

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

2010

### A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation

Lolita Buckner Inniss

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Constitutional Law Commons](#), [Law and Race Commons](#), [Legal History Commons](#), [Litigation Commons](#), and the [Public Law and Legal Theory Commons](#)

---

#### Citation Information

Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT. 649 (2010), available at <https://scholar.law.colorado.edu/faculty-articles/1356>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).



DATE DOWNLOADED: Fri May 14 15:15:06 2021

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

Lolita Buckner Inniss, A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation, 24 St. JOHN's J. LEGAL COMMENT. 649 (2010).

ALWD 6th ed.

Inniss, L. ., A critical legal rhetoric approach to in re african-american slave descendants litigation, 24(4) St. John's J. Legal Comment. 649 (2010).

APA 7th ed.

Inniss, L. (2010). critical legal rhetoric approach to in re african-american slave descendants litigation. St. John's Journal of Legal Commentary, 24(4), 649-696.

Chicago 17th ed.

Lolita Buckner Inniss, "A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation," St. John's Journal of Legal Commentary 24, no. 4 (Summer 2010): 649-696

McGill Guide 9th ed.

Lolita Buckner Inniss, "A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation" (2010) 24:4 St John's J Legal Comment 649.

AGLC 4th ed.

Lolita Buckner Inniss, 'A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation' (2010) 24(4) St. John's Journal of Legal Commentary 649.

MLA 8th ed.

Inniss, Lolita Buckner. "A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation." St. John's Journal of Legal Commentary, vol. 24, no. 4, Summer 2010, p. 649-696. HeinOnline.

OSCOLA 4th ed.

Lolita Buckner Inniss, 'A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation' (2010) 24 St John's J Legal Comment 649

Provided by:

William A. Wise Law Library

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

# A CRITICAL LEGAL RHETORIC APPROACH TO IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS LITIGATION

LOLITA BUCKNER INNISS\*

## INTRODUCTION

Critical legal rhetoric is a means of explicating the way in which rhetoric and ideology relate to law. It names the rhetorical practices and clarifies the ideologies that go into making up the law's articulations. Critical legal rhetoric is, in other words, a way of understanding not only *why* law performs its work, but *how*. Critical legal rhetoric is an analytical approach that concerns itself with both the structural and material aspects of a text in order to trace the recurring forms that inhabit both the legal and the public sphere.<sup>1</sup> The chief methodological framework for performing critical legal rhetorical analysis comes from the work of Marouf Hasian, Jr., particularly his schema for analysis, which he calls "substantive units" in critical legal rhetoric.<sup>2</sup> Critical legal rhetoric is a potent tool for exposing the way in which the public ideologies of society and the private ideologies of jurists, legislators and other legal actors are manifested in legal and law-like pronouncements.<sup>3</sup>

\* Professor, Cleveland Marshall College of Law, Cleveland State University, A.B. Princeton University, J.D. University of California, Los Angeles, LL.M. Osgoode Hall, York Law School, University, PhD Candidate, Osgoode Hall Law School, York University. This article is adapted in part from a thesis submitted to the York University Faculty of Graduate Studies in partial fulfillment of the requirements for the degree of Master of Law. The author thanks Professors Obiora Okafor and Sonia Lawrence of Osgoode Hall Law School, York University, Professor Anthony Farley of Boston College Law School, Professor Toni Williams of the University of Kent Law School, and Professors Mark Sundahl and Brian Ray of Cleveland Marshall College of Law, Cleveland State University for reading earlier drafts of this article.

<sup>1</sup> MAROUF HASIAN, JR., *LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE* 14 (Westview Press 2000) ("Because critical rhetoricians are concerned with both the structural and material dimensions of both textual and visual material, they try to find perspectives that allow them to trace the recurring forms that circulate in both the legal and public spheres.").

<sup>2</sup> *Id.* (explaining that Hasian's substantive units of analysis "sometimes involve macroanalysis, such as Michel Foucault's discussions of *epistemes*, or they can involve microanalysis, where researchers look at syntax or the semantic meanings of a particular term").

<sup>3</sup> See Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT'L & COMP. L. Q. 901, 901-02 (1999) (discussing what constitutes law and finding that soft law, unlike hard

In this article I apply critical legal rhetoric to the judicial opinion rendered in response to the Defendants' Motion to Dismiss Plaintiffs' Second Amended and Consolidated Complaint in *In Re African-American Slave Descendants*.<sup>4</sup> This case concerned the efforts of a group of modern-day descendants of enslaved African-Americans to obtain redress for the harms that slavery caused not only to their ancestors, but also to themselves.<sup>5</sup> While it does not concern well-known litigants or high profile issues, and therefore figured little in the broader public consciousness, the case is important because it documents the dramatic struggles of blacks for racial inclusion, which are emblematic of the wider American effort to craft an inclusive liberal culture of citizenship.<sup>6</sup> As such, it lends itself especially well to a critical legal rhetorical analysis. Because the focus of this article is a particular methodological approach to legal rhetorical analysis, I do not address the substantive legal nature of reparations claims more broadly, as has been done in some other recent articles.<sup>7</sup> Instead, I use reparations and slavery as the context for illustrating critical legal rhetoric. after

law, lacks the power to bind, despite offering normative guidance); see also Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 499 (2006) (expounding on the soft vs. hard law debate and discussing the "relatively recent blossoming of multiple soft law tools and the calls for a soft harmonization of European private law[s] [that] have invited reflection on the genealogy of soft law.").

<sup>4</sup> *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d. 721, 726 (N.D. Ill. 2005) (discussing plaintiff's complaint, which "asks the courts to reexamine a tragic period in our Nation's history [slavery] and to hold various corporate defendants liable for the commercial activities of their alleged predecessors before, during, and after the Civil War in America").

<sup>5</sup> This case concerns what one scholar has called a "historical injustice," a matter belonging to a class of wrongs that share key characteristics: "(a) they were committed or sanctioned at least a generation ago; (b) they were committed or authorized by one or more collective agents, such as a government or corporation; (c) they harmed many individuals; and (d) they involved violations of fundamental human rights, often discrimination based on race, religion, or ethnicity." Shelley Buchanan, *Questioning the Political Question Doctrine: Inconsistent Applications in Reparations and Alien Tort Claims Act Litigation*, 17 CARDOZO J. INT'L & COMP. L. 345, 361 (2009), citing Katrina Miriam Wyman, *Is There a Moral Justification for Redressing Historical Injustices?* 61 VAND. L. REV. 127, 134 (2008).

<sup>6</sup> See MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE* xii (Vintage Books 2004) (discussing various "legal cases that allow us to peer into a history of resistance to principles of racial exclusion, that for centuries, were central to American conceptions of national identity" and how "[t]he struggle of Afro-Americans for individual and social justice forcefully challenged those principles and helped to fashion a more inclusive, liberal culture of citizenship in our country.").

<sup>7</sup> See e.g., Eric K. Yamamoto, Kim, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 15-39 (2007); Tara Kolar Ramchandani, *Judicial Recognition of the Harms of Slavery: Consumer Fraud as an Alternative to Reparations Litigation*, 42 HARV. C.R.-C.L. REV. 541 (2007); Eric K. Yamamoto, Kim et al., *American Racial Justice on Trial--Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1295-1310 (2003); Robert Westley, *Bridging the Public/Private Law Divide in African-American Reparations Discourse*, 55 RUTGERS L. REV. 301 (2003).

introducing the *African-American Slave Descendants* case, I explain the genealogy of critical legal rhetoric as a prelude to a discussion and application of the methodology. I briefly trace the evolution and meaning of the term ‘rhetoric’ and examine the relationship between rhetoric and law. I then explore the connection between rhetoric and ideology, which is crystallized in the form of the ideograph and its use as a tool of what is known as critical rhetoric. Finally, I show how critical legal rhetoric is achieved by bringing critical rhetoric to law, and thereafter apply critical legal rhetoric to the case of *In Re African-American Slave Descendants*.

## I. THE CASE OF IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS

### A. The Facts

The case began in 2002, when nine lawsuits were filed around the country against various American corporations. On October 25, 2002, the Judicial Panel on Multidistrict Litigation transferred these actions for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. The suits were consolidated in federal court in the Northern District of Illinois, where the plaintiffs filed a First Consolidated and Amended Complaint on June 16, 2003.

#### a. The Plaintiffs

The plaintiffs in these cases included the following: Deadria Farmer-Paellmann<sup>8</sup> (who has often served as the leader and spokesperson for the class of plaintiffs), Mary Lacey Madison, Andre Carrington, Richard Barber, Sr., Hannah Jane Hurdle-Toomey, Marcelle Besteda Porter, Julie Mae Wyatt-Kervin, Emma Marie Clark, Ina Bell Daniels Hurdle McGee, Antoinette Harrell Miller, as well as a group of anonymous plaintiffs, many

<sup>8</sup> Deadria Farmer-Paellmann’s story of how she became involved in the suit is compelling. Having developed an interest in the notion of reparations generally, she first considered the possibility of suing the federal government for its role in creating and maintaining slavery. When her research suggested that this would be difficult given the failure of other such suits, she turned instead to researching the role of private entities. She attended law school to further her research and gain the skills necessary to prosecute such a suit. In the course of her work, she uncovered evidence that Aetna Insurance had insured the lives of slaves for the benefit of their owners and thereby profited from slavery. She also determined that predecessors to one financial services institution, JP Morgan Chase, had “accepted approximately 13,000 enslaved individuals as collateral on loans and took possession of approximately 1,250 enslaved individuals.” Nick Mathiason, *British Firms Could Be Sued for Slave Trade*, THE OBSERVER, July 1, 2007, at 3. Her work led to Aetna’s offer of a public apology for its involvement in slavery. Ms. Paellmann’s discovery also led the state of California and other state and municipal jurisdictions to compel other companies to search their records for involvement in slavery and to make this information available to the public. Jason Levy, *Slavery Disclosure Laws: For Financial Reparations or for “Telling the Truth?”*, 2009 COLUM. BUS. L. REV. 468, 472-473 (2009).

of whom, it was alleged, had been held as slaves well after the period on legal slavery ended in the United States. The plaintiffs filed on behalf of themselves and others similarly situated, thus including in the plaintiff class all of the descendants of African-ancestored persons who had been enslaved in the United States.

b. The Defendants

The following companies were defendants: FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase Manhattan Bank, Westpoint Stevens Inc., RJ Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc., Loews Corporation, Canadian National Railway, Southern Mutual Insurance Company, and American International Group ("AIG"). On January 26, 2004, United States District Court Judge Norgle granted a joint motion to Dismiss filed by all defendants in response to the First Amended and Consolidated Complaint, while giving leave for the plaintiffs to re-file their claims. On April 5, 2004 the plaintiffs filed a Second Amended Consolidated Complaint on behalf of themselves and a plaintiff class consisting of the same plaintiffs.<sup>9</sup> It is the judicial opinion disposing of this Second Amended Consolidated Complaint that is the focus of this article.

