

# THE HUMANITIES IN THE LAW SCHOOL CURRICULUM: COURTSHIP AND CONSUMMATION

Linda H. Edwards\*

## INTRODUCTION

It is popular today to believe that Langdell was opposed to skills instruction in law school. Elsewhere I have come to his defense on this point,<sup>1</sup> arguing that the distinction between doctrine and skills had not yet been invented in Langdell's day and that Langdell himself was a believer and enthusiastic participant in forms of teaching that today we label as skills instruction.<sup>2</sup> But on the subject of the role of the humanities in legal education, the case against Langdell is strong.

No set of objective criteria exists for defining the reach of "the humanities," but disciplines commonly thought to fall within that category include art, drama, ethics, history, literature, music, philosophy, religion, and rhetoric. One of the family resemblances among these disciplines is their rejection of scientific methods as the primary tools for understanding the world. They lean instead toward a critical theory that sees the world as variable according to context, time, language, and culture. They analyze and critique aspects of human society and cultural values. It is this methodological divide that primarily separates the humanities from the sciences, and it was with the sciences that Langdell was besotted.

Langdell first encountered scientific education when he took natural history as an undergraduate at Harvard College, and that course formed his understanding of science, scientific research, and

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\* E.L. Cord Foundation Professor of Law, University of Nevada, Las Vegas. I would like to thank Harold Lloyd and Christine Coughlin for their gracious invitation to participate in such an engaging and timely Symposium and also to thank the other Symposium participants for such stimulating conversation about this important topic.

1. Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 192 (2014).

2. *Id.*; see also BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL, 1826-1906*, at 131 (Daniel Ernst & Thomas A. Green eds., 2009) ("Langdell required students to read original sources rather than textbooks, to analyze particular controversies rather than general propositions, to formulate their own interpretations in response to questions, and to respond to hypotheticals and opposing views.").

scientific teaching.<sup>3</sup> The zoology portion of the course was taught by Louis Agassiz, who was, at the time, "the dominating figure in the field."<sup>4</sup> There Langdell learned a view of science as primarily the observation of natural phenomena and their classification into appropriate taxonomies.<sup>5</sup> Not only was this approach the dominating view, but such "categorical thinking"<sup>6</sup> was extremely congenial to Langdell's rigid mind.<sup>7</sup> He must have felt that he had found his intellectual home ground.

Of course, to a hammer everything looks like a nail, so later, when Langdell returned to Harvard Law School, he began to teach a scientific approach to law and legal education.<sup>8</sup> He wanted to create a law school that taught law as an exact science.<sup>9</sup> Langdell wrote that "[l]aw, considered as a science . . . has arrived at its present state by slow degrees."<sup>10</sup> The goal of law study, he wrote, is "to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of [the law's] essential doctrines."<sup>11</sup> The study of law, as Langdell saw it, either was or was analogous to a science.

Langdell had one other goal. He had practiced law on Wall Street for roughly fifteen years, during the height of the Tammany Hall scandals.<sup>12</sup> That experience taught Langdell that law practice was overwhelmingly corrupt, and so, when he returned to Harvard, he went with a reformer's fire.<sup>13</sup> He believed that most students deserved to fail, and he saw those who survived as the primary way to combat corruption in legal practice.<sup>14</sup> Thus, Langdell was a notoriously hard grader.<sup>15</sup> He hoped that weeding out less talented or diligent students would produce lawyers who could win cases on the merits rather than on social contacts and financial influence.<sup>16</sup>

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3. Howard Schweber, *Before Langdell: The Roots of American Legal Science*, in THE HISTORY OF THE AMERICAN LAW SCHOOL: A COMPREHENSIVE SELECTION OF ESSAYS 606, 629-31 (Steve Sheppard ed., 1999).

4. KIMBALL, *supra* note 2, at 25.

5. *Id.* at 24-27.

6. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 17 (1992).

7. See KIMBALL, *supra* note 2, at 136, 140-41.

8. See *id.* at 140-41.

9. Letter from Ephraim W. Gurney to Charles W. Eliot (Jan. 3, 1883) (on file with Harvard University Archives, box 71).

10. C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS, at vi (1871).

11. *Id.* at vii.

12. See KIMBALL, *supra* note 2, at 42-43, 69-72, 75-77.

13. See *id.* at 69-70, 75.

14. *Id.* at 193, 212.

15. See *id.* at 212-13.

16. See *id.* at 193, 210-11.

In fact, Langdell believed that rhetoric,<sup>17</sup> a subject at the heart of the humanities, played a significant role in causing the legal corruption he intended to stamp out.<sup>18</sup> He identified four cases of the corruption of legal practice: personal favoritism, incompetence, improper procedural moves, and the arts of rhetoric.<sup>19</sup>

So on the question of whether the humanities should play a role in legal education, Langdell was more than an agnostic or a skeptic; he was an atheist. In fact, he was the Madalyn Murray O'Hair<sup>20</sup> of his day. But Langdell was dead wrong. Lawyers with a grounding in the humanities<sup>21</sup> are likely to have stronger lawyering skills. They are better able to interpret and construct legal rules; to recognize, use, and defend against foundational frames; to predict a decision maker's range of possible responses; and to choose and use effective strategies of persuasion. In short, if I needed a lawyer, I would look for someone who had read Shakespeare, Aristotle, and Wittgenstein.<sup>22</sup> I would look for someone who could appreciate the rhythm and spark of good poetry and could analyze a novel's plotline. In other words, I'd want a lawyer who is at home with the humanities.

Perhaps the most important and relevant humanities relationships are between literature,<sup>23</sup> history, and law. In an

17. During his undergraduate education at Harvard College, Langdell excelled, having been described as "the best scholar in his class." JAMES BRADLEY THAYER, *LETTERS OF CHAUNCEY WRIGHT WITH SOME ACCOUNT OF HIS LIFE* 23 (1878). In nearly every course, he ranked in the top ten out of student groupings ranging from 309 to 809. KIMBALL, *supra* note 2, at 25. In rhetoric, however, Langdell ranked 42nd out of 181. It was by far his lowest grade. *Id.* at 24–25. In fact, one might question whether Langdell understood rhetoric well enough to categorically reject its role.

18. See KIMBALL, *supra* note 2, at 169.

19. *Id.*

20. Madalyn Murray O'Hair was the founder of American Atheists and was the organization's president for twenty-three years. She was the mother of the child-plaintiff in *Murray v. Curlett*, 374 U.S. 203 (1963), the lawsuit in which the Supreme Court ended required Bible reading in public schools. See generally BRYAN F. LE BEAU, *THE ATHEIST: MADALYN MURRAY O'HAIR* (2003) (exploring the life and atheist beliefs of Madalyn Murray O'Hair).

21. I am somewhat reluctantly treating law here as distinct from the humanities. A good case can be made, however, that law, as a study of human society and cultural values, is itself a discipline within the humanities.

22. Well, okay, almost no one can actually read Wittgenstein. But I would want my lawyer to have read about him and to have at least a passing familiarity with his ideas. For an example of Wittgenstein's application to a crucially important question in law study, read constitutional law scholar Ian Bartrum. See, e.g., Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259, 285 (2013) (using Wittgenstein to argue that constitutional meaning depends on the community of language users in context).

23. For the purposes of this Symposium, I can see no helpful distinction between the category of "literature" and the category of "popular culture," and so this Article will use a broad definition of "literature" to include both the

elegant offering on the subject, using a metaphor drawn from Simon de Beauvoir's *L'Invitée (She Came to Stay)*, Bernadette Meyler describes those relationships as akin to a love triangle.<sup>24</sup> Yet it has taken a long time for this romance to develop curricular currency. Modern historiography originated in the seventeenth century, roughly contemporaneously with the beginnings of modern Anglo-American law,<sup>25</sup> but legal history did not make its appearance in law school curricula until after World War I.<sup>26</sup> Law and literature did not find a precarious place in legal education until roughly the 1970s.<sup>27</sup> While both courses are commonly taught in law schools today, they typically are seen as boutique courses in which small numbers of students enroll. These boutique courses are seldom recommended to students interested primarily in the practice of law.

