Dec. 4, 2013).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

police, using their traditional methods, have failed to protect the other witness. Crisp's mother, Eleanor Crisp, becomes a moving force in the plot. Furious at her son's arrest, she kills the witness, and the prosecution must therefore dismiss all charges. Crisp is freed, and Eleanor collects him from jail. The pair immediately proceed to Astoria, intending to do whatever is necessary to take the boy and dispose of his mother.<sup>69</sup>

Upon arriving in Astoria, Cullen finds and grabs his son. The kindergarten class sees the grab, however, and they alert Kimble using his police-cadet-style training. Kimble and his partner manage to kill Cullen, capture Eleanor, and rescue Dominic. He and his mother are now safe. Kimble retires from the police force and returns to Astoria, continuing to teach his students to be "junior cadets." We are left to believe that whenever danger threatens in the future, Kimble will be there to save the day.

KINDERGARTEN COP is one of an almost limitless list of modern versions of the myth of redemptive violence. Instead of Apsu, we have Cullen, who is killed, thus enraging Eleanor, the female destructive force (Tiamat). Kimble is the Marduk figure, the strong leader who can protect the vulnerable targets of evil, but he must have complete obedience from those he protects. The movie teaches the same lessons we identified in the *Enuma Elish*: that at any moment, overwhelmingly destructive forces may attack us. On our own, we cannot protect ourselves. Our only hope is unquestioning obedience to a strong leader, who will save us by defeating the evil powers that threaten us. But the myth teaches another highly problematic lesson as well: it teaches that normative legal and social systems are weak, misguided, ineffectively cumbersome, or completely impotent in the face of serious threats. Thus, to be able to save us, the hero must not be constrained by the "technicalities"<sup>70</sup> of law. Efficient violence is the only way to maintain order and control truly sinister evil.

Nearly all versions of the myth find narrative ways to demonstrate the law's ineffectiveness. Usually, the story uses a combination of strategies to drive its lesson home: casting the hero as a police officer whose style and techniques have been rejected, either formally or informally, by his police peers, as in KINDERGARTEN COP;<sup>71</sup> describing cumbersome investigative protocols that foil effective police work;<sup>72</sup> portraying other officers or governmental officials as corrupt and in league with evil

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<sup>69</sup> *Id.*

<sup>70</sup> One could make a case that the myth of redemptive violence is almost solely responsible for the phrase "got off on a technicality." Usually the technicality at issue is a Constitutional provision, but the myth has taught well the lesson that constitutional rights are luxuries, to be followed only when nothing really important is at stake.

<sup>71</sup> See, e.g., the DIE HARD (Twentieth Century Fox 1988) series; EXIT WOUNDS (Warner Bros. 2001); all of the LETHAL WEAPON (Warner Bros. 1987) series.

<sup>72</sup> See, e.g., COLLATERAL DAMAGE (Warner Bros. 2002).

forces;<sup>73</sup> or even creating a narrative world in which there seem to be no relevant legal systems or standards at all.<sup>74</sup>

Movies have a compelling narrative reason for portraying law as misguided or impotent. The stories are created to be market successes. Their primary cultural appeal is their use of violence and the viewer's vicarious and allegedly safe enjoyment of it. The stories are remarkably successful in that regard. They invite us to make use of two common psychological defense mechanisms, each of which helps us avoid confronting our own fears and negative feelings. We can project<sup>75</sup> our own violent impulses onto the evil aggressor so we can enjoy watching his violent acts throughout most of the story.<sup>76</sup> But because we identify<sup>77</sup> primarily with the hero, we also vicariously experience and enjoy his use of violence to finally save the day. In a neat narrative package, we can safely project our own negative violent tendencies onto the antagonist and then vicariously defeat those frightening tendencies by using "redemptive" violence against them.

This process of projection and identification is, in fact, a modern reenactment of an ancient purification ritual – the ritual of the scapegoat.<sup>78</sup> In that ritual, the gathered community selects an animal or an individual to be the scapegoat.<sup>79</sup> The community then ritually transfers to the scapegoat all of the community's evil or negative tendencies, illnesses, and fears.<sup>80</sup> Then the group ritually tortures and kills the scapegoat or expels the scapegoat into the wilderness.<sup>81</sup> After this catharsis, community life can return to normal until levels of anxiety and fear become too great and it is time to enact the ritual again.<sup>82</sup>

Not only do scapegoating rituals serve the psychological function of managing the community's negative emotions, but they also affect

<sup>73</sup> See, e.g., *CLEAR AND PRESENT DANGER* (Paramount Pictures 1994); *TAKEN* (EuropaCorp. 2008); *MISSION IMPOSSIBLE* (Paramount Pictures 1996); *AIR FORCE ONE* (Columbia Pictures 1997).

<sup>74</sup> See, e.g., the *JAMES BOND* (Eon Productions 1962) series.

<sup>75</sup> Projection is one's conscious denial of having negative feelings or desires by attributing them to others.

<sup>76</sup> We can safely enjoy the negative violence because we know that in the end, the hero will defeat the aggressor.

<sup>77</sup> Identification operates when a person imagines herself as being like another, especially a hero or leader.