*B. The Gravamen of the Complaint*

The crux of the complaints filed in this action was that various American corporations such as CSX, Aetna, and Fleet Bank had profited from slavery by either insuring slaves, lending to owners, or, in some cases, even owning slaves, and that those who descended from slaves have various civil claims arising from this corporate involvement in slavery. The claims asserted by the plaintiffs were conspiracy, conversion, unjust enrichment, replevin, violation of Title 42, § 1982 (guaranteeing property rights of all citizens), intentional infliction of emotional distress, negligent infliction of emotional distress, and several counts alleging violation of state-based Unfair Deceptive Acts and Practices (UDAP) in the jurisdictions where the cases were initially filed (New York, Texas, California, Illinois, Louisiana

<sup>9</sup> Amended Complaint at 5, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, (E.D.N.Y. Apr. 6, 2004) (stating that plaintiffs are filing on behalf of themselves, their enslaved ancestors, and all other persons similarly situated alleging nine separate complaints of various unjust enrichment and human rights violations regarding the trans-Atlantic slave trade).

and New Jersey.) The relief requested included an accounting of profits, disgorgement of profits, creation of an “independent historical Commission” to study defendants’ actions, a constructive trust, restitution, and compensatory and punitive damages arising out of the named defendants’ alleged past and continued wrongful conduct relating to the institution of slavery. On July 6, 2005, Judge Norgle dismissed the Second Amended Consolidated Complaint once more in response to defendants’ joint motion to dismiss. This dismissal was with prejudice.<sup>10</sup>

### *C. The Dismissal*

Judge Norgle asserted four bases for dismissal:

- 1) lack of standing;
- 2) failure to state a claim on which relief could be granted;
- 3) debarment of the suit under the political question doctrine;
- 4) debarment of the suit under relevant statutes of limitations;

In reaching his decision on dismissal, Judge Norgle went well beyond the legal precedents and addressed the social and political history of slavery. He also attempted to formulate a definition of reparations by considering the political, moral and legal justifications for slave reparations. Norgle left for last the legal grounds for his decision. This conclusion suggests that there is a clear delineation between the legal, the political, and the moral.

### *D. Why this Case?*

The case of *Slave Descendants* is novel in many respects. It involves nine individual plaintiffs who have sued several corporations for damages because those corporations allegedly profited from the system of chattel slavery imposed on African-Americans in the United States. Although

<sup>10</sup> See *Slave Descendants*, 375 F. Supp. 2d at 781 (dismissing plaintiffs’ complaint with prejudice and holding “Plaintiff’s attempt to bring these claims more than a century after the end of the Civil War and the formal abolition of slavery fails”); see also *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006) (noting that on December 13, 2006, the panel, consisting of Seventh Circuit Judges Easterbrook, Posner and Manion upheld, at the pleading stage, the consumer protection claim predicated on the defendants’ failure to disclose to consumers their past involvement in slavery; however, Posner stated, “This claim has nothing to do with ancient violations and indeed would be unaffected if the defendants’ dealings with slaveowners had been entirely legal. It is a complaint of consumers being deceived because sellers have concealed a material fact. The injury is the loss incurred by buying something that one wouldn’t have bought had one known the truth about the product.”); see also Jeff Coen, *New Day in Court for Reparations: Plaintiffs Appeal Ruling in Suit Seeking Pay for Slaves’ Descendants*, CHI. TRIB., Sept. 28, 2006 (discussing plaintiffs’ argument before the Seventh Circuit of the United States Federal Court of Appeals that the suit should be reinstated and allowed to proceed to trial).

there is an already significant and constantly growing body of cases on the general topic of African-American reparations and other efforts at seeking compensation for slavery,<sup>11</sup> the claims in *African-American Slave Descendants* is unique in its particular approach to redress African-American slavery. The plaintiffs argued novel causes of action and targeted entirely private nongovernmental entities as defendants. However, beyond its potential impact on the plaintiffs and the defendants, the case may be viewed as a localized narrative of the relationship between the black actor, the state and the polity. Hence, the opinion rendered in the Motion to Dismiss in the case of *African-American Slave Descendants Litigation*<sup>12</sup> is an ideal vehicle for illustrating critical legal rhetoric because it combines a number of elements that highlight an ongoing but frequently little remarked concern of African-ancestored people in the United States: the effort to receive reparations for their enslavement. Had the case proceeded to a full trial, and had the plaintiffs won, the case had the potential to reverse hundreds of years of assertions about the responsibility of public and private actors who helped to sustain chattel slavery in the United States. Though the case was dispensed with in pretrial proceedings, the case is arguably what one observer has called a classic "legal symbol:" it transcends its own context, and its meaning both depends upon and influences group assumptions about race, slavery and law in the United States.<sup>13</sup>

<sup>11</sup> See generally *Obadele v. United States*, 52 Fed. Cl. 432, 433 (2002) (stating that Plaintiffs sought compensation from the United States to redress wrongs that their ancestors suffered as a result of being African-American); *Bell v. United States*, 2001 U.S. Dist. Lexis 14812 (N.D. Texas 2001) at \*2 (explaining that petitioners are bringing their suit as a special damage claim for slavery reparation); *Cato v. United States*, 70 F.3d 1103, 1103 (9th Cir. 1995) (listing the elements of plaintiff's claim arising out of wrongdoings from slavery); *Berry v. United States*, 1994 U.S. Dist. Lexis 9665 (N.D. Cal. 1994) at \*9 (discussing plaintiff's claim for compensation from wrongs from slavery); *Johnson v. McAdoo*, 45 U.S. App. D.C. 440 (1916) (seeking to sue the United States over the rate charged for the exportation of sugar). But see *Pigford v. Glickman*, 185 F.R.D 82 (1999) (describing black farmers' claims of redress for the federal government's failure to fund farm loans as it pledged to do, which resulted in a capitulation by the government and a settlement on behalf of black farmers whose plight in many ways resulted from slavery and Jim Crow; however, the merits of the case did not rely upon injuries from slavery, but rather from the government's actions dating from the late twentieth century: the judge who approved the settlement suggested the slavery connection in his opinion, referencing "Forty Acres and a Mule" and the government's broken promises to blacks, but noted that the specific promises in dispute came well after the period of slavery; Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130, 162-66 (2005) (providing a discussion of *Pigford v. Glickman*). For a broad discussion of the various theories employed in reparations cases see Eric K. Yamamoto, Kim, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1,15-39 (2007).

<sup>12</sup> In re African-Am. Slave Descendants Litig., 375 F.Supp. 2d 721 (N.D. Ill. 2005).

<sup>13</sup> See Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1112 (2005) (defining a case that appears in symbolic form as one that, among other things, "is recycled for an associated saying or quotation that transcends its original context"); In this respect, *Slave Descendants* may also be classified as what Weiner calls a "black trial": "[a] legal event[] that figure[s] symbolically and dramatically in American culture by making public certain basic ideological conflicts about race and



I go next to a brief discussion of rhetoric.

## II. *The Meaning of Rhetoric*

At the heart of critical legal rhetoric is rhetoric itself. By rhetoric, I refer to that branch of literary theory that concerns itself with how language operates, especially how it operates in argument. Though the term rhetoric is quite frequently employed in the pejorative sense of putting forward meaningless, intellectually void discourse for the sole purpose of persuading others to embrace a point of view, the reach of rhetoric is well beyond this jaundiced view. Rhetoric may be traced from its classical antecedents all the way to its modern incarnation as a significant tool in expressions of law such as the judicial opinion.

Rhetoric, one of the three original liberal arts in ancient Greece, has a long and distinguished pedigree. Although in earliest times the focus of rhetoric was oral communication, over the centuries rhetoric has come to encompass written communication as well. Rhetoric, as opposed to dialectical or logical approaches, was the province of civic discourse, law, and politics. Aristotle, in the *Art of Rhetoric*, indicates that while both rhetoric and dialectic are epistemological devices and, hence, utilized for truth seeking, the realm of rhetoric is ultimately the deliberative or the adjudicatory.<sup>14</sup> Even well before Aristotle, rhetoric was firmly established as a communicative technique for shaping public knowledge and public culture. Consider, for example, references to the use of rhetoric in the work of Homer.<sup>15</sup>

In the continuing journey to understand the nature of legal

civic life." MARK S. WEINER, *supra* note 6, at xi. Weiner describes black trials as not strictly limited to the conduct of legal proceedings that could be termed as "trials" wherein there is examination before a judicial tribunal of the facts at issue in a cause, but other sorts of proceedings performed by or sanctioned by law that involve the rights of blacks such as grand jury investigations, hangings and televised hearings. *id.*; see generally William Lewis & John Louis Lucaites, *Race Trials: The Rhetoric of Victimhood and the Racial Consciousness of 1930s America*, in ARGUMENT IN A TIME OF CHANGE: PROCEEDINGS OF THE TENTH BIENNIAL CONFERENCE ON ARGUMENTATION 269–74 (James F. Klumpp ed., 1998) (introducing a discussion on two trials which demonstrate the enabling and restriction of racial discourses in America).

<sup>14</sup> ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 335 (George A. Kennedy trans., Oxford Univ. Press 1991).