This curricular marginalization may be caused, in part, by a tendency to foreground the material from the nonlaw discipline. Courses in law and the humanities tend to show the glances and smiles and slow dances of a courtship, but they may stop just short of consummation. They do not always show students the intimate relationship between the humanities and law practice—the point of connection with the nuts and bolts of what lawyers and judges actually do. Courses in legal history often are organized according to stages of legal history.<sup>28</sup> Courses in law and literature often are organized around particular literary works or themes.<sup>29</sup> This foregrounding of the source<sup>30</sup> discipline may leave little syllabus

literature of high culture and the more ubiquitous and public literatures of popular culture. I hope the excellent scholars who write under each of these scholarly self-identities will forgive me for this instrumental choice. See generally Robin West, *Literature, Culture, and Law—at Duke University* 27–28 (Georgetown Law Faculty, Working Paper No. 75, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1201867](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1201867) (discussing the relevance of popular narrative fiction to law).

24. Bernadette Meyler, *Law, Literature, and History: The Love Triangle*, 5 U.C. IRVINE L. REV. 365, 366–67 (2015).

25. See J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 31–32 (1987); Meyler, *supra* note 24, at 368.

26. Meyler, *supra* note 24, at 368.

27. The beginning of attention to literature in legal education is commonly attributed to JAMES B. WHITE, *THE LEGAL IMAGINATION* (1973). See, e.g., Meyler, *supra* note 24, at 368.

28. See, e.g., *Courses*, WAKE FOREST L. ADMISSIONS, <http://admissions.law.wfu.edu/about/academics/courses/> (last visited Mar. 23, 2016) (describing the course “Legal History—American”); Christina Ponsa, *L6213 American Legal History*, COLUM. L. SCH., <http://web.law.columbia.edu/courses/sections/19305#.Vp2YqSorLIV> (last visited Mar. 23, 2016).

29. See, e.g., Daniel Solove, *Law & Literature*, GEO. WASH. U. L. SCH., [http://docs.law.gwu.edu/facweb/dsolove/law-humanities/Law-Literature-Syllabus\\_files/Law-Literature-Syllabus-2010.pdf](http://docs.law.gwu.edu/facweb/dsolove/law-humanities/Law-Literature-Syllabus_files/Law-Literature-Syllabus-2010.pdf) (last visited Mar. 23, 2016).

30. I use the term “source” here in much the same way we see it used in the modern study of metaphor. The “target domain” is the point under discussion, and the “source domain” is the origin of the comparison to be made. See

space for an examination of how lawyers and judges might use those concepts to solve legal problems and resolve legal disputes. Course syllabi may emphasize the interdisciplinary material, hoping that students will glean the connections to law practice from the leavings in the field.<sup>31</sup> Without a focus on why the material is relevant, the courses may seem a mere vehicle to escape boredom with traditional law courses. If so, it is no wonder that some might question why law students should explore the humanities.<sup>32</sup>

But what if we were to begin a course in law and the humanities not with the humanities material but with the point of direct connection to law? The vibrancy of the interdisciplinary partnership might be harder to miss.<sup>33</sup> To offer an example, this Article looks to the case of *Hamdi v. Rumsfeld*<sup>34</sup> to show law's connection to literature, world religions, and history, with guest appearances by philosophy and rhetoric along the way.<sup>35</sup> The Article explores just one kind of connection—the framing operation of these ubiquitous, yet often overlooked, preconstructions. While the humanities have important roles to play in what we today call “skills” instruction,<sup>36</sup> this Article will focus primarily on how the

GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* 276–78 (1987) (stating that metaphors that are motivated by structural correlation seem natural because “the pairing of the source and target domains is motivated by experience”).

31. The Torah required farmers to leave the edges of their fields unharvested and to leave in the field whatever they dropped so that those in need could glean the field. See *Ruth* 2:2–3 (Revised Standard Version).

32. Meyler, *supra* note 24, at 366 (“Despite the proliferation of the ‘law and’ fields, many—including law and the humanities—still appear from the vantage point of legal pedagogy as a superficial carapace that can be shed when financial exigencies press law schools to cut costs and reduce tuition.”).

33. A modest suggestion, made humbly as one who does not teach either course: Perhaps the syllabus might be organized according to lawyering tasks and performances. The interdisciplinary material would then make its appearance in the context of its use in the law. Neither students nor curricular planners would need to wonder whether or how the material is relevant to law practice. And I would suggest, with appropriate temerity, that scholars of law and the humanities might find rich strains for their own work. This section and those that follow are offered as a small example of expressly foregrounding the points of connection between law and the humanities.

34. 542 U.S. 507 (2004).

35. While today's topic focuses on the humanities, some of the social sciences should be represented in the law school curriculum as well. For instance, some understanding of sociology would be quite helpful in constructing policy arguments, and the role of psychology in the practice of law should, at this point, be beyond dispute. See, e.g., JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS* 1–3 (2012).

36. Whether or not they are aware of what they are doing, lawyers routinely use the ideas presented here. See, e.g., Linda H. Edwards, *Advocacy as an Exercise in Virtue: Lawyering, Bad Facts, and Furman's High-Stakes Dilemma*, 66 *MERCER L. REV.* 425, 439, 442–43 (2014) [hereinafter Edwards, *Advocacy as an Exercise in Virtue*] (discussing the rhetorical strategy in

humanities can assist the Langdellian project itself—the understanding of legal doctrine.

So what might these disciplines have to do with law and a good legal education? Perhaps the answer depends, in part, on what we mean by “law.”<sup>37</sup> As James Boyd White has reminded us,

law is not at heart an abstract system or scheme of rules, as we often think of it; nor is it a set of institutional arrangements that can be adequately described in a language of social science; rather, it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions. It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again.<sup>38</sup>

If Professor White is correct, and I think he is, then the humanities have a great deal to teach us about law and about its practice in the real world.

#### I. THE LESSONS OF LITERATURE’S FRAMES AND HISTORY’S STORIES

In the modern era, perhaps beginning with Robert Cover’s seminal article *Nomos and Narrative*,<sup>39</sup> we have slowly been realizing that the law is made of stories.<sup>40</sup> The law itself, that is—not just the situations clients bring to the law. To a greater extent than we have yet realized and explored, legal argument is made of the stories lawyers and judges tell each other about the law.<sup>41</sup> These stories often track the myths<sup>42</sup> we have inherited from

Furman v. Georgia, 408 U.S. 238 (1972)); Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 885 (2010) [hereinafter Edwards, *Once Upon a Time in Law*] (illustrating the brief in *Miranda v. Arizona*, 384 U.S. 436 (1966) as a birth story and the brief in *Bowers v. Hardwick*, 478 U.S. 186 (1986) as a rescue story).

37. See generally Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master’s Tools*, 13 CONN. PUB. INT. L.J. 43 (2013) (discussing the definition of “law”).

38. James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES L. 381, 382 (2011), reprinted in LINDA H. EDWARDS, READINGS IN PERSUASION 325 (2012).

39. Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. . . . In this normative world, law and narrative are inseparably related.” (footnote omitted)).

40. Edwards, *Once Upon a Time in Law*, *supra* note 36, at 883–84.

41. See, e.g., L.H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995).

42. Master narratives can also be thought of as myths. In its technical sense, a myth is a story that transmits a portion of a worldview held by a particular people. The term does not imply falsity. To the extent that the term implies anything about the question of truth, it transmits a truth larger than

literature, myths that are further instantiated and transmitted through popular culture. The law, in other words, is made of “stories about birth, death, battle, betrayal, tricksters, and champions,” just to name a few.<sup>43</sup> That these stories do their formative work beneath the surface of routine law talk simply makes them all the more powerful and all the more worthy of our attention.

The stories do not sound like what they are, of course. They use the traditional language of law talk, purporting to rely on legal rules and citing to legal authority, analogy, policy, and principle. But all this traditional law talk begins at the point where its foundational preconstructions have led it.<sup>44</sup> The case of *Hamdi v. Rumsfeld* offers us an example of the hidden influences of historical and literary frames. To show the direct connection between the law and these preconstructive frames, we begin not with the relevant literary or historical material but with the legal issue at the heart of Hamdi’s case.