<sup>78</sup> See CHARLIE CAMPBELL, *SCAPEGOAT: A HISTORY OF BLAMING OTHER PEOPLE* 37–45, 181–85 (2011) ("The ritual of the scapegoat goes back right to the beginning of mankind."); see generally Lynn Sandra Kahn, *The Dynamics of Scapegoating: The Expulsion of Evil*, 17 *PSYCHOTHERAPY: THEORY, RES. & PRACT.* 79 (1980); *THE SCAPEGOAT: RITUAL AND LITERATURE* (John B. Vickery & J'nan M. Sellery, eds., 1972).

<sup>79</sup> CAMPBELL, *supra* note 78, at 37–45.

<sup>80</sup> Kahn, *supra* note 78, at 79 ("In this context, scapegoating was seen as a response to deprivation, frustration, and fear which was . . . transferred" on to an animal, another person, or a group.).

<sup>81</sup> CAMPBELL, *supra* note 78, at 37–45.

<sup>82</sup> *Id.* The scapegoating ritual was especially used in the aftermath of a disaster. *Id.* at 39.



community life in another significant way. The scapegoating ritual reinforces community boundaries—boundaries that seem necessary to help us organize and manage a complex world.<sup>83</sup> We decide who is in and who is out. When the ritual is reenacted physically, such as in a sentencing hearing, community boundaries are reinforced literally. The defendant is physically excluded or killed. But a scapegoating ritual defines community boundaries abstractly as well, whether the ritual is reenacted in real life or on the big screen. The reality is that in-groups are formed not so much by admission ceremonies as by exclusion ceremonies. Participating in a process of excluding someone else establishes a kind of bond with others who participate in the exclusion. Anyone who has watched faculty politics for very long will certainly recognize this phenomenon. Deciding who is *not* a part of the community is the simplest and easiest way to decide who *is*. The more fearful a community is, the higher it builds its walls and the more it limits its membership. In these fearful times, modern narrative reenactments of the myth of redemptive violence provide a seductive opportunity to participate in ongoing scapegoating rituals and thus to manage communal and individual fear.

But real life is not the same as fiction – or is it? The myth of redemptive violence is told as fiction, yet its lessons become a means for the dominant culture to understand the world. Recall these lessons: that we are always on the brink of destruction by powerful evil forces; that our only hope is a strong leader who will kill our enemies; that we must not question this leader and we must not let the law impede him. After many years of cultural saturation by the myth of redemptive violence—in movies, television, video games, and books—America’s response to the events of September 11<sup>th</sup>, 2001 was predictably consistent with the myth’s lessons. A large segment of the population solidified its support for George W. Bush (a president with the paradigmatic style of a strong leader); followed him into war in an unrelated country after being told about threats of “weapons of mass destruction;” and quickly came to view constitutional protections as impediments to the Nation’s safety.<sup>84</sup> This national response was no accident.

The myth of redemptive violence is one example of the foundational

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<sup>83</sup> See generally Erich Neumann, *The Scapegoat Psychology*, THE SCAPEGOAT: RITUAL AND LITERATURE, *supra* note 78, at 44–46 (discussing scapegoating as a group purification ritual that identifies those who are cast as aliens to the group (often racial, religious, or ethnological minorities) and “exterminated as a foreign body”); CAMPBELL, *supra* note 78, at 187 (“The scapegoat is the symbol for the part of us that we most wish to remove and that society fears most at that time [witches, Jews, Cathars].”); Kahn, *supra* note 80, at 79 (arguing that scapegoating is a response to group tensions arising from “internal diversity”).

<sup>84</sup> See generally James N. Schubert et al., *A Defining Presidential Moment: 9/11 and the Rally Effect*, 23 POL. PSYCHOL. 559 (2002).

myths that underlie the power of the dominant group.<sup>85</sup> It plays a key role in legal decision-making. Perhaps its most direct effects are felt in criminal law, sentencing, and death penalty issues, in the legitimization of “anti-terrorism” initiatives, and in questions about immigration and undocumented workers. But its fear, its resistance to change, and its insistence on obedience to those in power become habits of the mind. Thus, they play a significant role in legal results in other areas as well: for example, in civil rights and discrimination, where the legal issues invite drawing boundaries between “us” and “them.” It uses fear to resist change and to justify the power of the dominant group. It rushes to identify both a victim and an outsider – an evil person or group. It preaches that “our” community is unraveling, and that law is an impediment to our safety rather than a tool that protects and liberates us.

#### IV. YASER ESAM HAMDI, THE FOURTH CIRCUIT, AND THE SUPREME COURT

The saga of Yaser Esam Hamdi provides a striking example of how the foundational myth of redemptive violence works to decide legal issues. Hamdi, an American citizen, was born in Louisiana but later moved with his parents to Saudi Arabia. It has been reported<sup>86</sup> that at the age of twenty, before the events of September 11<sup>th</sup>, he ran away from home to a Taliban camp, becoming disillusioned within a few weeks.<sup>87</sup> Shortly after the events of September 11<sup>th</sup>, he was caught in hostilities and captured by the Northern Alliance.<sup>88</sup> The United States Executive branch kept him imprisoned for nearly three years, first in Afghanistan, then at Guantanamo Bay, and eventually in military jails in the United States.<sup>89</sup> For the first two years, he was kept in virtual solitary confinement, without charge, without access to a lawyer, and without any contact from his parents or other family members. The administration did not disclose its allegations