<sup>15</sup> EDWARD P. J. CORBETT & ROBERT J. CONNORS, CLASSICAL RHETORIC FOR THE MODERN STUDENT 10 (Oxford University Press 1999). To illustrate the meaning of rhetoric, the authors quote Odysseus's speech in Book 9 of the *Iliad* wherein Odysseus persuades Achilles to continue fighting. The authors write: "Today we find it almost laughable to read about warriors pausing in the heat of battle, as they do in some of the scenes of the *Iliad*, to hurl long speeches at one another. But the tradition of oratory was already well established—if not yet well formulated—in Homer's time, and this tradition persisted and grew stronger throughout the Golden Age of Athens. So we must take the oratory displayed in this scene as seriously as the participants took it, and we must savor the relish with which they indulged in this battle of words." *Id.* at 10.

pronouncements, modern commentators have taken up the baton of rhetoric and law, particularly as it concerns the judicial opinion. Although I rely chiefly upon the work of Marouf Hasian in framing my discussion, there are a number of other contemporary scholars who have examined the import, complexity, and richness of the law's rhetoric. Among them are John Louis Lucaites<sup>16</sup> William Lewis,<sup>17</sup> Francis J. Ranney,<sup>18</sup> James B. White,<sup>19</sup> Gerald Wetlaufer,<sup>20</sup> Robert Ferguson,<sup>21</sup> Kurt Saunders,<sup>22</sup> Richard M. Weaver,<sup>23</sup> Chaim Perelman,<sup>24</sup> and Frederic Gale.<sup>25</sup>

An example of the writing in this area is the work of Fredric Gale. In *Political Literacy: Rhetoric, Ideology, and the Possibility of Justice*, Gale considers the discourse of legal jurisprudence as manifested in court decisions and other similar types of legal interpretation.<sup>26</sup> Though Gale's focus is clearly rhetorical, he positions himself outside Aristotle's understanding of rhetoric as chiefly the situs of legal persuasion.<sup>27</sup> Gale's

<sup>16</sup> See generally John Louis Lucaites & William E. Wiethoff, *Rhetoric and Law*, 60 S. COMM. J. 1 (1994) (examining the relationship between rhetoric and the law); John Louis Lucaites, *Between Rhetoric and the Law*, 76 Q. J. SPEECH 435 (1990) (reviewing Lucaites' characterization of the relationship between rhetoric and the law).

<sup>17</sup> See generally William Lewis, *Law's Tragedy*, 21 RHETORIC SOC'Y Q. 3, 11 (1991) (elaborating on the criticisms of James Boyd White's characterization of the relationship between law and rhetoric).

<sup>18</sup> See generally FRANCES J. RANNEY, *ARISTOTLE'S ETHICS AND LEGAL RHETORIC: AN ANALYSIS OF LANGUAGE BELIEFS AND THE LAW* (2005) (examining the troubled relationship between rhetoric and law).

<sup>19</sup> See generally James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985) (suggesting that law is not a system of rules, but a branch of rhetoric).

<sup>20</sup> Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545 (1990) (reflecting on the discipline-specific rhetoric of law and using literary criticism as a method to identify ways in which the law provides its own particular kinds of statement).

<sup>21</sup> Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

<sup>22</sup> Kurt Saunders, *Law as Rhetoric, Rhetoric as Argument*, 44 J. LEGAL EDUC. 566 (1994) (exploring the relationship between rhetoric and legal argument).

<sup>23</sup> RICHARD M. WEAVER, *THE ETHICS OF RHETORIC* (Hermagoras Press 1985) (1953) (providing a critique of the ethical and cultural role of rhetoric).

<sup>24</sup> GUY HAARSCHER, ET. AL, *JUSTICE ET ARGUMENTATION: ESSAIS À LA MÉMOIRE DE CHAÏM PERELMAN* (Brussels, Belgium: Editions de l'Université de Bruxelles 1986); CHAÏM PERELMAN, *AN HISTORICAL INTRODUCTION TO PHILOSOPHICAL THINKING* (Random House 1965); CHAÏM PERELMAN, *JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* (D. Reidel 1980); CHAÏM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* (Routledge & Kegan Paul Ltd. 1963); CHAÏM PERELMAN, *THE NEW RHETORIC AND THE HUMANITIES: ESSAYS ON RHETORIC AND ITS APPLICATIONS* (D. Reidel 1979); CHAÏM PERELMAN & RAY D. DEARIN, *THE NEW RHETORIC OF CHAÏM PERELMAN: STATEMENT & RESPONSE* (Univ. Press of Am. 1989); CHAÏM PERELMAN, *THE REALM OF RHETORIC* (Univ. of Notre Dame Press 1982).

<sup>25</sup> FREDRIC G. GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* (State Univ. of New York Press 1994).

<sup>26</sup> *Id.* at 2 (explaining that Gale's examination of legal rhetoric focuses on "the rhetoric of justification, that is, the discourse that purports to explain the rules by which opinions become laws").

<sup>27</sup> It is important to note here that much of contemporary United States scholarship on Aristotle's *Rhetoric* has been characterized by divergent opinions. There has been what one scholar has described

concern “is not about the way lawyers and judges use language to persuade.”<sup>28</sup> Rather, he notes that his work “is one step more abstract, being concerned with the rhetoric of justification, that is, the discourse that purports to explain the rules by which opinions become laws.”<sup>29</sup> Gale describes his principal concern as the “rhetoric of justification” in the appellate decision.<sup>30</sup>

Gale’s articulation of these concerns recalls Aristotle’s view of rhetoric: judges select jurisprudential theories that best reflect the arguments upon which they rely. Hence, for Gale, jurisprudential theories are not so much legal epistemological devices for predicting or explaining future judicial acts, as they are post hoc explicatory tools for past judicial decisions. Attributing the force of unvarnished authority and unassailable integrity to judicial opinions “conceals the political and ideological purposes of the discourse behind a veil of language intended to provide a transcendent, predictable theory of jurisprudence but which in fact fails to do so.”<sup>31</sup>

The long connection between rhetoric and law has meant that this connection strikes many as more apparent than it, in fact, is.<sup>32</sup> Indeed, in recent years, a number of authors have identified and expounded upon the law as rhetoric.<sup>33</sup> However, perhaps the facile identification between rhetoric and law takes too much for granted. Notwithstanding the easy identification between law and rhetoric in the classical **rhetorical tradition**, there are clear distinctions between law and **rhetoric**.

Law is inherently a social endeavor that is enforced by political authority. Law, though often unitary in its ideal, is multifunctional in attaining its ideal. Law consists of rules or norms of conduct that mandate, proscribe or permit specified relationships among people and organizations, articulate methods to ensure the impartial treatment of such people, and prescribe punishments for those who do not follow the established rules of conduct. At the same time, there often is a certain self-reflexiveness to law wherein law is itself an agent for enforcing its own rules. One chief claim

as “sustained and sharp controversy” surrounding the meaning and importance of the work. Michael Leff, *The Uses of Aristotle’s Rhetoric in Contemporary American Scholarship*, 7 ARGUMENTATION 313, 313 (2004).

<sup>28</sup> See Gale, *supra* note 25, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> GALE, *supra* note 22, at 3.

<sup>32</sup> White, *supra* note 19, at 684 (suggesting that “law is most usefully seen not, as it usually is by academics and philosophers, as a system of rules, but as a branch of rhetoric”).

<sup>33</sup> Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 871–74 (1988) (rejecting Enlightenment “reason” as a foundation for law in favor of rhetorical argumentation and, ultimately, the character that alone makes it succeed).

that formal law makes is its relative certainty, rigidity, and fixedness in a world wherein many other things change easily.

In contrast, rhetoric is the use of language to persuade, and it just as often serves as a mere instrument as it does an actual source of meaning. Rhetoric is highly situationally contingent and operates in the realm of uncertainty and probability.<sup>34</sup> According to Francis Ranney, rhetoric is "a perspective on language that is conscious of itself as such."<sup>35</sup> For Ranney, this means that while rhetoric is, at its core, concerned with the use of language, it is not synonymous with language; rhetoric is the conscious, thoughtful use of language in a symbolic manner. However, rhetoric is, like law, ultimately epistemic in nature; it brings a knowledge system to particularized contexts.<sup>36</sup> Despite this similarity, to view the identity between rhetoric and law lightly is to potentially misunderstand the relation, for the connections between law and rhetoric are "more esoteric than self-evident."<sup>37</sup> One reason for this may be that classical rhetoric requires the understanding of a fundamental division between *what* is communicated through language and *how* it is communicated.

#### *A. The Judicial Opinion as an Exercise in Rhetoric*

Reading a judicial opinion as a rhetorical writing necessarily entails bringing aspects outside of the text to the opinion, such as the historical context by which it is framed and the biography of the author or other actors. Such a reading necessarily requires viewing the text on a plane wherein relevant features within and without the text are taken into account. This is especially true given the casuistry that exemplifies the judicial decision-making process, in particular the doctrine of stare decisis. Because the subject matter at the heart of the African American *Slave Descendants* case is slavery, this raises a host of moral and ethical dilemmas.<sup>38</sup> A failure to take into account the atmosphere outside of the text threatens to render the text little more than a pallid, legalistic account,

<sup>34</sup> EDWARD P. J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 7 (Oxford Univ. Press 1965) (discussing that rhetoric is used to persuade another about the course of the future, which is inherently uncertain and focuses on probability).

<sup>35</sup> FRANCES J. RANNEY, *ARISTOTLE'S ETHICS AND LEGAL RHETORIC: AN ANALYSIS OF LANGUAGE BELIEFS AND THE LAW* 11 (Ashgate Publ'g Co. 2005).

<sup>36</sup> See generally WILLIAM A. COVINO & DAVID A. JOLLIFFE, *RHETORIC: CONCEPTS, DEFINITIONS, BOUNDARIES* (Allyn & Bacon, 1995) ("[R]hetoric is not a *content* area that contains a definite body of knowledge, like physics; instead, rhetoric might be understood as the study and practice of shaping content.").

<sup>37</sup> GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 292 (Princeton Univ. Press 2000).

<sup>38</sup> See e.g. the discussion of slavery as an ideograph *infra* at Sec. V. A..

which obscures the very vivid reality underneath.