#### *Hamdi v. Rumsfeld*

Yaser Esam Hamdi was born in Louisiana as an American citizen.<sup>45</sup> He later moved with his parents to Saudi Arabia.<sup>46</sup> It has been reported that in approximately July of 2001, he left his parents’ home to go to a Taliban camp but became disillusioned and left within a few weeks.<sup>47</sup> His father alleged that Hamdi went to Afghanistan to do relief work before the events of September 11 and could not have received military training there.<sup>48</sup> Whatever the circumstances, Hamdi was found hiding in an area of active combat in Afghanistan and was captured by Northern Alliance troops.<sup>49</sup> He may have been fighting alongside a Taliban military unit or he may have been attempting to flee the area and return home.

Shortly after Hamdi’s capture, the Bush administration labeled Hamdi as an “enemy combatant.”<sup>50</sup> Hamdi was imprisoned in solitary confinement for more than two years, first in Afghanistan,

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mere historical truth. It is in this sense that the term “myth” is used here. See Edwards, *supra* note 37, at 47 n.20.

43. Edwards, *Once Upon a Time in Law*, *supra* note 36, at 884.

44. PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 204 (1987).

45. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

46. *Id.*

47. Tony Bartelme, *Hanahan Brig: The Next Guantanamo?*, *POST & COURIER* (Mar. 22, 2009, 8:51 PM), <http://www.postandcourier.com/article/20090315/PC1602/303159931>. Because of the government’s position in Hamdi’s case, see *infra* text accompanying notes 124–26, we have no reliable statement of facts from which to draw.

48. *Hamdi*, 542 U.S. at 511.

49. *Id.* at 513.

50. *Id.*

then in Guantanamo Bay, later in a high-security military prison in Norfolk, Virginia, and finally in a brig in Charleston, South Carolina.<sup>51</sup> He was never charged with any offense.<sup>52</sup> He was permitted no contact with his family or with anyone other than government guards and interrogators.<sup>53</sup> He was prevented from consulting a lawyer.<sup>54</sup> The methods of his interrogation remain undisclosed.

For the government, all of this was happening in the shadow of September 11, 2001. The horrendous acts of terrorism—which resulted in the deaths of thousands of Americans in two iconic American cities, as well as the deaths of those whose plane crashed outside of Shanksville, Pennsylvania—had initiated a new and far more dangerous form of war.<sup>55</sup> This “War on Terror” required new, daring strategies. September 11 had activated the President’s constitutional powers as Commander in Chief. Congress had authorized the President “to use all necessary and appropriate force” against anyone “he determines planned, authorized, committed, or aided the terrorist attacks.”<sup>56</sup> The Commander in Chief had determined that Hamdi had aided the terrorist agenda.<sup>57</sup> Thus, in the fight for our lives and for the future of the nation, whatever rights Hamdi might have had under normal circumstances were inapplicable now. The government claimed the right to keep him imprisoned incommunicado, interrogating him for as long as it chose.<sup>58</sup> Our very lives depended upon these virtually unlimited powers of the Commander in Chief.

Hamdi’s father had somehow learned of his son’s detention, and, not surprisingly, he saw the matter differently. He filed a habeas corpus petition as his son’s next friend, objecting to the government’s actions.<sup>59</sup> He argued that in the United States, the President does not have the unlimited power to order an American citizen imprisoned indefinitely and held incommunicado.<sup>60</sup> When the government detains and holds a citizen, he argued, that citizen must have the right to the most basic of American freedoms: the right to know the allegations against him, the right to assistance

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51. *Id.* at 510.

52. *See id.* at 510–11.

53. *See id.* at 511.

54. *Id.*

55. *See generally* Walter Enders & Todd Sanders, *After 9/11: Is It All Different Now?*, 49 J. CONFLICT RESOL. 259, 259–63 (2005) (“[T]his article shows how transnational terrorism has changed following 9/11 and the subsequent war on terror.”).

56. S.J. Res. 23, 107th Cong. § 2(a) (2001).

57. *See Hamdi*, 542 U.S. at 512–13, 540.

58. *Id.* at 510–11.

59. *Id.* at 511.

60. *See id.* at 521.

from counsel, and the right to a hearing before a neutral tribunal.<sup>61</sup> Otherwise none of us are safe, and the danger at home becomes far greater than the danger from abroad.

Eventually the litigation wound its way to the Fourth Circuit and later reached the United States Supreme Court.<sup>62</sup> Most cases that reach the Court on certiorari come with strong legal arguments on both sides, and this case was no exception. The government's argument was based primarily on the War Powers Clause and on the congressional Authorization for Use of Military Force.<sup>63</sup> Arguments offered on behalf of Hamdi were based on the Fifth and Fourteenth Amendments to the United States Constitution.<sup>64</sup> Each side relied on prior interpretations of constitutional and statutory language, policy arguments, analogies and distinctions, and relevant international law. For every argument, there was a counterargument.

Relying on traditional legal argument alone, then, a decision either way would be justifiable. Indeed, the Justices of the Supreme Court, who are among the smartest lawyers in the land, together with their teams of elite law clerks, were starkly divided on the outcome.<sup>65</sup> Given the strength of the traditional legal arguments for each of these positions, how would the limiting principles of Langdellian law study explain the divided Court? Are some of the Justices smarter than others? Are some less committed to the rule of law? Or more or less worried about terrorism? Do some misunderstand the text they are called upon to interpret? Or misunderstand their role? I would like to suggest that these are not the only answers, and not even the best answers. Traditional legal argument ultimately did not resolve the constitutional conundrum for any of these Justices, nor could it. Instead, each Justice saw the question primarily through the lens of a particular master story and then used traditional forms of Langdellian analysis to support the resolution the master story had already preordained. In other

61. *Id.* at 511.

62. *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

63. *See Hamdi*, 542 U.S. at 514–16.

64. *Id.* at 511.

65. Justices O'Connor, Kennedy, and Breyer, as well as Chief Justice Rehnquist, concluded that the government could detain Hamdi but that he had the right to contest that detention. *Id.* at 509. Justices Souter and Ginsburg concluded that Hamdi's detention itself was unauthorized. *Id.* at 539–41 (Souter, J., concurring). Justices Scalia and Stevens concluded that Hamdi should be tried for treason and that Congress could suspend his due process rights temporarily under the Suspension Clause. *Id.* at 554 (Scalia, J., dissenting). Justice Thomas concluded that Hamdi's detention fell squarely within the President's war powers and that the judiciary lacks the capacity to second-guess the President's decision. *Id.* at 579 (Thomas, J., dissenting).

words, whether they knew it or not, the Justices were acting as humanists.

## II. AMERICAN STORIES AND THE MYTH OF REDEMPTIVE VIOLENCE

Shift the camera: While the Justices were pondering Hamdi's case, students and teachers were busy in humanities classrooms across the land. In American history courses, teachers were teaching the Founding Era. Students were learning how and why the nation was formed and the Constitution was drafted and ratified. One of the most enduring versions of that historical era is a story of resistance to tyranny and the protection of the people against overriding governmental power.<sup>66</sup>

Meanwhile, in at least some world literature courses, teachers were teaching the *Enuma Elish*,<sup>67</sup> and students were reading the myth and analyzing its meaning.<sup>68</sup> The story begins with the two gods of the universe, Apsu and Tiamat.<sup>69</sup> Tiamat gave birth to a litter of young gods, but this new generation was prone to misbehavior.<sup>70</sup> At his wits' end, Apsu had had enough and decided to kill the troublemakers.<sup>71</sup> The young gods discovered the plot, however, and managed to kill Apsu before he could kill them.<sup>72</sup> When Tiamat—also called the Dragon of Chaos—learned of Apsu's death, she became enraged.<sup>73</sup> Vowing revenge, she created multiple dragons, poisonous snakes, and terrible weapons; she assembled her forces and prepared for battle.<sup>74</sup> The young gods were terrified. They were helpless against Tiamat's power, and they knew it.<sup>75</sup>

66. John Locke discussed his "right of revolution" philosophy in his *Second Treatise*, which essentially states that citizens have a right to instigate a revolution against a government when it becomes a tyrannical power and acts against the interests of its people. JOHN LOCKE, *SECOND TREATISE* (1689), reprinted in 1 *THE FOUNDERS' CONSTITUTION* 76, 82 (Philip B. Kurland & Ralph Lerner eds., 1987). The "right of revolution" philosophy endures today in Article 10 of the New Hampshire Constitution. N.H. CONST. pt. I, art. X.