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<sup>85</sup> For other examples, see, e.g., LAKOFF, *supra* note 45 (the metaphor of the stern father and its role in the law of domestic programs); Edwards, *supra* note 25, at 914–15 n.267 (the myth of the divine child and its role in abortion analysis); Linda L. Berger, *Of Metaphor, Metonymy, and Corporate Money: Rhetorical Choices in Supreme Court Decisions on Campaign Finance Regulation*, 58 MERCER L. REV. 949, 950, 960 (2007) (the metaphors of corporate personhood); Robert Sapolski, *This is Your Brain on Metaphors*, N.Y. TIMES (Nov. 15, 2010, 4:32 PM), <http://perma.cc/YFJ7-TGVA> (the metaphor of infestation and its role in issues of immigration); see generally, e.g., Carol McCreehan Parker, *The Perfect Storm, the Perfect Culprit: How a Metaphor of Fate Figures in Judicial Opinions*, 43 MCGEORGE L. REV. 323 (2012) (discussing the metaphor of the perfect storm);

<sup>86</sup> The facts of Hamdi’s situation cannot be recited with certainty since the government never allowed Hamdi to speak for himself.

<sup>87</sup> Tony Bartelme, *Hanahan Brig: The Next Guantanamo?*, POST & COURIER, (Mar. 22, 2009, 12:01 AM), <http://perma.cc/DM9T-QWL9>.

<sup>88</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 510–13 (2004) (according to his father’s affidavit, Hamdi had traveled to Afghanistan prior to the beginning of the hostilities, had been in the country less than two months to do relief work, and was trapped in the hostilities).

<sup>89</sup> Hamdi v. Rumsfeld, 294 F.3d 598, 601 (4th Cir. 2002).

against him, and he had no opportunity to refute them. The government argued that because the United States was under attack by terrorist forces, it could keep Hamdi, an American citizen, in this fashion, essentially for as long as it chose.<sup>90</sup>

Hamdi's long, solitary detention and interrogation eventually resulted in a series of hard-fought legal efforts by others on his behalf. The government argued, for the first time in American jurisprudence,<sup>91</sup> that it had the power to hold an American citizen incommunicado, subjected to indefinite detention on American soil "without charges, without any findings by a military tribunal, and without access to a lawyer."<sup>92</sup> The government argued that the detention was lawful because the Commander in Chief had classified Hamdi as an "enemy combatant."<sup>93</sup> The government initially argued that its classification of Hamdi could not be challenged.<sup>94</sup> Thus, the Commander in Chief asserted the power to hold "any American citizen alleged to be an enemy combatant . . . indefinitely without charges or counsel on the government's say-so."<sup>95</sup>

After being ordered to explain the factual basis for its decision to classify Hamdi as an enemy combatant, the government submitted one document: a two-page affidavit by Michael Mobbs, a Defense Department official.<sup>96</sup> In just nine numbered paragraphs, Mobbs declared that he was familiar with the Hamdi classification from having reviewed the relevant government records and reports. Based on what he had read in the government's files, Mobbs asserted that Hamdi had been fighting as part of the Taliban and that Hamdi had confirmed the government's position during interrogation.<sup>97</sup> The nature of the government's interrogation of Hamdi was not set forth and the affidavit was almost entirely conclusory and based on hearsay.

The legal issue was thus ready for debate: Does the Commander in Chief have the power to detain a U.S. citizen, without access to counsel or to any due process, based solely on its own unsubstantiated and untested assertions of the relevant legal conclusion? The District Court held that the Mobbs affidavit fell "far short of even . . . minimal criteria for judicial

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<sup>90</sup> One week after the events of September 11, Congress passed a resolution authorizing the President to "use all necessary and appropriate force" against the "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

<sup>91</sup> Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 533.

<sup>97</sup> Respondents' Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus at 19-20, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002).

review,”<sup>98</sup> and it ordered the government to produce at least some of the underlying facts.<sup>99</sup> The government immediately appealed to the Fourth Circuit, which stayed the order and held that the Mobbs affidavit was sufficient.<sup>100</sup> The Fourth Circuit held, in a stunning logical fallacy, that it was “undisputed” that Hamdi (who had yet to see a lawyer or make any filing in the case) had been present in a zone of active combat, and therefore Hamdi had no right to dispute the government’s allegations.<sup>101</sup> In other words, the government had prevented Hamdi from disputing the allegations, and therefore, the government’s allegations were undisputed. Since the allegations were not disputed, Hamdi had no right to dispute them. According to the Fourth Circuit, the “vital purposes”<sup>102</sup> of the detention of enemy combatants are “directly derived from the war powers of Articles I and II”<sup>103</sup> and therefore the principles of separation of power prohibit a court from inquiring further into Hamdi’s status.<sup>104</sup>

But beneath all the Constitutional talk about war powers and the separation of powers, the argument was fundamentally about the choice of a constitutive myth. Like most cases that reach the Supreme Court on certiorari, each side had feasible deductive arguments. Each side used the traditional master’s tools – the interpretation of constitutional and statutory language; analogies and distinctions; policy arguments; even principles of international law. The Court could have chosen the deductive arguments of the government and the Fourth Circuit or the deductive arguments of Hamdi’s father and the District Court. At its core, the question was whether to see the legal issues through the lens of the myth of redemptive violence or through the lens of the story of the American Revolution and the founding of the Nation.