Given the reliance on previous legal authority requisite in the enterprise of citing precedent to support an outcome, all such judicial decisions become subject to the charge of being logically fallacious. This is because such decisions argue from authorities whose veracity or accuracy is unproven. Moreover, even assuming that the appeal to authority found in judicial opinions is a sound basis for obtaining relevant propositional knowledge, it is always possible for a jurist to evade precedent by making inapt comparisons between cases, whether intentional or not. This of course presents the familiar problem of comparing apples to oranges, or worse yet, apples to car engines, when making appraisals. However, concern with what counts as a functional analogue for arguments based on precedent differs somewhat from the more general problem of arguing by analogy, for arguments based on precedent ultimately rely upon not just “the pure science” ideal of achieving congruence between situations but also upon principles of fairness and consistency.<sup>39</sup> Because discussions of this type often implicate values and ideals that go beyond the individual interests at stake, reasoning may be all the more subject to being clouded by a desire, whether implicit or explicit, to achieve a particular outcome.<sup>40</sup>

Typically, the only way to challenge an error occurring in a court judgment is via the appellate process. Because there might be practical reasons that prevent litigants from making such an appeal—expense, lack of time, or already having reached a court of last resort—evasions of precedent may not only go unchallenged, but become entombed in the system of precedent for later reference themselves.<sup>41</sup> All of this is not to gainsay the value of casuistic or moral pragmatic approaches to judicial decision-making or to urge some sort of iconoclastic heterodoxy that reforms or replaces the genre of the judicial opinion. Rather, reading judicial opinions as exercises in rhetoric broadens our understanding of the law as a means of expressing ideology.

<sup>39</sup> CHRISTOPHER TINDALE, *FALLACIES AND ARGUMENT APPRAISAL* 205 (Cambridge Univ. Press 2007) (“[N]otice that the reasoning here, unlike that in basic analogical arguments, involves an appeal to an underlying principle of consistency or fairness.”); *see generally* PETER BURKE, *HISTORY AND SOCIAL THEORY* 25–27 (Cornell Univ. Press 2005) (describing problems of creating fair analogies due to significant differences in traits as well as one’s own bias as to what the standard should be).

<sup>40</sup> *See* TINDALE, *supra* note 39, at 205 (stating that close associations may cause people to disregard facts detrimental to their argument).

<sup>41</sup> *See* JOSEPH VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* 5 (Yale Univ. Press 1978) (explaining that standing is another hurdle that may prevent litigation from being pursued further).

### *B. The Rhetoric, Ideology and Law Continuum*

The dichotomy between content and form in rhetoric – between what is stated and how it is stated – was described by Aristotle as *logos* and *lexis*.<sup>42</sup> This distinction, though foundational in early understandings of rhetoric, tends to understate the connectedness of ideas themselves and the language used to express them. This connectedness implicates not just law and rhetoric, but a connection between ideology and rhetoric as well. To fully explicate this connection, I explore the development of some the multiple strands and purposes of ideology, such as the conceptual, doctrinal, epistemological, and sociological strands. I then reach the notion of law as an ideological creation from which grows the critical rhetoric approach.

#### *a. The Origins of Ideology*

Ideology as a concept in social thought has had a long and complex development, and, consequently, has multiple strands. In this discussion of ideology, the focus is upon the notion of ideology as a broad general concept. Hence, I concern myself with its nature and function as such. This contrasts with a consideration of ideology as a specific political doctrine. Of course, an assessment of ideology in the first sense, conceptually, may be, as one observer has written, “conditioned ‘ideologically’” in the second sense of personally held political beliefs.<sup>43</sup> Be that as it may, the concept/doctrine dichotomy in the meaning of ideology is sufficiently unambiguous as to make it a valid distinction to draw.

Early writers on the subject emphasized the epistemological aspects of ideology. For example, this was seen in the work of Antoine Louis Claude Destutt de Tracy, one of the earliest writers on the subject. For Destutt de Tracy, ideology had its origins in the Enlightenment critique of “tradition and prejudice; rational grounded knowledge was to replace the mystifications of preexisting modes of thought.”<sup>44</sup> Relying as it does on rationality, ideology in this context is said to be empirically based; it is a

<sup>42</sup> ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 317 (George A. Kennedy trans., Oxford Univ. Press 1991) (defining *lexis* as “how something is said, style, often word choice, sometimes composition of sentences or speeches” and *logos* as “word, sentence, rational argument, speech, tale, esteem, etc.”).

<sup>43</sup> See TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 242 (Verso 1991) (describing how two different political groups view themselves as understanding reality and accuse the other of being ideological).

<sup>44</sup> ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS 182 (Univ. of Cal. Press 1979).

“science des idées” which describes the “natural history of the mind.”<sup>45</sup> The goal of ideology was to liberate society from attachments to religion based superstition by creating a mechanism for analyzing “ideas”—society’s core beliefs and ideas.<sup>46</sup> The theory of sensationalism, the belief that “all ideas, all knowledge, and all the faculties of human understanding — perception, memory, or judgment — rest on sensory data,” was central to the epistemological approach to ideology.<sup>47</sup>

Others commentators have focused on the sociological aspects of ideology. Perhaps the most popular sociological conception of ideology dictates the work of Karl Marx to be at the center.<sup>48</sup> Sociological definitions of ideology are still commonly split between “Marxist” or “non Marxist,” notwithstanding the fact that interpretations of Marx’s views on ideology have frequently shifted over time. Generally, Marxist theories on the nature of ideology are seen as both epistemic and sociological in nature, and have been concerned with notions of truth and falsity of cognition.<sup>49</sup> In this view, ideology has a distinctly pejorative slant, and is understood to be a product of illusion which leads to distortion and Marxian “reification”—making that which is contingent appear to be universal or inevitable.<sup>50</sup>

Though some non-Marxist commentators have retained the pejorative associations of the concept of ideology, one of the most central non-Marxist strains of ideology is construed as an opposing view because it tries to neutralize the concept of ideology by functionally differentiating it from systems of scientific knowledge. Such approaches to ideology appear to be more sociological than epistemological and are more concerned with the ways ideas function in social life than with their reality or unreality.<sup>51</sup>

<sup>45</sup> George Lichtheim, *The Concept of Ideology*, 4 History and Theory 164, 167 (Random House 1965).

<sup>46</sup> JAMES JASINSKI, SOURCEBOOK ON RHETORIC: KEY CONCEPTS IN CONTEMPORARY RHETORICAL STUDIES 312 (Sage Publ’ns 2001) (explaining that the science of ideas was a way to free society from the religious tyranny that justified rigid social hierarchies).

<sup>47</sup> DICTIONARY OF THE HISTORY OF IDEAS: STUDIES OF SELECTED PIVOTAL IDEAS 253 (Philip P. Weiner ed., Charles Scribner’s Sons 1968).

<sup>48</sup> See RAYMOND BOUDON, THE ANALYSIS OF IDEOLOGY 17–19 (Polity Press 1989) (using Marx’s definition of ideology, and its focus on truth and falsehood, as the point of origin in discussing the Marxist and non-Marxist lines of thought).

<sup>49</sup> See *id.* at 23 (demonstrating, via a table, the shifts in Marxist definitions of ideology and contrasting with non-Marxist definitions of ideology, both categorized by the criterion of truth and falsehood).

<sup>50</sup> TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 2–3 (Verso 1991) (discussing the pejorative formulations of the definition of ideology, the Marxist tradition of viewing ideology as a distortion based on true and false cognition, and that ideology is frequently contingent on one’s convictions as opposed to what actually is).

<sup>51</sup> *Id.* at 3 (characterizing the non-Marxist school of thought as an alternative tradition focused on the sociological function of ideas instead of the reality or unreality of those ideas).

These sociological views of ideology often include law and view law as a distinctly ideological entity.

b. Law as an Ideological Creation

The idea that law is ideological is not new.<sup>52</sup> If law is understood as a system of enforceable rules governing social relations and legislated by a political system, it would seem that a connection between law and ideology is almost a necessary precondition. This is true for two reasons. First, understanding law as ideology enables a more nuanced and critical view of the law and its function, hence it helps to clarify a set of vital social institutions. Second, viewing law as ideology underscores the importance of non-legal actors and institutions in the formation of law.

Perhaps one of the most forceful accounts of the ideological nature of law are found in the work of E.P. Thompson. According to Thompson, law is central to the ideology of dominant groups, and ideology was central to the law's power and validity. Justice, or the appearance of justice, is a vital tool of law as ideology:

If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony. The essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just. It cannot seem to be so without upholding its own logic and criteria of equity: indeed, on occasion, by actually *being* just.<sup>53</sup>

Such discussions of the linkages between rhetoric, ideology and law are the essence of what is known as critical rhetoric.

### III. THE CRITICAL RHETORIC APPROACH

Critical rhetoric is a school of thought which attempts to establish the importance of rhetoric in non-Platonic terms. This means, among other things, that rhetoric is broadened from its facile association with persuasion. The phrase "critical rhetoric" was created by rhetorician Raymie E. McKerrow, and is meant to describe a two-part task: first, analyzing the discursive forces of dominating power<sup>54</sup> and next, critiquing

<sup>52</sup> See COLIN SUMNER, *READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW* 266-267 (Academic Press 1979); see also PAUL Q. HIRST, *ON LAW AND IDEOLOGY* 173 (Humanities Press 1979).

<sup>53</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 263 (Pantheon Books 1975).

<sup>54</sup> See Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 Comm. Monographs 91,



liberating power, or freedom.<sup>55</sup> Ultimately, McKerrow viewed this type of critique as a “critique of ideologies, wherein ideologies [are] perceived as rhetorical creations.”<sup>56</sup> Beyond a general critique of power and freedom, McKerrow also set forth “principles of praxis” for the application of critical rhetoric.<sup>57</sup>

#### *A. McKerrow's Two Part Project—The Theoretical Rationale and Principles of Praxis*

In his work, McKerrow emphasized that critical rhetoric is not to be construed as a methodology in and of itself wherein there are specific guides as to how perform the task.<sup>58</sup> Rather, critical rhetoric provides an “orientation” that helps to draw the parameters of the critic’s relationship with a particular concept. McKerrow thought of critical rhetoric as a project having a theoretical rationale and principles of praxis.<sup>59</sup>

The theoretical rationale involved “two ‘complementary’ phases or moments of critique.”<sup>60</sup> The first was a critique of domination, wherein the chief focus is on the “discourse of power which creates and sustains the social practices which control the dominated.”<sup>61</sup> The second phase of critique was a critique of freedom, necessary because power is not only repressive; power, McKerrow asserted, could also be productive or constitutive.<sup>62</sup> The aim of the critique of freedom was not to counter domination but to inject a note of skepticism into the workings of political actors who may themselves be the source of new forms of power and ultimately domination, although they see themselves as anti-hegemonic.<sup>63</sup>

92–93 (1989) (describing domination as the construction of an order by the ruling class, and the imposition of sanctions for dissenters as a means of establishing bounds accepted by the people in a community).

<sup>55</sup> *Id.* at 100 (stating that a critic may begin to affirm the possibility of freedom by focusing on the effects of truth originating from discourses that are neither inherently true or false, and distancing themselves from preconceived categorizations of what should be scientifically true or false).