67. The *Enuma Elish* is an ancient Babylonian cosmogony, that is, a story about how the universe was created. *Cosmogony*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 282 (11th ed. 2003); *Enuma Elish—The Babylonian Epic of Creation*, ANCIENT HIST. ENCYCLOPEDIA, <http://www.ancient.eu/article/225/> (last visited Mar. 23, 2016).

68. At least I hope this was true. Portions of this Section appeared in Edwards, *supra* note 37, at 53–54.

69. MYTHS FROM MESOPOTAMIA: CREATION, THE FLOOD, GILGAMESH, AND OTHERS 233 (Stephanie Dalley trans., 1989).

70. *Id.*

71. *Id.* at 234.

72. *Id.* at 234–35.

73. *See id.* at 236.

74. *Id.* at 237.

75. *Id.* at 242.

In the face of all this fear, the young gods pleaded with one of their number, Marduk, to fight Tiamat.<sup>76</sup> Marduk agreed, but on one condition: the other gods must give him unquestioned obedience.<sup>77</sup> The deal was struck, and Marduk devised a plan.<sup>78</sup> First, he caught Tiamat in a net.<sup>79</sup> Of course the mighty Tiamat could easily tear her way free, but Marduk knew that the net would make her angry.<sup>80</sup> When Tiamat opened her mouth to roar in rage, Marduk drove a mighty wind down her throat.<sup>81</sup> Then he shot an arrow into her distended belly, exploding it and piercing her heart.<sup>82</sup> He split open her skull and scattered her blood across the firmament.<sup>83</sup> Then he stretched out her corpse full-length and from it he created the earth.<sup>84</sup> Saved from destruction, the younger gods vowed to remain true to their bargain.<sup>85</sup> They promised to obey Marduk without question.<sup>86</sup> In exchange, Marduk would protect them from all the future Dragons of Chaos.<sup>87</sup>

Myths are powerful teachers,<sup>88</sup> and this one teaches a particular set of lessons. Simply put, it teaches that the world is in the clutches of powerful and destructive evil forces. At any moment, these forces may attack. Our only hope is a strong leader, who will save us by defeating these evil powers. The price, however, is unquestioning obedience to our leader, for if our leader is constrained, the powers of evil will prevail and we will be destroyed.

The *Enuma Elish* dates at least to 1250 BCE, and it spread in various forms from Babylonia throughout the ancient world.<sup>89</sup> Its basic structure and theme remained a part of succeeding cultures as well. The story is over 3250 years old now, but we do not need to have read the *Enuma Elish* to know its plot. In the last forty years, our culture has been saturated with retellings of this myth, which Walter Wink has called “the Myth of Redemptive Violence.”<sup>90</sup>

76. *Id.*

77. *Id.* at 243–44.

78. *Id.* at 249–50.

79. *Id.* at 251.

80. *See id.*

81. *Id.* at 253.

82. *Id.*

83. *Id.* at 254.

84. *Id.* at 254–55.

85. *Id.* at 257–58.

86. *Id.* at 259.

87. *Id.* at 261.

88. Perhaps the most powerful of all stories are cosmogonies; myths that tell a creation story. *Cosmogony*, *supra* note 67. Cosmogonies are among the most formative of cultural myths because they tell us what the world is like, who we are within that structure, and how we should respond to the events that befall us.

89. *See* Edwards, *supra* note 37, at 54.

90. *See* WALTER WINK, *THE POWERS THAT BE: THEOLOGY FOR A NEW MILLENNIUM* 42–62 (1998).

Consider nearly any action movie starring Bruce Willis or Arnold Schwarzenegger.<sup>91</sup> Almost all modern action movies and many dramas are versions of this same mythical story—a story we know well.<sup>92</sup> Powerful evil forces threaten death and destruction. The customary societal responses to such a threat, for example, police forces and investigatory agencies, are shown to be impotent—perhaps even ridiculously so. We watch painfully ineffective efforts to combat the danger.<sup>93</sup> Then enters a strong hero, who comes from outside the established institutions and uses strategies unimagined by smaller, more limited bureaucratic minds. Acting outside established institutions, this hero is unconstrained by rules and regulations designed for less dangerous situations, and it is this lack of constraint that ultimately saves the day.

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91. 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 appropriately named “KAOS.”

92. A few examples of “hard action” movies using this plot are: *COLLATERAL DAMAGE* (Warner Bros. 2002), the *KILL BILL* (Miramax Films 2003) series, the *LETHAL WEAPON* (Warner Bros. 1987) series, the *MISSION IMPOSSIBLE* (Paramount Pictures 1996) series, the *TERMINATOR* (Hemdale Film 1984) series, the *X-MEN* (Twentieth Century Fox 2000) series, and most Steven Seagal movies.

Examples of lighter action movies (ample violence but some humor and designed for broader audiences, including children) are: the *BATMAN* (Warner Bros. 1989) series, *INDEPENDENCE DAY* (Twentieth Century Fox 1996), the *INDIANA JONES* (Paramount Pictures 1981) series, the *KARATE KID* (Columbia Pictures 1984) series, *KINDERGARTEN COP* (Universal Pictures 1990), the *MATRIX* (Warner Bros. 1999) series, the *MEN IN BLACK* (Columbia Pictures 1997) series, *ROBIN HOOD* (Universal Pictures 2010), the *SPIDER-MAN* (Columbia Pictures 2002) series, the *SUPERMAN* (Film Export A.G. 1978) 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 remarkable similarities between the *Enuma Elish* and 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 a third larger than any known shark. *Id.* The movie’s preview describes the shark: “It is as if nature had concentrated all its forces of evil in a single being.” *Id.* 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. *Id.* Brody is a hero, danger is subdued, and the people are restored to safety. *Id.*

93. For example, we see the police force and various governmental bureaucracies struggling with their cumbersome rules, their bureaucratic chains of command, their misguided customs, their occasional turf battles with other agencies, and especially with the constitutional limitations on what they are permitted to do.

Take the movie *Die Hard* and the blockbuster series it generated.<sup>94</sup> In this immensely popular series, spanning twenty-five years to date, John McClane (Bruce Willis) is a New York City policeman who is positioned on the outside of the police establishment.<sup>95</sup> His colleagues and superiors, who play by the book, do not respect him or his unconventional methods. In each plotline, a brilliant and powerful sociopathic leader engages in an evil plot, assisted by a team of skilled and well-resourced co-conspirators. The evil plot puts large numbers of innocent people in deadly danger. Establishment law enforcement officers rely on their bureaucratic policies and procedures, but these efforts prove pathetic in the face of the powerful evil team. Worse yet, established law enforcement personnel are trying to prevent McClane from doing what must be done. After a long and dangerous effort, in which McClane uses unexpected strategies well outside the rulebook, he ultimately saves the day and captures or kills the evildoers. In each plotline, McClane must not only fight the evil forces, but he must circumvent the establishment's efforts to prevent him from taking more effective but less conventional action.<sup>96</sup>

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94. DIE HARD (Twentieth Century Fox 1988); DIE HARD 2 (Twentieth Century Fox 1990); DIE HARD WITH A VENGEANCE (Twentieth Century Fox 1995); LIVE FREE OR DIE HARD (Twentieth Century Fox 2007); A GOOD DAY TO DIE HARD (Twentieth Century Fox 2013).