The Fourth Circuit was operating within the myth of redemptive violence, and its opinions are essentially retellings of that myth. The primary opinion begins by describing the world as an overwhelmingly dangerous place, under attack by powerful evil forces.<sup>105</sup> After an opening paragraph baldly stating its decision, the Fourth Circuit began to explain and justify its ruling with this language:

[T]he al Qaida terrorist network, utilizing commercial airliners, launched massive attacks on the United States on September 11, 2001, successfully striking the World Trade

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<sup>98</sup> *Hamdi*, 243 F. Supp. 2d at 533.

<sup>99</sup> *Id.* at 529.

<sup>100</sup> *Hamdi v. Rumsfeld*, 316 F. 3d 450, 473 (4th Cir. 2003).

<sup>101</sup> *Id.* at 459, 475.

<sup>102</sup> *Id.* at 465.

<sup>103</sup> *Id.* at 466.

<sup>104</sup> *Id.* at 473.

<sup>105</sup> *Id.* at 459.

Center in New York City, and the Pentagon, the military headquarters of our country, near Washington, D.C. . . . In total, over 3,000 people were killed on American soil that day.”<sup>106</sup>

The opinion next describes the Congressional grant of what the opinion treats as virtually unlimited authority to respond to this terrorist attack:

In the wake of this atrocity, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons. The President responded by ordering United States armed forces to Afghanistan to subdue al Qaida and the governing Taliban regime supporting it.”<sup>107</sup>

The Fourth Circuit opinion goes on to explain that this situation calls for broad judicial deference to the executive branch, which must not be compelled to justify its actions.<sup>108</sup> “While the ordinary §2241 proceeding naturally contemplates the prospect of factual development,”<sup>109</sup> in cases such as this, a judicial inquiry into executive decisions risks conflict with the President’s war-making powers and may impede the executive’s ability to defend the country’s interests. “The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case.”<sup>110</sup> The opinion went on to proclaim that court interference is extraordinarily dangerous: “[T]he implications of the district court’s [order that the government produce evidence] could not be more serious.”<sup>111</sup> Judicial review must defer to the President’s war powers.<sup>112</sup> The government need only identify the legal authority upon which it relies and provide an affidavit of hearsay statements describing the government’s version of the circumstances of the case.<sup>113</sup>

According to the Fourth Circuit, an American citizen in Hamdi’s situation cannot be allowed to rebut the government’s factual assertions:

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<sup>106</sup> Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).

<sup>107</sup> *Id.* at 459–60.

<sup>108</sup> *Id.* at 474.

<sup>109</sup> *Id.* at 470.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 471.

<sup>112</sup> Hamdi v. Rumsfeld, 316 F.3d 450, 471–72 (4th Cir. 2003).

<sup>113</sup> *Id.* at 472–73.

“We hold that no evidentiary hearing or factual inquiry . . . is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.”<sup>114</sup>

Thus, the Fourth Circuit saw normative judicial inquiry as worse than ineffective – it is “extraordinarily dangerous.”<sup>115</sup> To defend us, the executive must be given a virtually free hand. Military decision-making must not be “saddl[ed] . . . with the panoply of encumbrances”<sup>116</sup> represented by a legal inquiry. Efficient, unencumbered violence is the only way to maintain order and control truly sinister evil.

Further, the Fourth Circuit saw the question as fundamental to defining and reinforcing community boundaries. Within the myth of redemptive violence, it is vital to know who is in and who is out. Thus, Hamdi’s case was even more important. Hamdi was an American citizen, but on a narrative level, the government and the Fourth Circuit rejected that inconvenient fact. At one point, the government raised a phantom argument that Hamdi had somehow renounced his citizenship, and the Fourth Circuit grasped the possibility, saying that Hamdi “may not have renounced” his citizenship.<sup>117</sup> Beneath the textual surface of each controlling opinion of the Fourth Circuit, it is clear that the Court did not view Hamdi as a “real” American. His official citizenship status was a mere legal technicality. At no point did the court consider that “real” American citizens might ever be in danger from unconstrained governmental power to detain and interrogate a citizen it labeled as an “enemy combatant.”<sup>118</sup> Despite his legal status, in the court’s narrative lens, Hamdi was not one of us.

The question of whether Hamdi was really one of us was directly

<sup>114</sup> *Id.* at 473.

<sup>115</sup> *Id.* at 471.

<sup>116</sup> *Hamdi v. Rumsfeld*, 296 F.3d 278, 283–84 (4th Cir. 2002).

<sup>117</sup> The sentence assumes a more likely scenario in which he did renounce and phrases as mere speculation the idea that he might not have renounced. As far as one can tell from the record, the choice to assume his renunciation has no evidentiary support. *Id.* at 280.