<sup>56</sup> *Id.* at 92.

<sup>57</sup> *Id.* at 91–92, 100 (explaining that the second part of the essay discusses the principles of praxis).

<sup>58</sup> *Id.* at 92 (stating that even though the principles are “not an exhaustive account, they constitute the core ideas of an *orientation* to critique”).

<sup>59</sup> McKerrow, *supra* note 54, at 92 (discussing how the principles underlying a critical practice “recast the nature of rhetoric from one grounded on Platonic, universalist conceptions of reason to one that recaptures the sense of rhetoric as contingent, or knowledge as doxastic, and of critique as a performance”).

<sup>60</sup> JASINSKI, *supra* note 46, at 117 (explaining that McKerrow discussed “two ‘complementary’ phases or moments of critique, with each phase or moment defined by its understanding of power.”).

<sup>61</sup> McKerrow, *supra* note 54, at 92.

<sup>62</sup> *Id.* at 98–99 (describing the idea that power “is not repressive, but productive—it is an active potentially positive force which creates social relations . . .”).

<sup>63</sup> *Id.* at 96 (asserting that results are never satisfying, and are therefore subject to never-ending

The ultimate goal was to promote constant reflection and introspection.

McKerrow's principles of praxis thus involved the articulation of eight principles for understanding critical rhetorical praxis. The first principle relate back to the proviso that critical rhetoric is not a method.<sup>64</sup> There is no particular strategy or formula for its performance. Rather, critical rhetoric is to be viewed as a mechanism for shaping, guiding, and orienting the rhetorical critic in its interactions with a particular subject matter.<sup>65</sup> This is not to suggest, however, that the mechanism of critical rhetoric exerts little change upon its objects. McKerrow suggests, for example, that the *sine qua non* of critical rhetoric is the reversal of the phrase "public address"—rather than evaluating public addresses, the critical rhetorician pays attention to the "symbolism which addresses publics".<sup>66</sup>

Such an assertion about reversal mediates for a specific set of understandings needed to perform critical rhetoric. First, it requires regarding the text under discussion as only a subset or a fragment of a larger discursive formation rather than as a fully integral, freestanding unit.<sup>67</sup> Hence, the text becomes merely a message fragment whose ultimate force and meaning is determined as it moves in various settings.<sup>68</sup> Second, because of the effect of fragmentation, the critic is not so much the interpreter of texts as he is the "inventor" of texts. Third, the identity of the agent who produces the message, while important in the overall understanding of the discursive formation, is deemphasized for purposes of understanding the way in which the broader symbolic structure functions to address relations of power.<sup>69</sup> Finally, because the function of the message takes precedence over the source of the message, function is paramount in choosing what text to make the subject of the critical rhetorical analysis. In selecting texts for critical rhetorical analysis, there is a move away from so-called elite cultures premised on "universal" standards of social, artistic or legal meaning, and toward the cultures of local, informal or marginal

skepticism).

<sup>64</sup> *Id.* at 100 (stating that a *methodology* is not being presented, but rather the author is presenting an outline of the "orientation" that a critic takes).

<sup>65</sup> *Id.* (explaining that the following section of the essay seeks to outline the "orientation" a critic will take towards the object of study).

<sup>66</sup> McKerrow, *supra* note 54, at 101.

<sup>67</sup> See ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 9 (Pluto Press 1994) (defining "discursive formation" as a "system of more or less stable elements of discourse that are linked or associated").

<sup>68</sup> See JASINSKI, *supra* note 46, at 117–18 (identifying several diverse discursive practice settings in which oppression and repression are manifest).

<sup>69</sup> See *id.* at 119 (explaining that critical rhetoric's focus is not on the intentions of the agents that produced the symbols addressing publics, but is "decenter[ed]," and is "on the way in which symbolic structures...function to perpetuate or challenge relations of power.").

communities.<sup>70</sup>

Among the several other principles that McKerrow details is that “*naming* is the central act of a *nominalist* rhetoric.”<sup>71</sup> In McKerrow’s view, this heralds a reinterpretation of abstract categories, one that recognizes the fact that names and labels wield power, and may be either repressive or productive, but rarely benign or neutral. Hence, concepts in law such as “justice” or “liberty” are not and have never existed as universals. In summary, rhetoric creates ideology and ideology creates, empowers and sustains law.

The ideograph is one way of accounting for the way in which rhetorical practices engender ideology and then law.<sup>72</sup>

### *B. The Ideograph as a Means of Understanding the Ideology and Rhetoric of Law*

Ideographs are words that contain unique ideological commitments.<sup>73</sup> The concept was initially conceived by rhetorician Michael Calvin McGee as a way of addressing what he believed to be two polarities in social and political thought: idealist/symbolist notions, or ideology and materialist/Marxist notions.<sup>74</sup> Ideographs are distinct from labels and other terms in that ideographs are “agencies of social control,”<sup>75</sup> and “agents of political conscientiousness.”<sup>76</sup> A crucial feature of ideographs is persuasion, since ideographs are the source of the persuasive power of

<sup>70</sup> See *id.* (describing how, given the emphasis on function, rather than “supposedly universal standards of artistic excellence,” in deciding on what objects to study, critical rhetoric “emphasizes vernacular cultures and practices over elite cultural practices”).

<sup>71</sup> McKerrow, *supra* note 54, at 105.

<sup>72</sup> See generally Michael Calvin McGee, *The “Ideograph”: A Link Between Rhetoric and Ideology*, 6 Q. J. SPEECH 1, Feb. 1980 (framing the ideograph as the link between rhetoric and ideology).

<sup>73</sup> In this regard, ideographs are also akin to the condensation symbol, a concept somewhat similar to the ideograph in that condensation symbols may be construed as a particular subset of the ideograph. A condensation symbol is a “name, word, phrase or maxim which stirs vivid impressions involving the listener’s most basic values.” See WEAVER, *supra* note 23, at 219 (classifying “un-American” as a dividing term which opposes core values). McGee’s concept of ideographs also bears some resemblance to Weaver’s notion of “ultimate terms,” which Weaver defines as “rhetorical absolutes” or “terms to which the very highest respect is paid.” McGee, in further describing his concept of the ideograph, speaks of two distinct vocabularies of ideographs: those that unite and those that divide. JASINSKI, *supra* note 46, at 309 (discussing Weaver’s categories of ideographs including those that unite and those that divide).

<sup>74</sup> See JASINSKI, *supra* note 46, at 309 (listing McGee’s examples of ideographs, “including liberty, property, law or the rule of law, religion, right of privacy, freedom of speech, and popular sovereignty,” and explaining how these terms have different notions in “technical” political philosophy than they do in public discourse).

<sup>75</sup> McGee, *supra* note 72, at 6.

<sup>76</sup> *Id.* at 7.

political language and the means by which such language exerts social control.<sup>77</sup>

For McGee, the ideograph is a high-order abstraction “representing collective commitment to a particular but equivocal and ill-defined normative goal. It warrants the use of power, excuses behavior and belief which might otherwise be perceived as eccentric or antisocial, and guides behavior and belief into channels easily recognizable by a community as acceptable and laudable.”<sup>78</sup> Ideographs, then, are instrumental in shaping behavior, and are forms that are embedded in the culture; they are not passing fancies, or current sayings. Rather, ideographs are the terms we use to justify decisions,<sup>79</sup> impart value,<sup>80</sup> and motivate behavior.<sup>81</sup> Some examples of ideographs given by McGee are “property,” “liberty,” “the rule of law,” “the right of privacy” and “popular sovereignty.”<sup>82</sup>

### *C. The Contingent and Contested Nature of Ideographs*

Ideographs, besides being significant cultural signifiers, are also, because of their existence as abstractions, highly contingent in meaning, and are thus always open to interpretation and negotiation. Ideographs are “flexible” and their meanings change between contexts and sometimes even within the same context.<sup>83</sup> An example of this is the way in which the ideograph “equality” has variable meanings.<sup>84</sup> However, as one observer points out, ideographs are not “totally arbitrary or absolutely polysemous.”<sup>85</sup> There is often at least basic agreement on their essential meanings. These commonly understood meanings arise from “rhetorically material limits” based on the “range and history of their acceptable usages in the community”<sup>86</sup> and their relation to other ideographs “relevant to the

<sup>77</sup> See *id.* at 5 (“Ideology in practice is a political language...with the capacity to dictate decision and control public belief and behavior.”).

<sup>78</sup> *Id.* at 15.

<sup>79</sup> JASINSKI, *supra* note 46, at 309 (identifying ideographs as terms used to justify decisions).

<sup>80</sup> *Id.* (discussing ideographs that impart value).

<sup>81</sup> *Id.* (explaining that ideographs play a role in motivating behavior).

<sup>82</sup> McGee, *supra* note 72, at 6–7, 13 (identifying examples of ideographs).

<sup>83</sup> CELESTE MICHELLE CONDIT & JOHN LOUIS LUCAITES, CRAFTING EQUALITY: AMERICA'S ANGLO-AFRICAN WORD xii (Univ. of Chi. Press 1993) (explaining ideographs and their multiple meanings).

<sup>84</sup> See *id.* at xi–xviii (discussing the idea that an ideograph can have different meanings within a culture).

<sup>85</sup> *Id.* at xiii.

<sup>86</sup> John Louis Lucaites, *Constitutional Argument in a National Theater: The Impeachment Trial of Dr. Henry Sacheverell*, in POPULAR TRIALS: RHETORIC, MASS MEDIA AND THE LAW 31, 34–35 (Robert Hariman ed., 1993).

specific rhetorical situation they are employed to modify or mediate.”<sup>87</sup> Moreover, communities are often deeply invested in maintaining the integrity and “vertical structure” of their ideographs.<sup>88</sup> It has been suggested, for example, that the formal existence of non-statutory law is a result of the literature that records ideographic uses in the common law and other examples of case law.<sup>89</sup>

Ideographs are constrained only by their diachronic structure, the history of the term’s usage within the community, and by their synchronic structure, the ability of proponents to make such terms comport or conflict with other competing ideographs. An essential query in this regard, then, is how a specific ideograph accrues meaning in particular rhetorical situations where it is asked to do the work of a political or legal community. This is seen where, for example, the ideograph “the right of privacy” is asked to condemn a specific act of power, such as the enactment of a law to fight the “war on terror.”<sup>90</sup>

Ideographic analysis requires more than merely labeling recurring terms. Rather, according to McGee, critical rhetoricians must consider the situational function of the ideographs at issue.<sup>91</sup> Significant and sustained ideographic analysis requires an analysis of the history of the particular use of a term as well as an understanding of the current contextual and temporal meaning of a term and its interaction with both public and private meanings. There is a tension, says McGee, between the ideographs of a community’s political vocabulary and the narrative frame in which such terms are to be understood. This means that more often than not, certain frameworks operate as relatively closed systems of political discourse.<sup>92</sup> This suggests that in many cases it may not be possible to adopt the

<sup>87</sup> *Id.* at 35.