95. See, e.g., DIE HARD (Twentieth Century Fox 1988).

96. In the first movie in the series, *Die Hard*, a team of (seeming) terrorists take a group of hostages at a Los Angeles office building and proceed to make international political demands. It happens that McClane is in the building (far outside his jurisdiction) to try to reconcile with his estranged wife. Local law enforcement officers do not know him and view his efforts as interrupting their well-rehearsed plans for dealing with terrorist attacks. Their efforts continually make the situation worse and result in the deaths of more hostages. Ultimately McClane is able to defeat the antagonists despite the efforts of the FBI and local law enforcement to stop him. In *Die Hard 2*, terrorists take over the air-traffic-control system at Dulles International Airport. It happens that McClane is there to pick up his wife who is due to arrive on a flight. Again he is outside his jurisdiction. In addition to preventing the terrorists from causing the crashes of multiple incoming flights, he must contend with military commanders and airport police, all of whom try to prevent his plans. In the third movie, *Die Hard with a Vengeance*, McClane has been suspended from the police force, but the evil antagonist forces his superiors to involve him against their will. McClane realizes what no one else has—that the antagonist is relying on typical unthinking reactions by the police. Only McClane sees the true situation and is able to foil the deadly plan. In *Live Free or Die Hard*, the FBI has relegated McClane to a lowly job of transporting a witness, but it is McClane's efforts, all outside the official chain of command, that ultimately defeat the cyber-terrorists. The FBI arrives only to clean up after the action is over. In *A Good Day to Die Hard*, the final movie to date, McClane's son is engaged in an undercover CIA operation in Moscow. The operation goes wrong when Russian political operatives bomb a courthouse. Only McClane and his son, again operating outside official CIA channels, realize that the plan is actually to obtain weapons-grade uranium for terrorist plots. Together they

Movies designed primarily for an adult audience are one form of the retelling of the myth, but perhaps even more noteworthy are movies intentionally designed to incorporate humor and to reach an audience of children. Consider *Kindergarten Cop*,<sup>97</sup> where Detective John Kimble (Arnold Schwarzenegger) is pursuing Cullen Crisp, a big-time drug dealer. After years of pursuit, Kimble is finally able to arrest Crisp for murder, but Kimble's police associates, using traditional police methods, botch the management of the key witness, resulting in Crisp's release. Kimble now must try again to find and stop Crisp. He believes that Crisp will try to kidnap his son Dominic from Astoria, Oregon, so Kimble goes undercover as a kindergarten teacher at Dominic's school. Instead of using normal classroom methods, however, he teaches his kindergarten students to be junior police cadets. He has them march to his whistle and instantly obey all of his commands. Sure enough, Crisp finds and grabs Dominic, but the kindergarten class sees the grab. They immediately alert Kimble, obeying their police-cadet-style training. As a result, Kimble is able to kill Crisp and rescue Dominic. The child and his mother are now safe. Kimble retires from the police force and settles in Astoria, continuing to teach his students to be "junior cadets." We are left to believe that whenever danger threatens again, Kimble's students will remain obedient, and he will save the day.

Nearly all versions of the myth of redemptive violence find narrative ways to demonstrate the ineffectiveness of legal constraints. Often the story uses a combination of strategies to drive this lesson home: casting the hero as a police officer whose style and techniques have been rejected by his police peers;<sup>98</sup> describing cumbersome investigative protocols that foil effective police work;<sup>99</sup> portraying other officers or governmental officials as corrupt and in league with evil forces;<sup>100</sup> or even creating a narrative world in which no relevant legal systems or constraints exist.<sup>101</sup> After so many years of cultural saturation, this attitude toward established legal standards is well settled in American culture.<sup>102</sup>

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manage to kill the terrorists and prevent the loss of the uranium—all while working outside untrustworthy official CIA channels.

97. *KINDERGARTEN COP* (Universal Pictures 1990).

98. For example, see the *DIE HARD* (Twentieth Century Fox 1988) series; *EXIT WOUNDS* (Warner Bros. 2001); and all of the *LETHAL WEAPON* (Warner Bros. 1987) series.

99. See, e.g., *COLLATERAL DAMAGE* (Warner Bros. 2002).

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

101. For example, see the *JAMES BOND* (Eon Productions 1962) series.

102. I do not mean to imply that cinematic popular culture is the sole cause of these assumptions about law. Far from it. Many other cultural voices and sources—such as political discourse, media sources, talk radio, and internet

A few literature classes here and there may have examined the myth of redemptive violence and its modern retellings. That sort of inquiry would be, after all, right at the heart of the humanities. But more likely and more importantly, the study of literature will have taught its students a particular set of narrative skills. In their literature courses, students will have learned to notice a story's themes and the lessons it purports to teach.<sup>103</sup> They will have learned to question those lessons and compare them to other possible stories, teaching other sets of lessons. Courses in American history will have taught not only history's facts but also its constitutive themes.<sup>104</sup> What analytical skills might these humanities students bring to the project of reading and understanding the law?

### III. THE FOURTH CIRCUIT

Back to the courtroom, then. *Hamdi v. Rumsfeld* made its way to the Fourth Circuit, which promptly disposed of Hamdi's claims.<sup>105</sup> The court held that the executive had the power to detain Hamdi, essentially for as long as it chose, without contact with family or lawyers, and without the opportunity to face his accusers or offer a defense.<sup>106</sup> The Commander in Chief need only declare Hamdi to be an enemy combatant.<sup>107</sup> The untested hearsay declarations filed by a Special Advisor to the Undersecretary of Defense for Policy<sup>108</sup> were sufficient to dot the i's and cross the t's. According to the Fourth Circuit, the "vital purposes"<sup>109</sup> of the detention of enemy combatants are "directly derived from the war powers of Articles I and II,"<sup>110</sup> and therefore, the principles of separation of powers prohibit a court from inquiring further into Hamdi's status.<sup>111</sup>

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sites—have pictured law and its principles as misguided and impotent in the face of real danger.

103. Angela Bunyi, *Finding the Message: Grasping Themes in Literature*, SCHOLASTIC (Feb. 18, 2011), [http://www.scholastic.com/teachers/top\\_teaching/2011/02/helping-students-grasp-themes-in-literature](http://www.scholastic.com/teachers/top_teaching/2011/02/helping-students-grasp-themes-in-literature).

104. Diana Laufenberg, *Diana Laufenberg on Teaching History Thematically: The Pitfalls of Chronology*, TEACHINGHISTORY.ORG (Apr. 20, 2011), <http://teachinghistory.org/nhec-blog/24585>.

105. See *Hamdi v. Rumsfeld*, 316 F.3d 450, 475–76 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

106. See *id.* at 476.

107. See *id.* at 475.

108. See *id.* at 461. 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 appearance in the case) had been present in a zone of active combat. *Id.* at 459. Since it was "undisputed" that Hamdi had been apprehended in a zone of combat, he had no right to dispute the government's allegations. *Id.*

109. *Id.* at 465.

110. *Id.* at 466.

111. See *id.* at 473.

A reader grounded in the humanities might recognize that story. The Fourth Circuit was operating within the world of the *Enuma Elish*—the myth of redemptive violence—and the opinion was essentially a retelling of the myth. Look first at the opinion's opening paragraphs. As every student of literature knows, the storyteller's opening can tell us a great deal about the writer's narrative perspective and ultimate message. When we read, "It is a truth universally acknowledged that a single man in possession of a good fortune must be in want of a wife,"<sup>112</sup> we are immediately set within a particular cultural perspective. So too with, "It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness . . ." <sup>113</sup> Or, "It was a queer, sultry summer, the summer they electrocuted the Rosenbergs, and I didn't know what I was doing in New York."<sup>114</sup> The Fourth Circuit's *Hamdi* opinion is no different. It begins by describing the world as an overwhelmingly dangerous place, under attack by powerful evil forces.<sup>115</sup> After an opening paragraph baldly announcing its decision, the Fourth Circuit began to explain and justify its ruling, not by reference to Langdellian analysis, but rather by this narrative perspective:

[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 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>116</sup>

After setting *Hamdi*'s legal issue squarely in the midst of a world filled with overwhelming fear and unthinkable violence (the world of the *Enuma Elish*), the opinion next describes the deal with *Marduk*—a congressional grant of virtually unlimited executive 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

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112. JANE AUSTEN, *PRIDE AND PREJUDICE* 1 (James Kinsley ed., Oxford Univ. Press 1970) (1813).