<sup>118</sup> Some oppositionist scholarship has made the connection between this approach to anti-terrorism litigation and questions of race. See, e.g., Raquel Aldana-Pindell, *The 9/11 “National Security” Cases: Three Principles Guiding Judges’ Decision-Making*, 81 OR. L. REV. 985, 1032–33 (2002); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441, 444 (2002); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 39–41 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1125 (2002); Adrien Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 747 (2003).

related to the legal outcome. For the Fourth Circuit, he was not, and so we can deny him due process without worrying that next time it will be one of us.<sup>119</sup> For the Supreme Court plurality, Hamdi *was* one of us, so we must accord him all the rights we would grant to any other American citizen.<sup>120</sup> For Justice Scalia, joined by Justice Stevens, Hamdi *was* one of us, so we should do what we do to citizens who (allegedly) take up arms against us: try him for treason. Who is in and who is out in a narrative sense, not just a doctrinal sense, matters profoundly.

Ultimately, however, a majority of the Supreme Court saw the story primarily through the constitutive lens of the hard-won freedoms secured by the American Revolution and the founding of the Nation. Recognizing the importance of both narratives, Justice O'Connor's plurality opinion ultimately is unwilling to sacrifice the freedoms at the core of the founding of the Nation. She wrote:

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. . . . see also *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").<sup>121</sup>

Justice Scalia, joined by Justice Stevens, saw the question as less of a balance between the two narratives. His opinion remains firmly planted within the constitutional narrative protecting citizens from governmental abuse of power.<sup>122</sup> Compare the beginning of the Fourth Circuit's opinion<sup>123</sup> with Justice Scalia's setting of narrative context:

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from

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<sup>119</sup> See Hing, *supra* note 118, at 444.

<sup>120</sup> Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).

<sup>121</sup> *Id.* at 532.

<sup>122</sup> See *infra* text accompanying note 124–29.

<sup>123</sup> Hamdi v. Rumsfeld, 316 F.3d. 450, 459–60 (4th Cir. 2003).

indefinite imprisonment at the will of the Executive. Blackstone stated this principle clearly: “Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities . . .” 1 W. Blackstone, *Commentaries on the Laws of England* 131–133 (1765).<sup>124</sup>

Justice Scalia moved immediately to the Founders’ adoption of Blackstone, citing *The Federalist* No. 84 as the foundation of the Constitution’s Due Process and Suspension Clauses.<sup>125</sup> Within the next two pages, he began to set out the English and American history of the implementation of these rights, always in the context of the struggle between governmental power and the people’s liberty and, in the America’s story, in the context of “the Founders’ general mistrust of military power permanently at the Executive’s disposal.”<sup>126</sup> He wrote, “A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.”<sup>127</sup> He concluded his opinion by choosing the story of American liberty instead of the myth of redemptive violence:

The Founders well understood the difficult tradeoff between safety and freedom. “Safety from external danger”, Hamilton declared, “is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.” *The Federalist* No. 8, p. 33. The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it. Many think it not only inevitable but entirely proper that liberty give way to

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<sup>124</sup> *Hamdi*, 542 U.S. at 554–55.

<sup>125</sup> *Id.* at 555–56.

<sup>126</sup> *Id.* at 568.

<sup>127</sup> *Id.* at 569.



security in times of national crisis – that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.<sup>128</sup>

The *Hamdi* case demonstrates how legal outcomes can be dictated not so much by deductive argument as by the choice of constitutive myth. Both sides offered traditional legal arguments, but the real battle was between the story of the Nation's founding, on the one hand, and the story of redemptive violence on the other. The Fourth Circuit saw the arguments through the lens of redemptive violence, and thus allowed the myth to play a key role in legal decision-making.<sup>129</sup> The majority of the Supreme Court saw the arguments primarily through the lens of the American story establishing the liberty and safety of citizens as against an unconstrained Executive.

Through the myth's foundation of fear, its insistence on obedience to a powerful leader, and its obsession with defining community boundaries, it has become a lens through which large portions of the culture view the world. We must be ready to cross-examine the myth: Does revenge really heal us? Is law weak and ineffective? Is violence the only effective answer to human evil? But we cannot cross-examine a myth unless we recognize it, becoming aware of its fingerprints on the legal decisions of our day. And we are not likely to recognize the myth and its work if we pretend that law is limited to the methods of traditional legal argument. Dialectic engagement, however, is not enough.<sup>130</sup> As oppositionists claim and as *Hamdi* shows, we must be ready to tell counter-stories<sup>131</sup> that teach a different set of lessons – lessons about law as a journey toward wholeness and healing, toward justice and inclusion, toward fulfillment of America's promise for all her children.

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<sup>128</sup> Just three months after the Supreme Court ruled that the administration could not detain Hamdi indefinitely without trial, Hamdi was deported to Saudi Arabia on the condition that he renounce his U.S. citizenship and give up his claims against the United States over his captivity. *Id.* at 578–79. Tony Bartelme, *Hanahan Brig: The Next Guantanamo?* CHARLESTON POST AND COURIER, Mar. 15, 2009 (Hamdi had to agree to comply with strict travel restrictions, including notifying the Saudi government if he ever plans to leave the kingdom); Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004.

<sup>129</sup> As is no doubt clear, I see the issues primarily through the story of the founding of the Nation and the protection of citizens against unbridled governmental power.

<sup>130</sup> See *supra* text accompanying notes 102–05.

<sup>131</sup> To be clear, our counter-stories must stand ready to be cross-examined as well.