<sup>88</sup> McGee, *supra* note 72, at 93 (“All communities take pains to record and preserve the vertical structure of their ideographs.”).

<sup>89</sup> *Id.* (“Formally, the body of nonstatutory ‘law’ is little more than a literature recording ideographic usages in the ‘common law’ and ‘case law.’”).

<sup>90</sup> See generally, Christian Halliburton, *Leveling the Playing Field: A New Theory of Exclusion for a Post-PATRIOT Act America*, 70 MO. L. REV. 519 (2005) (suggesting that the PATRIOT Act is inconsistent with established Fourth Amendment law); Nadine Strossen, *Safety and Freedom: Common Concerns for Conservatives, Libertarians, and Civil Libertarians*, 29 HARV. J.L. & PUB. POL’Y 73 (2005) (commenting on the balance between civil rights and national security); 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 (2003) (arguing that in the post-9/11 world civil rights should move away from the historical black-white binary and expand to include other groups such as Arabs and Muslims).

<sup>91</sup> See JASINSKI, *supra* note 46, at 310 (explaining McGee’s deeper analysis of ideographs, how they enable and constrain decision and action).

<sup>92</sup> MICHAEL CALVIN MCGEE, 1984: *Some Issues in the Rhetorical Study of Political Communication*, in POLITICAL COMMUNICATION YEARBOOK 155, 158–159 (Keith R. Sanders, Dan D. Nimmo & Lynda Lee Kaid eds., S.Ill. U. Press 1984) (suggesting that history can shape the meaning of a term within the context of a community’s political vocabulary).

rhetoric produced in one ideological system for use in another.<sup>93</sup> The development of ideographic analysis distinct to the legal realm has been achieved via the creation of what is known as critical legal rhetoric.

#### IV. THE CRITICAL LEGAL RHETORIC APPROACH AND THE IDEOGRAPH AS A TOOL OF CRITICAL LEGAL RHETORIC

In Part III, I introduced the notion of critical rhetoric and described it as a body of thought with goals of establishing rhetoric in non-platonic terms and offering a critique of ideologies. I then described a principal mechanism for understanding the relationship between rhetoric, ideology and law, and the ideograph. Ideographs are words that function as high order abstractions though they are typically drawn from ordinary language. Ideographs are linguistic mechanisms employed by a community to express its system of values and beliefs. I now turn to a discussion of how the ideograph functions within the structure of critical legal rhetoric, which is distilled from the critical rhetoric approach.

##### *A. The Origins and Nature of Critical Legal Rhetoric*

"Critical legal rhetoric" grows out of the critical rhetoric approach. The concept was introduced by Marouf Hasian, Jr.<sup>94</sup> Hasian describes critical legal rhetoric as a process of legal analysis that goes beyond looking at precedent and "black letter" law and being skeptical about scholars' claims about the nature of law.<sup>95</sup> In developing a critical legal methodology that involves both legal and extralegal actors, those within the legal sphere and those in the wider world outside of the legal community, Hasian creates what he calls "substantive units of analysis" to form the structure of such discussions. The foundational unit that Hasian adopts is McGee's notion of the ideograph. Ideographic analysis via critical legal rhetoric here becomes a potent tool to express the rhetoric and ideology of law. It has been employed, for example, to assess the more practical aspect of the functioning of law.<sup>96</sup> Ideographic analysis has also been used to assess the

<sup>93</sup> *Id.* (reasoning that, because the meaning of a political term is related to the history of the community using it, another community could apply a different meaning to that term).

<sup>94</sup> See HASIAN, *supra* note 1, at 13 ("For scholars to contemplate the possibility of a 'critical' legal rhetoric, they need to develop perspectives that treat the idioms of the law as discursive phenomena that are neither rigidly objective nor nihilistic in nature.").

<sup>95</sup> *Id.* at 2 (noting that while seminal judicial opinions and other "orthodox texts" play an important role in legal research, "legal studies must begin to take seriously the notion that there are many more social actors involved in the creation, maintenance, and recirculation of jurisprudential ideas").

<sup>96</sup> See Ann Sinsheimer, *The Ten Commandments As A Secular Historic Artifact Or Sacred*

meaning of broad socio-legal concepts, such as the term “liberty” and all that it embodies.<sup>97</sup>

As Hasian acknowledges, a number of “critical theorists” take a stance similar to his, challenging the boundaries of conventional legal analysis. Among these are adherents of the Critical Legal Studies (CLS) school and the various strains that have grown from it, such as Critical Race Theory (CRT), Black Critical Theory (Blackcrit), Latino Critical Theory (Latcrit) or Feminist Legal Studies (FLS). However, what is unique to the critical legal rhetoric approach is its focus on discursive practices and more specifically rhetorical practices in the law to problematize the notion of a fixed boundary between concepts such as “the rule of law” and “the rule of men,” or, more generally, between rhetoric and reality. By engaging rhetorical practices, critical legal rhetoric endeavors to take seriously the claims of extrajudicial actors, acknowledging them as interlocutors in a public, rather than private, conversation about what the law is. Perhaps what most distinguishes critical legal rhetoric from other critical approaches to law is that it exists as a critical methodology that may be used in conjunction with, and not instead of, other critical methods. It is very often in fact a tool to expose the use of other critical methods. Critical legal rhetoric may in addition be used as a means of expressing, articulating or ordering other critical methodologies.

### *B. The Basic Assumptions of Critical Legal Rhetoric*

It is important to make clear the nature of critical legal rhetoric since, as it has been observed, rhetorical analysis in and of itself is not a methodology.<sup>98</sup> Rhetoricians may employ a great variety of techniques to analyze the broad phenomenon of persuasion.<sup>99</sup> This is no less true in the field of critical legal rhetoric. In elaborating on the parameters of critical legal rhetoric, Hasian sets forth five basic assumptions that are at the heart of a critical legal rhetoric approach. The assumptions are generally

*Religious Text: Using Modrovich v. Allegheny County To Illustrate How Words Create Reality*, 5 U. MD L. J. RACE, RELIGION, GENDER & CLASS 325, 349 (2005) (discussing how ideographic analysis may be used as a legal educational tool to help students to assess legal arguments, improve oral argument skills and writing skills, and improve lawyering overall); see also Mihaela Popescu & Oscar H. Gandy, Jr., *Whose Environmental Justice? Social Identity and Institutional Rationality*, 19 J. ENVTL. L. & LITIG. 141, 164 (2004) (describing the extent to which the ideograph has also been used to analyze the notion of community identity in environmental law).

<sup>97</sup> See Warren Sandmann, *The Argumentative Creation of Individual Liberty*, 23 HASTINGS CONST. L. Q. 637, 637-38 (1996) (referring to Michael McGee, *supra* note 72 at 6).

<sup>98</sup> See Jerry Frug, *supra* note 33, at 871-72 (1988) (rejecting Enlightenment “reason” as foundation for law in favor of rhetorical argumentation).

<sup>99</sup> *Id.* at 872-73 (discussing the character method of constructing legal arguments).

described as:

- 1) Legal formalism obscures rather than clarifies judicial rules and norms in the United States.<sup>100</sup>
- 2) A small group of "empowered elites" profit from the denial of the rhetorical nature of law.<sup>101</sup>
- 3) There are multiple possible views of law and equity, and prevailing norms exist in part because of "chance, visions losing out, the forgetfulness of some, and the sharp memories of others."<sup>102</sup>
- 4) Because law is essentially contingent, often employing "fabrication in place of discovery, and artifice as well as science," historical studies are needed to look beyond official "precedents."<sup>103</sup>
- 5) Critical legal rhetoric involves both deconstructive and reconstructive aspects of the law, that is, querying the givens of law while providing what he describes as a "vernacular" voice for alternate views in both the public and private spheres.<sup>104</sup>

These assumptions are at the heart of critical legal rhetorical analysis. I next apply this methodology to the *Slave Descendants Case*.

#### V. HASIAN'S SUBSTANTIVE UNITS OF ANALYSIS AND IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS

The judicial opinion rendered on the motion to dismiss in *In Re African-American Slave Descendants Litigation* relies upon a number of concepts that have multiple, particularized meanings both within the legal sphere and without. Here, I identify and focus on the following concepts as substantive rhetorical units:

##### Ideographs

- Slavery
- Standing

<sup>100</sup> HASIAN, *supra* note 1, at 4 ("Legal formalism hides the constitutive nature of America's judicial rules and norms.").

<sup>101</sup> *Id.* ("[T]he more we see [law] as a deductive, logical system of inquiry, the more we move away from the Greek notion of *phronesis*, or practical wisdom. Studying the 'rule of law' becomes the professional occupation of only a few rather than the duty of the many.").

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

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

<sup>104</sup> *Id.* at 4–5 (referring to Hasian's fifth basic assumption of the critical legal rhetoric approach).



### Characterizations

—Slaves

—Slave traders

Narratives and Myths—I discuss the concept below both in its function as narratives and more broadly as myths

—The Causes of the Civil War

### Memories

—Whether reparations were previously paid to blacks

My analysis leads to an understanding of the *Slave Descendants* case as an example of Weiner's Black trial. African-ancestored blacks in the United States are, in the context of this decision, constructed as outsiders, foreigners or "non-belongers" in the United States. The black trial is broadly constitutive of the legal narratives that form the contours of legal-historical creation myths that purport to explain black presence and the black experience in the United States and in its legal system.

#### *A. Slavery as an Ideograph in General*

In order to name and define rhetorical practices at work in the *Slave Descendants* case, it is necessary to delineate the ways in which particular advocates, especially those in judicial settings, have steered the ideological commitments of the majority. The concept of ideographs is useful for this task because it enables the analyst to follow the trajectory of key phrases or even single words that are, in McGee's words, "more pregnant [with meaning] than propositions ever could be."<sup>105</sup> In a critical legal rhetoric approach, language is not a neutral delivery device for power but retains the residue of previous struggles. It is by these means that legal advocacy and legal conclusions empower or disempower people.