113. CHARLES DICKENS, *A TALE OF TWO CITIES* 5 (Richard Maxwell ed., Penguin Books 2003) (1859).

114. SYLVIA PLATH, *THE BELL JAR* 1 (Harper & Row 1971) (1963).

115. See *Hamdi*, 316 F.3d at 459.

116. *Id.*

Afghanistan to subdue al Qaida and the governing Taliban regime supporting it.<sup>117</sup>

The Fourth Circuit opinion goes on to explain that this situation calls for near-total judicial deference to the executive branch, which must not be asked to justify its actions.<sup>118</sup> “While the ordinary § 2241<sup>[119]</sup> proceeding naturally contemplates the prospect of factual development,”<sup>120</sup> in cases such as this, a judicial inquiry into executive decisions risks impeding the executive’s ability to defend the country’s interests. As between the President’s claim of unbridled power and the rights of citizens to due process of law, the Fourth Circuit does not stutter: “The military has been charged by Congress and the executive with winning a war, not prevailing in a possible court case.”<sup>121</sup>

The opinion announces 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>122</sup> Courts must defer to the President’s war powers.<sup>123</sup> The government need only identify a legal authority and provide an affidavit of hearsay statements describing the government’s version of the circumstances of the case.<sup>124</sup> According to the Fourth Circuit, an American citizen in Hamdi’s situation cannot be allowed to rebut the government’s factual assertions: “We hold that no evidentiary hearing or factual inquiry . . . is necessary or proper . . . to avoid encroachment into the military affairs entrusted to the executive branch.”<sup>125</sup>

Owen Fiss has offered a succinct description of the Fourth Circuit’s decision:

[T]he court held that the Mobbs affidavit is in and of itself sufficient to establish that Hamdi is an enemy combatant and that no further inquiry is necessary. Accordingly, it refused to allow Hamdi to appear in court to contest Mobbs’s affidavit. It relieved Mobbs of the obligation to take the witness stand, either to repeat his sworn statement in open court or to be questioned by Hamdi’s lawyers or the trial judge. It did not allow Hamdi’s lawyers to engage in any discovery whatsoever or to consult with Hamdi himself. . . . [Thus, it] repudiated the

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117. *Id.* at 459–60 (citation omitted).

118. *Id.* at 474.

119. 28 U.S.C. §§ 2241–2255 (2012) provide the statutory authorization for the writ of habeas corpus.

120. *Hamdi*, 316 F.3d at 470.

121. *Id.*

122. *Id.* at 471.

123. *Id.* at 471–72.

124. *See id.* at 472–73.

125. *Id.* at 473.

most elementary understanding of the judiciary's responsibility under the Constitution.<sup>126</sup>

The Fourth Circuit saw normative judicial inquiry as worse than ineffective—it would be extraordinarily dangerous.<sup>127</sup> To defend us, the executive must be given a free hand. Military decision making must not be “saddl[ed] . . . with the panoply of encumbrances”<sup>128</sup> represented by a legal inquiry. In other words, the world is in the clutches of powerful and destructive evil forces. At any moment, these forces may attack again. Our only hope is a strong, unencumbered leader, who receives our unquestioning obedience and support. In the Fourth Circuit, the *Enuma Elish* is with us yet.

#### IV. THE SUPREME COURT

After the Fourth Circuit's decision, Hamdi's case proceeded to the Supreme Court.<sup>129</sup> The legal issue was the same: Does the Commander in Chief have the power to detain a citizen without due process of any kind, based solely on the government's unsubstantiated and untested hearsay assertions?<sup>130</sup> But at its core, the key question was which story the Court would choose. Would the Court see the legal issues through the lens of the *Enuma Elish* and the myth of redemptive violence, as had the Fourth Circuit? Or would the Court see the legal issues through a different lens—the story of the American Revolution and the founding of the nation?<sup>131</sup>

Like the Fourth Circuit, Justice Thomas saw the *Hamdi* case as one of the recurring versions of the *Enuma Elish*. He began his dissenting opinion with a summary of his view:

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. . . . The plurality utterly fails to account for the

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126. Owen Fiss, *In the Shadow of War*, 58 U. MIAMI L. REV. 449, 458–59 (2003).

127. *See id.* at 460–61 (explaining that ideally a court would hold the executive accountable through a judicial inquiry in order to allow the executive to continue to hold someone, whereas no inquiry allows the executive to act outside the Constitution).

128. *Hamdi*, 316 F.3d at 283–84.

129. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

130. *See id.* at 509.

131. There are many “American stories,” of course. For simplicity and clarity, this Article refers to the version of the American story that sees the overriding principle inherent in the founding of the nation as the protection of American citizens from tyrannical governmental power.

Government's compelling interests and for our own institutional inability to weigh competing concerns correctly.<sup>132</sup>

After this opening summary, Justice Thomas began the body of his opinion by restating the lesson of the *Enuma Elish*:

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." . . . [The Founders] chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation "ought to exist without limitation" . . . .

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security . . . . "It is essential to the protection of the community against foreign attacks."<sup>133</sup>

According to Justice Thomas, the Constitution describes the deal we strike with each succeeding President. The President agrees to take responsibility for our safety, and we agree to let him do what is necessary to defend us.<sup>134</sup> In matters of war, even on American soil, we promise not to question him or put institutional impediments in his way. This promise should sound familiar. It is a promise of long standing in the history of humanity—a promise at least 3250 years old—and Justice Thomas remains faithful to it to this day.

Later in his opinion, Justice Thomas is even more explicit about what drives his decision. He challenges Justice Scalia's position that the government should try Hamdi for treason and, if necessary for the prosecution, request Congress to suspend the writ of habeas corpus.<sup>135</sup> For Justice Thomas, this solution was not enough. The congressional ability to suspend the writ might not apply to a situation such as Hamdi's. He wrote, "Justice Scalia's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully."<sup>136</sup> Thus, for Justice Thomas, the Court should interpret the Constitution to ensure that it is lawful for the President to do what is necessary for the nation's security. Since a trial for treason might not succeed, the Court should clear the way for a more certain result. In other words, the myth of redemptive violence—the belief that the

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132. *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

133. *Id.* at 580.

134. "[T]he Court has recognized the President's . . . need to be free from interference." *Id.* at 582.

135. *Id.* at 592–94.

136. *Id.* at 594.

Commander in Chief must be unconstrained in the War on Terror—should guide our interpretation of constitutional text. Justice Thomas concluded that, “Hamdi has been deprived of a serious interest,” but that deprivation is justified by “the Government’s overriding interest in protecting the Nation.”<sup>137</sup>

While Justice Thomas saw the issue entirely through the lens of the myth of redemptive violence,<sup>138</sup> Justice Scalia’s dissenting opinion, joined by Justice Stevens, recognized the conflict between the *Enuma Elish* and the American story. While the opinions of the Fourth Circuit and Justice Thomas had set the context as the myth of redemptive violence,<sup>139</sup> Justice Scalia opened by recognizing the two opposing narrative perspectives:

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens’ constitutional right to personal liberty.<sup>140</sup>

Finding the American story to be of paramount importance but not willing to sacrifice national security, Justice Scalia then sets out a procedure he believes would remain true to the American story but still provide the executive with the power it needs: “Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution’s Suspension Clause . . . allows Congress to relax the usual protections temporarily.”<sup>141</sup>

In contrast to the narrative context of the opinions by the Fourth Circuit and Justice Thomas, the Scalia opinion places the case clearly in the context of his version of the American story, in particular the American story characterized as “[t]he struggle between subject and crown.”<sup>142</sup> Compare the opening of the Fourth Circuit’s opinion<sup>143</sup> with Justice Scalia’s opening narrative context:

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137. *Id.* at 598.

138. Owen Fiss has described the phenomenon as springing “from a fear of interfering with the executive in the conduct of the Afghanistan war or, for that matter, any war.” Fiss, *supra* note 126, at 457.

139. *See supra* text accompanying notes 67–90.

140. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

141. *Id.*

142. *Id.* at 557.

143. *Hamdi v. Rumsfeld*, 316 F.3d. 450, 459–60 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004).