## V. IT'S PRECONSTRUCTIONS ALL THE WAY DOWN

As laid out in the introduction, this article will elaborate on two of the arguably controversial premises in the deductive argument. The first was the idea that traditional legal analysis often does not fully account for legal results. Despite articulated reliance on traditionally accepted legal “reasons,” a legal result may have been effectively preordained by widely accepted mental patterns (schemas) such as myth, metaphor, and other master stories and cultural scripts. That idea surely does not surprise readers familiar with any of several literatures, among them, critical theory, law and rhetoric, law and society, law and the humanities, law and literature, post-modern or deconstructivist philosophy, or cognitive theory. For other readers, the sections above have offered a taste of what the premise might mean and why it might offer a more accurate or more complete understanding of what often accounts for legal results.

Failing to recognize the hidden foundations of traditional legal analysis leads to a significant misunderstanding about the role of narrative in law and therefore a misunderstanding of the relationship between critical theory and traditional legal analysis. The error is often reflected in criticisms of storytelling’s legitimacy as a form of legal critique. The argument goes like this: Legal deliberation is rational when it relies on precedent, statutory language, or policy. But it is emotional, overly subjective, and unreliable when it relies on stories, so we should reject stories and choose traditional legal analysis.<sup>132</sup>

Richard Posner’s attack on critical race theory set out in the introduction to this article takes that position. Posner and others like him believe that critical theory tells oppositional stories in order to pit them against traditional legal reasoning, such as reliance on authority, analogy, and policy. Not so. Outsider stories do not oppose the tools of traditional legal analysis. Rather, outsider stories oppose *the dominant group’s hidden foundational master stories* – the cultural stories that actually account for the decision, which is then rationalized and justified by use of authority, analogy, and policy.<sup>133</sup> As Delgado said in 1989, it’s a war between stories.<sup>134</sup>

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<sup>132</sup> See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–80 (1989); FREDERICK F. SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 38–52 (1991).

<sup>133</sup> See generally Delgado, *supra* note 22.

<sup>134</sup> Notice, for instance, that the question Posner and others attempt to answer – whether oppositionist critique stands within law or external to it – cannot even be asked without reliance on the rhetorical study of metaphor. The question assumes the operation of the container schema, which assumes a boundary, an interior, and an exterior. Metaphorically, we think of ideas as objects, so with the operation of the container schema and the ideas-as-objects metaphor, we can then ask whether the object “oppositional critique” is “inside” or “outside” the container “law.” Without metaphor and other preconstructions, we cannot think about, talk about, or decide any abstract question, including the

The litigation history of *Hamdi v. Rumsfeld* provides a good example of the war between stories. The Fourth Circuit governing opinions used the traditional language of legal analysis (textual interpretation; analogy; distinction; policy), but these deductive arguments were all made within a narrative world created by the myth of redemptive violence. That powerful rhetorical combination – narrative and deduction -- is possible because the myth of redemptive violence is already encoded in parts of the Constitution, particularly the Article II War Powers, which assign the President the role of Commander in Chief and place the exercise of that war power in “a single hand.”<sup>135</sup> Similarly, the Supreme Court majority used the same tools of traditional legal analysis, but within a narrative world of a brave struggle to protect the liberties hard won at our Nation’s founding. The story of liberty does not oppose the deductive arguments of the Fourth Circuit; rather it opposes the myth of redemptive violence.<sup>136</sup>

So as early oppositionists knew long ago and cognitive science has now demonstrated, it’s stories, frames, and metaphors all the way down.<sup>137</sup> And if it’s stories and other pre constructions all the way down, then the choice is not between oppositional stories and “reasoned argumentation,” as Posner seems to think. Rather, the choice is whether to admit that “reasoned argumentation” is built upon the foundation of identifiable and well-rehearsed pre constructions. In the hands of the dominant group, those pre constructions maintain existing power and position, so there is a lot at stake for the dominant group here. Admitting the existence of these foundational stories would subject those stories to critique and require justification of the assumption that they are somehow more legitimate or more accurate than other stories. That is a battle the dominant group would find hard to win, so it is no wonder that voices such as Posner’s want to separate narrative from law.

## VI. CHOOSING A DEFINITION FOR “LAW”

The idea that traditional legal analysis often does not fully account for legal results gets us only so far, because in Step Three, the deductive

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outcome of a particular legal case or our understanding and critique of the law itself. *Id.* at 2418; see generally Mark L. Johnson, *Mind, Metaphor, and Law*, 58 MERCER L. REV. 845 (2006); GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (1980).

<sup>135</sup> “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (Thomas, J., dissenting) (quoting Alexander J. Hamilton, *The Federalist* No. 74, at 500 (J.Cooke ed. 1961)).

<sup>136</sup> In this context, we must quibble with Robert Cover just a bit. For every constitution, there are multiple epics. But see Cover, *supra* note 30; L. H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995).

<sup>137</sup> See Nancy Levit, *Reshaping the Narrative Debate*, 34 SEATTLE U. L. REV. 751, 755 (2011); Joseph William Singer, *Radical Moderation*, 1985 AM. B. FOUND. RES. J. 329, 329–30 (1985).

argument comes down to simple human choice. As we have seen above, narrative theory and cognitive science can answer the objection to Step Two's thesis that cultural frames underlie and account for legal outcomes. But Step Three's thesis – that “law” includes those largely unarticulated frames – depends on the definitions we choose. As metaphor theory teaches us, the criteria that determine status within or outside a category are not preordained.<sup>138</sup> They are the product of the values and interests of whichever discourse community dominates the conversation.<sup>139</sup> We could choose to define law narrowly, including only the reasons traditional legal discourse will admit or only those that affect law more than they affect other parts of our lives (if such a category exists). If we do, then my argument fails, but only because we have decided that we want it to fail and so have defined our terms accordingly.