Certain ideographs may have more power than others to guide or shape behavior, usually by branding as unacceptable certain behaviors. Using the word 'slavery' is one such behavior.<sup>106</sup> Slavery, as a condition of involuntary servitude, is a concept that undermines the very foundation of the American ethos. "America" is itself arguably an ideograph that conveys both physical and ideological freedom and autonomy; one need

<sup>105</sup> McGee, *supra* note 72, at 7.

<sup>106</sup> See *id.* at 15 (contrasting ideographs that guide thoughts and actions into acceptable "channels" with those, like "slavery," that negatively classify certain behaviors).

only look to the numerous legal documents, treatises and other artifacts of the American socio-legal culture that treat America as a concept more than a place. America as freedom has been frequently hailed in song, such as in the lyrics of "America," which intones in its first line America's status as a "sweet land of liberty. "America" functions as a national anthem though not officially serving as such.<sup>107</sup> Slavery is as a result, by its very definition, antithetical to the broad notion of America. Yet, slavery not only existed but flourished in the United States of America, and its harms, some argue, have yet to abate.

### *B. The Meaning of Slavery in Slave Descendants*

In the *Slave Descendants* case, the reader is immediately introduced to slavery in the opening sentence of Judge Norgle's opinion: "This case arises out of the institution of human chattel slavery as it existed in the North American colonies and the later formed United States of America."<sup>108</sup> First, it is important to note the extent to which the judge goes to make known the negative valence of the word 'slavery.' Slavery is, by definition, the condition of one human person as the legal property of another. Therefore, to say that slavery is "an institution" and one of "chattel slavery" almost creates a hyperbolic over-description that threatens to undermine its meaning in simple terms. Such uses of hyperbole are often meant not to clarify, but to obfuscate, and to turn attention away from the horrors described by not giving the reader or listener a chance to gasp or remonstrate at the existence of a wrong.<sup>109</sup>

The use of hyperbole here functions in much the same way that an under-description would function: it renders the propositions being discussed vague and shows a tentative commitment to them.<sup>110</sup> This vagueness can and often does result in indeterminacies in legal rights and obligations. The judge's language here seems to say, "I know that it [slavery] is bad, it is very bad. I know it and acknowledge it so now let us all get over it." This is clear in the sentence following, where the judge

<sup>107</sup> See Robert James Branham, "Of Thee I Sing": Contesting "America," 48 AM. Q. 623, 627, 633 (1994) (describing the ideographic implications of the song "America" and citing it as a "discourse on citizenship", a "claim of belonging," and a "touchstone" for those seeking freedom, such as immigrants and blacks).

<sup>108</sup> In re African-Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 726 (N.D. Ill. 2005).

<sup>109</sup> Edward Said, *Dreams and Delusions*, AL-AHRAM WEEKLY, Aug. 21, 2003, <http://weekly.ahram.org.eg/2003/652/op1.htm> (explaining how hyperbole has been used to describe the harmful effects of terrorism).

<sup>110</sup> TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW 33 (Oxford Univ. Press 2000) (discussing the way uninformative utterances are vague).

indicates that allegations in the plaintiff's complaint "retell the generally acknowledged horrors of the institution of slavery, and the malignant actions of the sovereigns, entities, and individuals, foreign and domestic, that supported that institution."<sup>111</sup>

The plaintiffs' claims about the effects of slavery are, according to the judge, a "retelling," signaling a reduced need to listen. The story is about "horrors," says Judge Norgle, but they are "generally acknowledged"—they are already known and accounted for. Moreover, we are to understand that the horrors of slavery have resulted not chiefly or at all from the actions of individuals, but from the actions of intangible collectives: "sovereigns" and the nebulous "entities," both "foreign and domestic." Slavery, we are told, grows out of a "tragic" and "deplorable" period in "our Nation's history."<sup>112</sup> This seems to say that, sad as slavery was, it was but an unfortunate historical error that has come and gone. With this discourse presented at the opening of the opinion, the judge lunges and the defendants dance immediately out of the plaintiffs' reach.

In grappling with the meaning of slavery, the judge next turns to what he terms "Historical Overview of Slavery in America."<sup>113</sup> Slavery is now, in Judge Norgle's words, an "immoral institution of human chattel slavery" whose nature Judge Norgle will "elucidate" by offering a definition of slavery.<sup>114</sup> The judge, by citing a former slave, defines slavery as "receiving by *irresistible power* the work of another man, and not by his *consent*."<sup>115</sup> There is, says the judge, an "essential unfairness" of slavery.<sup>116</sup>

On one hand, to say that something is essential goes to the heart of the matter and, hence, may suggest that the judge sees the lack of fairness as irrefutable. On the other hand, the use of the word 'essential' here suggests that the unfairness is so central to the matter that either it is not easily discernible or it need not be remarked. As one observer has written, in the context of feminist jurisprudential assessments of the law and what makes law male, "to qualify [terms] is to weaken [them]."<sup>117</sup> In this context, where the issue is race and not gender, I believe that observation is equally

<sup>111</sup> See *Slave Descendants*, 375 F. Supp. 2d at 726 (summarizing the plaintiffs' allegations).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (explaining that the court will proceed with a brief historical analysis of slavery, the first step of which requires a definition of slavery).

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

<sup>116</sup> *Slave Descendants*, 375 F. Supp. 2d at 727.

<sup>117</sup> JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* 69 (Princeton Univ. Press 1999).

cogent, as there are clear similarities in the power dynamics between men and women and blacks and whites in the United States. Here, at first look, the qualification "essential" seems to be a concession to the black plaintiffs and a snub to the white defendants. However, a closer look reveals otherwise.

Despite its asserted "essential unfairness," United States slavery managed to exist for hundreds of years, even in light of broadly shared notions of "fairness." These notions were often taken to mean procedural fairness that exists outside of the core "essential" unfairness when the formal law sanctions an otherwise immoral practice. In the context of slavery, there was apparently, in the minds of many, a clear delineation between law as procedural fairness and law as substantive fairness. Many scholars have discussed the fact that there existed a number of jurists in the antebellum United States who, with rare exceptions, interpreted laws enforcing slavery to support the institution despite espousing anti-slavery rhetoric and expressing support for the abolitionist cause in other venues.<sup>118</sup>

Later in the opinion, in a section titled "Slavery and Morality," the judge states, "[T]he immorality of the institution of slavery is obvious."<sup>119</sup> While this would appear to be a concession to the plaintiffs in *Slave Descendants* regarding the nature of slavery and their claims, a closer look reveals it to be an example of the same type of distancing seen at the beginning of the opinion when Judge Norgle suggests that slavery was an institution resulting from the acts of certain entities.<sup>120</sup> The judge never states that "slavery is immoral," but instead cites the *immorality* of the *institution* of slavery. Rather than using the adjective 'immoral' to bring immediacy and clarity to the wrongs of slavery, the judge creates a refuge by declaring slavery to be an 'institution.' This use of an abstract noun formulation is often subject to the critique that it obscures rather than clarifies definitions.<sup>121</sup>

<sup>118</sup> See, e.g., DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 73–74 (1998) (citing ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 226–29 (1975) (discussing "judicial response patterns" and issues that arose through responses by abolitionist judges required to interpret statutes which had enforced slavery in nineteenth-century America).

<sup>119</sup> *Slave Descendants*, 375 F. Supp. 2d at 729.

<sup>120</sup> *Id.* at 726 ("The allegations . . . retell the generally acknowledged horrors of the institution of slavery, and the malignant actions of the sovereigns, entities, and individuals, foreign and domestic, that supported that institution.").

<sup>121</sup> See DIANA HACKER, THE BEDFORD HANDBOOK 229 (7th ed. 2006) ("Specific, concrete nouns express meaning more vividly than general or abstract ones. Although general and abstract language is sometimes necessary to convey your meaning, ordinarily prefer specific, concrete alternatives.").

Abstract nouns are nouns which express an intangible idea such as a condition, quality, or mental concept.<sup>122</sup> They are formed by adding suffixes to verbs or, as in the case of ‘immoral,’ adjectives.<sup>123</sup> Abstract noun phrases, rather than refer directly to the subject noun itself, “supernominalize” it; that is, raise the concrete noun (here, ‘slavery’) to a higher level of abstraction, beyond a particular or individual example of slavery.<sup>124</sup> When writers use abstract nouns rather than the concrete nouns or adjectives that more directly state the case, they may do so in order to dignify or rehabilitate the subject or its author or to divert from the nature of the subject itself.<sup>125</sup> There is also evidence that the use of such techniques in legal writing renders such writings difficult to understand.<sup>126</sup> Despite the use of the word ‘obvious,’ this distancing from the immoral nature of slavery is palpable.

The use of abstract nouns and abstract noun phrases is closely related to another rhetorical distancing technique, the choice of passive voice versus active voice. The two are related because the passive voice is typically achieved by the use of abstract nouns and the avoidance of active verbs or adjectives.<sup>127</sup> Active voice is distinguished from passive voice by the identity of the actor. Active voice is performative, and the subject and verb relationship is straightforward.<sup>128</sup> Passive voice is the form of the verb that shows that the grammatical subject is the person or thing to which the action in the verb is done. Often, with passive voice, the agent of the action is not specified, so the agent may be kept out of focus.<sup>129</sup> It has been

<sup>122</sup> HOWARD JACKSON, *GRAMMAR AND VOCABULARY* 35–36 (Routledge 2002).

<sup>123</sup> *Id.* at 6, 79. (explaining that to establish word classes two important characteristics can help since, first, most of the words have a plural form—it is a characteristic of nouns to have a singular and a plural form, and second, some of the words have derivational endings that are characteristics of nouns, for example “ness,” “ism,” and “ing”).

<sup>124</sup> FRANK B. EBERSOLE, *LANGUAGE AND PERCEPTION: ESSAYS IN THE PHILOSOPHY OF LANGUAGE* 47–52 (Univ. Press of America 1979) (providing an example of an abstract noun phrase with “the game of baseball” as opposed to simply “baseball”; the “game of baseball” conveys the broader systemic aspects of baseball itself, whether methodological, economic, social or even philosophical).