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from 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. . . . [C]onfinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." . . . These words were well known to the Founders.<sup>144</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 Clause and Suspension Clause.<sup>145</sup> Over the next two pages, he tells a historical story—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.<sup>146</sup> Once the struggle crossed the pond, he placed the issue in the American context of "the Founders' general mistrust of military power permanently at the Executive's disposal."<sup>147</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>148</sup> He concluded his opinion by choosing the story of American liberty instead of the myth of redemptive violence. He wrote:

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."

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144. *Hamdi*, 542 U.S. at 554–55 (Scalia, J., dissenting) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131–33 (1765)).

145. *Id.* at 555–56 (citing THE FEDERALIST NO. 84 (Alexander Hamilton)).

146. *Id.* at 557–58.

147. *Id.* at 568.

148. *Id.* at 569.

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 security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*.<sup>149</sup> 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>150</sup>

Having remained true to the American story, Justice Scalia then suggested a constitutional procedure he believed would enable the Commander in Chief to operate without too much restraint: “There are times when military exigency renders resort to the traditional criminal process impracticable. . . . Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature’s explicit approval of a suspension [of the writ of habeas corpus].”<sup>151</sup> Justice Scalia saw the Suspension Clause as designed to function as a “safety valve” to provide the “exercise of extraordinary authority because of a crisis.”<sup>152</sup> In fact, “[w]hen the writ is suspended, the Government is entirely free from judicial oversight.”<sup>153</sup> If the government desires virtually unlimited power to detain a citizen, it need only ask Congress to suspend the writ. Thus, Justice Scalia recognized the narrative lens of the myth of redemptive violence and sought a way to accommodate it, even within his view of the American story. As he pointed out, “[t]he Government has been notably successful in securing conviction, and hence long-term

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149. Popularly translated as “in time of war . . . the laws are silent.” *Inter Arma Silent Leges*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/inter%20arma%20silent%20leges> (last visited Mar. 23, 2016).

150. *Hamdi*, 542 U.S. at 578–79 (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 8, at 33 (Alexander Hamilton)). 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 arising from his captivity. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES (Oct. 12, 2004), [http://www.nytimes.com/2004/10/12/world/middleeast/us-releases-saudi-american-it-had-captured-in-afghanistan.html?\\_r=0](http://www.nytimes.com/2004/10/12/world/middleeast/us-releases-saudi-american-it-had-captured-in-afghanistan.html?_r=0). Hamdi also had to agree to comply with strict travel restrictions, including notifying the Saudi government if he ever plans to leave the kingdom. See, e.g., Bartelme, *supra* note 47; *Man Held as Enemy Combatant To Be Freed Soon*, CNN.COM (Sept. 23, 2004, 7:38 AM), <http://www.cnn.com/2004/LAW/09/22/hamdi/index.html>.

151. *Hamdi*, 542 U.S. at 561–62 (Scalia, J., dissenting).

152. *Id.* at 562–63 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring)).

153. *Id.* at 563–64.

custody or execution, of those who have waged war against the state.”<sup>154</sup> Justice Scalia therefore found a procedural path for the Commander in Chief to achieve the power he sought.

Moving to the opposite end of the spectrum, Justice Souter, joined by Justice Ginsburg, rejected outright the myth of redemptive violence. Again the first clue comes in the choice of the concurring opinion’s opening sentences:

According to Yaser Hamdi’s petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side. It is undisputed that the Government has not charged him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an Executive designation of Hamdi as an “enemy combatant,” the Government denied him the right to send or receive any communication beyond the prison where he was held and, in particular, denied him access to counsel to represent him.<sup>155</sup>

As the opinion continues, Justice Souter presents Hamdi’s case entirely through the constitutive lens of American history, including the infamous detentions of Japanese Americans during World War II.<sup>156</sup> Even in the face of the fears promulgated by the myth of redemptive violence, the hard-won freedoms secured by the American Revolution and the founding of the Nation should not once again be bartered away.<sup>157</sup> Thus, for Justice Souter, the question is not what due process rights Hamdi might or might not have while detained; rather, Hamdi’s detention itself was unauthorized. The opinion sets the issue in the context of the Non-Detention Act,<sup>158</sup> which had replaced the Emergency Detention Act pursuant to which Korematsu and others had been detained.<sup>159</sup> Justice Souter found “powerful reason to think that [the Non-Detention Act] was meant to require clear congressional authorization before any citizen can be placed in a cell.”<sup>160</sup> Justice Souter did not read the Authorization for Use of Military Force as providing that kind of “clear congressional authorization.”<sup>161</sup> For the very reason that the

154. *Id.* at 577.

155. *Id.* at 539–40 (Souter, J., concurring).

156. “Congress meant to preclude another episode like the one described in *Korematsu v. United States*, 323 U.S. 214 (1944).” *Hamdi*, 542 U.S. at 542 (Souter, J., concurring).

157. *Id.* at 542–43 (Souter, J., concurring).

158. *Id.* at 542.

159. *Id.*

160. *Id.* at 543.

161. *Id.* at 543, 547.

Commander in Chief is charged with the responsibility for national security, the balance between safety and freedom should be entrusted elsewhere. Justice Souter wrote:

For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. . . . [J]ust as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.<sup>162</sup>

Thus, Justice Souter rejected outright the lessons of the *Enuma Elish*. In America, no matter how frightening the danger, the President cannot claim unquestioned authority and obedience where the rights of citizens are concerned. The President does not have the unconstrained authority to imprison an American citizen without charges and without judicial process. If the President wishes to detain a citizen in such a manner, he must seek authorization from Congress.

Like Justice Scalia's dissent, Justice O'Connor's plurality opinion recognized both stories, but chose the lens of the American story as the constitutive view. Justice Scalia proposed an alternate strategy to empower the Commander in Chief, however, while Justice O'Connor struck a different and far less deferential balance. Again the opening factual recitation provides a glimpse of the balance she sought:

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States . . . ."

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born [an American citizen] in Louisiana in 1980, Hamdi moved with his family to

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162. *Id.* at 545 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance . . . and eventually was turned over to the United States military. [He was] detained and interrogated . . . in Afghanistan [and then at] Guantanamo Bay . . . [U]pon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia [and then] to a brig in Charleston, South Carolina. The Government contends that Hamdi is an “enemy combatant,” and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the determination that access to counsel or further process is warranted.<sup>163</sup>

This factual description sets the issue in the context of the events of September 11, but it nearly immediately begins telling Hamdi’s story as well. This particular recitation is strikingly human. In both Justice Souter’s concurrence and Justice Scalia’s dissent, Hamdi appears second-hand, almost entirely through his father’s assertions of legal arguments.<sup>164</sup> Here, however, Hamdi is presented as a real person rather than as an abstraction. We are introduced to him first as a man and as a man detained.<sup>165</sup> Then a full-stop, five-word sentence gives us his name.<sup>166</sup> Then we see him as a newborn citizen in Louisiana<sup>167</sup> and as a child moving to Saudi Arabia with his parents.<sup>168</sup> We learn that somehow he came to reside in Afghanistan, but we do not know how that came to be.<sup>169</sup> Then we see him seized.<sup>170</sup> More than any of the other opinions in

163. *Id.* at 510–11 (plurality opinion).

164. Justice Souter’s factual recitation consists of little more than this sentence:

According to Yaser Hamdi’s petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side.

*Id.* at 539 (Souter, J., concurring). Justice Scalia’s factual recitation consists of two sentences:

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time.

*Id.* at 554 (Scalia, J., dissenting).

165. “This case arises out of the detention of a man . . .” *Id.* at 510 (plurality opinion).

166. “His name is Yaser Esam Hamdi.” *Id.*

167. “Born in Louisiana . . .” *Id.*

168. “Hamdi moved with his family to Saudi Arabia as a child.” *Id.*

169. “By 2001, . . . he resided in Afghanistan.” *Id.*

170. “At some point that year, he was seized by members of the Northern Alliance . . .” *Id.*

the case, the plurality opinion recognizes Hamdi as a human being who has a story to tell—a story the government has prevented him from telling and us from hearing.