So back to the matter of choice: since law's definition is a discursual question – a question defined by the relevant discourse community – law's definition comes down to a matter of power, and we should consider the implications of the *choice* to define “law” broadly or narrowly. Traditional definitions of law are narrow, privileging what Goodrich calls “the grammatical or logical decoding of the text,”<sup>140</sup> and thus conclude that oppositionists stand outside law.<sup>141</sup> But the choice to exclude the prophets prevents traditionalists from hearing important voices and important messages. It effectively precludes any real hope for understanding oppositionists' perspectives and for developing a broader view of legal possibilities.

To return to this article's beginning, oppositionists, in a way comparable to a psychoanalyst looking for what lies beneath an explicit behavior, try to look deeper to ask what is really going on.<sup>142</sup> Will we allow such questions to be asked inside the wall? Law is clearly the product of argument. Traditional law-talk, conducted in rationalist, objectivist language, is half of an argument. Oppositionist critique is the other half. For law to progress, we need both sides of the argument inside the wall.

What about the prophets? Should they agree to stay outside the city walls? When there is a choice to be made, critical theory wonders which option benefits which group. It is easy to see why traditionalists would prefer the narrow definition of “law,” placing critical theory outside the wall. Traditional legal analysis relies primarily on existing legal texts. A

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<sup>138</sup> See Johnson, *supra* note 134.

<sup>139</sup> *Id.*

<sup>140</sup> Goodrich, *supra* note 11, at 206.

<sup>141</sup> See, e.g., Posner, *supra* note 3; Heather MacDonald, *Rule of Law: Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A21 (describing feminist jurisprudence and critical race theory as “antithetical to the very notion of law”).

<sup>142</sup> See *supra* text accompanying notes 22–30.

narrow view of law shields from challenge the pre constructions that have produced those existing legal texts as well as authoritative interpretations of them. Thus, this self-protective view<sup>143</sup> allows the products of existing power structures to appear neutral, objective, logical, and even quasi-scientific. It is a short step from that definition of law to the conclusion that oppositional storytelling is an illegitimate method of legal critique because it is not *legal* critique at all. The narrow definition devalues oppositional scholarship and legitimates traditional power structures within both the academy and law practice.

A broad definition, however – a definition that includes *everyone's* pre constructions – can have a leveling effect for groups with less power. Each set of pre constructions becomes subject to identification and critique, so any legal question can be evaluated more completely and with less blind adherence to the values and interests of the dominant group. Thus, this definitional question is more than just a matter of theory; it has important real world implications. Dominant foundational narratives will not succumb to simple dialectical critique. Early oppositionists knew this. For example, Goodrich does not hold out much hope for merely pointing out that the emperor's rules and standards have no clothes. He observes that an ideology is a collective practice and a mode of belonging, and that this mode of belonging is its most enduring feature.<sup>144</sup> Thus, direct, express critique of ideology is inadequate. For this, he quotes R. Debray: "Specialists have torn all the ideological systems to shreds, laid bare all the shameful messianisms and exposed all the nonsense to pitiless ridicule – yet 'ideology' buries its philosophical gravediggers one after the other,"<sup>145</sup> and F. Nietzsche, *The Dawn of Day*, aphorism 444 (London: Allen & Unwin 1903):

*Surprise at resistance:* Because we see through a thing we think that in future it will be unable to offer us any resistance whatsoever – and we are surprised at finding that we are able to see through it, and yet unable to run through it. This foolish sensation and surprise are similar to the sensation which a fly experiences before a window pane.<sup>146</sup>

Recent work in cognitive theory has substantiated this early oppositionist intuition. It turns out that rational argument does little to

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<sup>143</sup> As strategies of self-protection, Goodrich points to the doctrines of unity, coherence, and univocality. Goodrich, *supra* note 11, at 205.

<sup>144</sup> *Id.* at 209.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 205.

change attitudes based on opposing preconstructions. In fact, there is evidence that confronting a decision-maker with rational *counterargument* (facts, policies, and principles that push against the decision-maker's preexisting leanings, which we have already learned are likely to be the result of preconstructions)<sup>147</sup> actually prompts that decision-maker to generate competing arguments and further solidifies preexisting views. Some fascinating recent work has shown that if an advocate's traditional merits arguments (facts, analogies, deductions) conflict with the decision-maker's preexisting values, the decision-maker is prompted to "protect" her preexisting values by generating counterarguments to oppose the advocate's traditional merits arguments. But if the advocate offers a "value-involved" argument,<sup>148</sup> such as stories, metaphors, and other frames, the decision-maker is more likely to be open to changing her mind and less likely to generate merits arguments to resist the advocate's position. As Kathryn Stanchi has written:

This means that in value-protective situations, stronger arguments in the persuasive message will not lead to attitude change, and may make the belief of the message recipient more entrenched. Rather, to induce attitude change in someone who has strongly held beliefs, the peripheral—not central—route<sup>149</sup> is the more effective means . . . In other words, if a person has strong values and the advocate's desired result conflicts with those values, merits arguments are not likely to wield great influence, regardless of their strength. The opposite occurs for a value-involved message recipient when the message confirms her beliefs ("value-affirmative processing"). In that situation, strong merits arguments will influence the message recipient by making more secure the beliefs consistent with the message.<sup>150</sup>

This cognitive finding is consistent with oppositionists' experience: even when the tools of traditional legal analysis provide feasible legal arguments on behalf of less powerful groups, those arguments are not enough. They often will not be effective unless they can be accompanied

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<sup>147</sup> See *supra* text accompanying note 36.