It comes as no surprise, then, that the plurality was unwilling to sacrifice the freedoms at the core of the founding of the Nation, even in the hope of greater safety and protection from the Tiamats of the world. Justice O'Connor 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. [S]ee 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>171</sup>

These five opinions in the *Hamdi* case demonstrate how legal outcomes can be dictated not so much by deductive argument and traditional Langdellian legal analysis but rather by the choice of constitutive myth. Both Hamdi and the government offered traditional legal arguments. Most of those arguments were logical and reasonable, but I would suggest that those Langdellian arguments did not decide the case. The real battle lay between the story of the nation's founding and its subsequent history, on the one hand, and the story of redemptive violence on the other. The Fourth Circuit and Justice Thomas saw the arguments through the lens of redemptive violence—the *Enuma Elish*—and thus allowed the myth to play a key role in legal decision making.<sup>172</sup>

The majority of the Justices, however, saw the arguments primarily through the lens of the American story, protecting the liberty of citizens as against an unconstrained executive. Though they fashioned their resolutions differently, eight members of the Court saw the American story as controlling, rejecting the key lesson of the *Enuma Elish* that we must not impede our leader and protector.<sup>173</sup> The four-Justice plurality constrained the Commander in Chief's power to detain without providing due process rights.<sup>174</sup>

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171. *Id.* at 532 (citation omitted).

172. 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.

173. See *Hamdi*, 542 U.S. at 507–79.

174. *Id.* at 533–34 (plurality opinion).

The two-Justice concurrence would have constrained the Commander in Chief's power even to detain without congressional permission.<sup>175</sup> The two-Justice dissent would have constrained his power to detain without prosecution for treason and would have constrained his power to avoid habeas proceedings without congressional approval.<sup>176</sup> Only Justice Thomas, standing alone, saw the case as the Fourth Circuit had seen it—as yet another example of the myth of redemptive violence, in which we must remain faithful to our promise to obey our leader without question.<sup>177</sup>

#### V. THE NEED FOR LAWYERS AND JUDGES GROUNDED IN THE HUMANITIES

As the opinions of Justice Thomas and the Fourth Circuit demonstrate, stories like the *Enuma Elish* remain a powerful force in law. Through the myth's foundation of fear and its insistence on obedience to a powerful leader, it has become a lens through which large portions of the culture, including some judges, view the world. In fact, for many, this Babylonian story is truer today than is any version of the American story. If we had a better grounding in the humanities, we might be more willing and more able to cross-examine the myth: Does revenge really heal us? Is law, along with its structures of governance, weak and ineffective? Is unconstrained violence the only effective answer to the worst of human evil? And perhaps most important, does our safety require blind obedience to a strong leader?

If we accept a myth—any myth—without question, we have given up a portion of our freedom. The unseen work of the myth creates our assumptions and constrains our options. But we cannot cross-examine a myth unless we recognize its work, becoming aware of its fingerprints on the legal issues of our day. It is the humanities that can teach us to notice that we have heard the story before. And once we recognize the story, it is the humanities that can teach us to question it. The study of literature teaches us to notice the lessons a story teaches and to ask whether those stories ring true. The study of history teaches us to recognize the many and varied versions of our American story and to struggle to make sense of them. The study of logic teaches us to raise our eyebrows when we hear the argument that (1) the government has not permitted an incarcerated citizen to contest his detention; (2) therefore the government's factual assertions are uncontested; and (3) therefore

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175. *Id.* at 551–52 (Souter, J., concurring).

176. *Id.* at 572 (Scalia, J., dissenting).

177. *Id.* at 594 (Thomas, J., dissenting).

the citizen does not have the right to contest the government's factual assertions.<sup>178</sup>

The study of rhetoric and philosophy teaches us that the meaning of any text—even a constitutional text—is not settled at the time of its writing or at any time thereafter, but rather is constantly subject to renegotiation.<sup>179</sup> If we have thought about philosophy and rhetoric, we will realize that in cases like *Hamdi*, we must, once again, negotiate the meanings of the Article I and II war powers,<sup>180</sup> the Suspension Clause,<sup>181</sup> the writ of habeas corpus,<sup>182</sup> the Fifth and Fourteenth Amendments' protections of due process,<sup>183</sup> the Non-Detention Act,<sup>184</sup> the Force Resolution,<sup>185</sup> and the doctrine of the separation of powers.<sup>186</sup>

For these tasks, Langdellian dialectic argument will not be enough. To examine a culturally powerful myth like the *Enuma Elish*, we must be ready to explore counterstories<sup>187</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.<sup>188</sup>

To be clear, we do not need humanities classes to teach us the myth of redemptive violence; echoes of the myth are all around us.<sup>189</sup> But as *Hamdi v. Rumsfeld* shows, we do need the humanities to remind us that the myth is only a narrative frame, one among

178. *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003), *vacated*, 542 U.S. 507 (2004). The logical problems with this set of propositions may seem obvious when they are set out as they are here, but imbedded in the Fourth Circuit's opinion, which conveniently equates Hamdi's position with the uninformed speculations offered by his father, they are less obvious. In fact, I have not yet seen a commentary on the Fourth Circuit's opinion that challenges this logical weakness.

179. See Bartrum, *supra* note 22, at 260.

180. U.S. CONST. art. I, § 8, cl. 11; *id.* art. II, § 2.

181. *Id.* art. I, § 9, cl. 2.

182. *Id.*

183. *Id.* amend. V; *id.* amend. XIV, § 1.

184. 18 U.S.C. § 4001(a) (2012).

185. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

186. U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

187. Our counterstories must stand ready to be cross-examined as well.

188. I do not for a moment mean that a judge should simply pick the story she likes best. Sometimes the legal result will be clearly dictated by mandatory authority—constitutional provisions, statutes, or governing case law. But as all lawyers know, many cases are not clearly decided by existing authority, and such is especially true at the highest appellate levels. When Langdellian analysis leaves room for multiple answers, the humanities can offer other helpful analytical processes.

189. "War always poses a challenge to law. It involves a pursuit of interests through violence rather than reason and often excites base fears and passions. The wars in Afghanistan and Iraq, and the most shapeless of all wars—the war on terrorism—are not exceptions. A practice of lawlessness has grown in the shadow of these wars . . ." Fiss, *supra* note 126, at 469–70.

many, and that its lessons are not necessarily an accurate view of the world or an appropriate prescription for constitutional decision making. We also need the humanities to teach us our own story, the American story in all its versions, and to remind us that it is not to be bartered away out of fear and in exchange for false promises of salvation.

### CONCLUSION

So what can the humanities teach us about law? Today the humanities occupy a small corner of the law school curriculum, “refracting and redacting”<sup>190</sup> the law from a safe distance. Might they instead become a more vibrant partner in legal education? Might law and humanities scholarship escape the pages of law reviews and teach us something important about how to read and understand the law? I hope that these small examples have pointed us in the direction of an answer, one consistent with a vision of law quite different from Langdell’s. James Boyd White has given us such a vision. He critiqued the law as Langdell saw it and offered us a richer view; a view that might justify a life well lived in the law. Looking back over his long and remarkable career, he wrote:

I have been resisting an image of law as rules and policy, but behind those things is a deeper vision: of law as abstract, mechanical, impersonal, essentially bureaucratic in nature, narrowing rather than broadening the human capacity for experience, understanding, imagination, and empathy. To focus on the law as a system, and not on what happens when that system meets the world—and the people of the world—is to strip it of its difficulty, its life, its meaning, and its value.

For it is at this moment, when the law meets the world—in the work of lawyer, judge, or teacher—that it becomes most fully alive. This moment contains within it the seeds of resistance to the forces of mindless empire and control, for every case is an opportunity for newness of thought, for creativity and surprise, for the introduction into the world of power an unrecognized voice, language, or claim.

In the moment of speech, or writing, there is always the possibility that one can bring the world into new life.<sup>191</sup>

Despite the long theoretical dominance of legal realism in *scholarly* circles, much of legal *education* as we know it has remained mired in Langdell’s formalist vision of the law—a vision of a narrow, abstract, impersonal system bereft of human meaning and value. But we can do better. We can approach law, and teach our students to approach law, not as a set of rules but as a form of life.

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190. See Meyler, *supra* note 24, at 384.

191. White, *supra* note 38, at 402.

If we decide to take up this life-giving journey, it is the humanities that can show us the way.