<sup>148</sup> Cognitive theory uses the term "value-relevant involved" to refer to decision-makers who approach an issue with preexisting views and values. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 440–42 (2006).

<sup>149</sup> The cognitive studies choice of language is unfortunate in the sense that, without any research justifying a preference, the language inherently privileges what it calls "central" processing at the expense of what it calls "peripheral" processing.

<sup>150</sup> Stanchi, *supra* note 148, at 441–42.

by exposure to a different narrative frame.

So in *Hamdi*'s case, it turns out that both the government and the Fourth Circuit's reliance on parsing authoritative text and drawing analogies and distinctions may not have had the desired effect on Supreme Court Justices who were inclined to approach the *Hamdi* issues from the values of liberty and the story of the Nation's founding. In fact, the use of the traditional master's tools may have had the opposite effect, prompting the generation of counterarguments. Similar sorts of traditional arguments made by *Hamdi*'s father's lawyers and the District Court may have had little effect or even a negative effect on the Fourth Circuit and on Justice Clarence Thomas, who saw the case through the lens of the myth of redemptive violence. Even a quick reading of the four opinions (the plurality, the concurrence, and the two dissents) demonstrates the back-and-forth among the Justices in which they respond to each other's traditional arguments by generating traditional counterarguments.

Therefore, establishing storytelling as a legitimate form of legal advocacy is more than a nice question of theory. Legal outcomes depend upon it. Audre Lorde was right: "[T]he master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."<sup>151</sup> What matters most may be story, metaphor, and other value-laden frames.

The question of whether critical theory is within or outside of law depends on the definition of "law." Either a broad definition or a narrow definition is rationally justifiable. The definition is in the control of the relevant discourse community, and it will reflect the values and interests of that particular community. In law, inclusion in that discourse community is contested. Many traditionalists seem to believe that the assumed values of the dominant cultural group—which are benefitted by a narrow definition of law—should control.<sup>152</sup> Oppositionists who want to challenge that hegemony should argue for a broad definition of law, finding room within it for the values and interests of less powerful groups.

## VII. CONCLUSION

This essay began by suggesting a short set of propositions about law: (1) that law includes both the outcomes of legal questions and the traditional law talk that claims to explain those outcomes; (2) that often this traditional law talk is primarily justification and that legal results are more accurately described as the product of preconstructions such as myths

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<sup>151</sup> Lorde, *supra* note 17, at 112.

<sup>152</sup> See generally Scalia, *supra* note 132; Carrington, *supra* note 7; MacDonald, *supra* note 141; Posner, *supra* note 3; SCHAUER, *supra* note 132.

and master stories; (3) that if law includes the reasons that *claim* to account for legal results (but often do not), it surely should include law's pre constructions, which may be the *actual* reasons for legal results; and (4) that if narrative and other pre constructions are part of law when they account for legal results consistent with the power of the dominant group (step three), they surely are also part of law when used by oppositionists to critique those same results. In short, stories and other frames are everybody's tools and therefore oppositional stories and frames should be considered within law, not external to it.

These premises may provide a simple rational argument for including critical theory within law, but that argument does not resolve the question. The rational argument can be contested with other rational arguments, such as skepticism about the role of pre constructions or rejection of a definition that might include everything and therefore define nothing. Such rational arguments about theory could go on endlessly and probably will, because what is at stake is power.

Truth be told, the theoretical question of how we choose to define law is less important than how well we can oppose injustice. The scholarship of critical theory has done excellent work in telling the stories of outsiders.<sup>153</sup> That scholarship is essential oppositional work because outsider stories have often been unheard in the halls of power. But we must do more to connect these oppositional stories to their own mythogenic and metaphorical roots<sup>154</sup> in order to teach progressive advocates how to become better oppositional storytellers. We must also unmask and deconstruct the foundational myths and metaphors assumed and masterfully employed to maintain existing power.

One of the primary differences between the Right and the Left is the starkly different set of constitutive myths and metaphors each uses to structure the world in which particular legal questions arise. The question for each of us, including for judges, is which set of myths we will choose to live within. We can call them law, or not, but that's where the real action is.

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<sup>153</sup> See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 462 (1993) ("Many Critical Race theorists consider that a principal obstacle to racial reform is majoritarian mindset – the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race. To analyze and challenge these power-laden beliefs, some writers employ counterstories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature.").

<sup>154</sup> See generally LINDA H. EDWARDS, READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD (2012); Edwards, *supra* note 25; Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006); see generally Pamela Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012).