<sup>125</sup> See, e.g., TERRI LECLERCQ, *EXPERT LEGAL WRITING* 52 (Univ. of Tex. Press 1995) (“When writers use abstract rather than concrete words, they may be responding to an innate need to dignify the subject—and its author.”).

<sup>126</sup> John Gibbons, *Language and the Law*, in *THE HANDBOOK OF APPLIED LINGUISTICS* 285 (Alan Davies & Catherine Elder eds., 2006) (discussing the fact that “linguistic aspects of the law raise many issues and difficulties” because the written language of “legislation and regulation is difficult” for lay people to understand).

<sup>127</sup> DIANA HACKER, *RULES FOR WRITERS* 80 (6th ed. 2008) (discussing passive voice and methods for avoiding its use).

<sup>128</sup> WILSON FOLLETT, *MODERN AMERICAN USAGE* 345–47 (Jacques Barzun ed., Hill and Wang Inc. 1966) (describing the properties of active voice).

<sup>129</sup> *Id.* at 347 (describing in some sentences with passive voice, there may be confusion as to who the agent is).

observed that in legal and law-related documents, the passive voice is often used to make vague allegations by suppressing the agent of the action with the passive voice.<sup>130</sup> In short, passive voice may allow writers to avoid commitment to a particular proposition.

Active voice is generally preferred in legal writing because it indicates that the subject is central to rather than peripheral to the proposition being stated. Active voice is clearer because it focuses the reader's attention on the "doer of the action." It is also more concise because it usually involves fewer words. Because of the power active voice has to expose not only injustice, but doers of injustice, choosing to use the *passive* voice often diminishes the impact of the articulations of power the dominant use to control the oppressed, and the descriptions of harms caused by this power. This is seen in the classic phrase of responsibility avoidance: "[l]istakes were made."<sup>131</sup> Obscuring the agency of the powerful in such matters is often crucial in a modern world wherein civility mandates that infelicitous expressions of raw power be avoided. For example, in the context of male hegemony over women, it has been suggested that using the passive voice to describe what occurs when men victimize women is "safer and easier" because it avoids accusations that statements about the harm men sometimes cause women constitutes male-bashing.<sup>132</sup> In such contexts, using the passive rather than the active voice not only diminishes the responsibility of the wrongdoer but, in ironic fashion, suggests the wrongdoer would himself be victimized if his wrongdoing were made manifest.

I now turn to a discussion of standing as an ideograph.

### C. *Standing as an Ideograph in General*

Standing doctrine involves the issue of who, if anyone, is entitled to prosecute a particular legal claim in court.<sup>133</sup> It is part of the United States Constitution's Article III case or controversy requirement.<sup>134</sup> Standing is

<sup>130</sup> TIMOTHY A. O. ENDICOTT, *VAGUENESS IN LAW* 32 (Oxford Univ. Press 2001) (explaining the role vagueness plays in verbal and written communication).

<sup>131</sup> Ishtla Singh, *Language, Thought and Representation*, in *LANGUAGE, SOCIETY AND POWER* 17, 29–30 (Ishtla Singh & Jean Stilwell Peccei eds., Routledge 2004) (illustrating the links between language use and perception within and among languages).

<sup>132</sup> *Id.* at 30 (analyzing how structural choices in language communicate perception and blame).

<sup>133</sup> William A. Fletcher, *The Structure of Standing*, 98 *YALE L. J.* 221, 222–23 (1998) (discussing the role of standing in federal courts and proposing that standing should be determined on the merits of a plaintiff's claim).

<sup>134</sup> U.S. CONST. art. III, § 2, cl. 1 (requiring that the "judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . [and] to Controversies to which the United States shall be a Party").

the requirement that a person bringing a suit is the proper party to request adjudication of the issue involved. The test traditionally applied is whether the party had a personal stake in the outcome of the controversy presented and whether the dispute touched upon the legal relations of the parties with adverse legal interests. The personal stake must be particular to the parties and not a general claim shared by all.<sup>135</sup>

Questions regarding standing typically concern public law questions such as inquiries into constitutionality and challenges of government action.<sup>136</sup> The matter of standing is very important to the process of accessing justice, and because of its role as gatekeeper, jurisprudential articulations which broaden the commonly understood notions of standing, and hence grant more access to the courts, may be seen as assaults upon the court in its role as a “bastion of stability.”<sup>137</sup>

Despite its importance as a fundamental requirement for access to the court system, the concept of “standing” is in fact relatively modern, first appearing in United States Supreme Court rulings in the late 1930s, and not taking on its present form until the 1970s.<sup>138</sup> A number of legal scholars who have studied the issue have concluded that the framers of the United States Constitution never intended standing, a term absent from the Constitution, to serve as an independent test for identifying who can properly bring a legal claim in federal court. Instead, it has been argued, the framers believed that Congress should have broad power to enact legislation granting citizens the right to sue. The Supreme Court of the United States has stated, “[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”<sup>139</sup>

The United States Supreme Court standing requirement is grounded in Article III, Section 2 of the Constitution, which grants the judiciary the power to hear ‘cases’ and ‘controversies.’ The Court has stated that the requirement that litigants demonstrate their standing to sue under the

<sup>135</sup> JETHRO K. LIEBERMAN, *A PRACTICAL COMPANION TO THE CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING* 474 (Univ. of Cal. Press 1999) (reviewing how the Supreme Court has ruled on issues from abortion to zoning).

<sup>136</sup> SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 105 (N.Y. Univ. Press 1999) (“Standing cases almost always are concerned with public law questions such as determinations of constitutionality and review of governmental action.”).

<sup>137</sup> ROBERT HEINEMAN, *AUTHORITY AND THE LIBERAL TRADITION: FROM HOBBS TO RORTY* 167 (Transaction Publishers 1993).

<sup>138</sup> See generally JILL NORGREN & SERENA NANDA, *AMERICAN CULTURAL PLURALISM AND THE LAW* (Praeger Publishers 2006) (providing a collection of cases that deal with many aspects of cultural pluralism throughout American history).

<sup>139</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Constitution confines the judiciary to its limited role in the system of separation powers.<sup>140</sup> Because of this, federal courts may exercise power only “in the last resort, and as a necessity.”<sup>141</sup> Hence, the standing requirement helps to ensure that cases filed in federal court result in the type of clearly articulated, “adversarial contests which the courts are institutionally competent to resolve.”<sup>142</sup>

Under the modern standing doctrine, a plaintiff must meet three requirements to have Article III standing. First, the plaintiff must show that he has suffered an “injury in fact.”<sup>143</sup> Next, the plaintiff must establish causation by demonstrating that the injury “fairly can be traced to the challenged action.”<sup>144</sup> Finally, the plaintiff must show that the injury “is likely to be redressed by a favorable decision” of the court.<sup>145</sup> Because of its primacy in the process of bringing a case to court, standing, in terms of ideographic analysis, is what Kenneth Burke has called a “title” or “god-term,” a term “implicit in all other terms and from which all other terms strive.”<sup>146</sup> <sup>147</sup> Standing in the United States jurisprudential context is, along with other jurisdictional requirements, part of the clear essence of having one’s day in court. Standing asks the plaintiff not only, “what is *the* problem?,” but also a series of subsequent and closely related questions such as: “is it *your* problem?” and “is your problem *continuing*?”

#### *D. Standing as an Ideograph in Slave Descendants*

In the *Slave Descendants* case, the plaintiffs’ principal claim for redress fell under what has been called a “traditional model” of reparations in which the claimants sought redress on behalf of the descendants of

<sup>140</sup> *Allen v. Wright*, 468 U.S. 737, 752 (1984) (noting that the United States Constitution creates a tripartite model of governance in which political power is divided between the legislative, executive and judicial branches and under this model, each branch has separate and independent powers and areas of responsibility; however, each branch may also be able to place limits on the power exerted by the other branches).

<sup>141</sup> *Id.* (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

<sup>142</sup> *Standing*, GEORGETOWN ENVTL. L. & POL’Y INST., available at [http://www.law.georgetown.edu/gelpi/research\\_archive/standing](http://www.law.georgetown.edu/gelpi/research_archive/standing) (last visited Oct. 12, 2009).

<sup>143</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

<sup>144</sup> *The Presbyterian Church v. United States*, 870 F.2d 518, 521 (9th Cir. 1989) (quoting *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.* 454 U.S. 464, 472 (1982)).

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

<sup>146</sup> RICHARD H. THAMES, *KENNETH BURKE AND THE 21ST CENTURY*, 24 (Bernard L. Brock ed., State Univ. of N.Y. Press 1999).

<sup>147</sup> Peter A. Cramer, *Diabolical Design’: The Charleston Elite, The 1822 Slave Insurrection and the Discourse of the Supernatural*, in *THE MEMORY OF CATASTROPHE* 39 (Peter Gray & Kendrick Oliver eds., 2004).



slaves.<sup>148</sup> The plaintiffs argued that their injury stemmed from the institution of slavery, and they articulated four specific injuries that they believed were sufficient to confer them standing to maintain the suit. First, the plaintiffs alleged the following: they continue to suffer concrete, direct harm as descendants of slaves because they do not presently have “the same opportunities as [do] their white contemporaries;”<sup>149</sup> they are forced to “overcome barriers to their human right to development which their white contemporaries [do] not;”<sup>150</sup> they “suffer irreparable psychological damage from the loss of their history, language and culture”<sup>151</sup> and, they do not “know the actual birth names of . . . their forbearers and, consequently, to this day do not know their own real names.”<sup>152</sup> Next, plaintiffs alleged that a subset of the plaintiff class were themselves actually enslaved in the twentieth century.<sup>153</sup> Plaintiffs then alleged that because they had filed or would file the necessary paperwork to become administrators of their ancestor’s estates, they have suffered an actual, particularized injury by being denied their rightful inheritances.<sup>154</sup>

In addition, the plaintiffs alleged that they “suffered segregation, lost opportunity, diminished self-worth and value, loss of property rights, loss of derivative property rights, and psychological harm. . .”<sup>155</sup> Plaintiffs further claimed that they were “consumers of defendants” and were injured by certain communications made by the defendants concerning defendants’ respective roles in the institution of slavery.<sup>156</sup> Related to their role as consumers, the plaintiffs alleged specifically that, “[d]ue to unconscionable, fraudulent and deceptive public communications made by defendants, plaintiffs suffered the harm of being misled, confused, and deceived about the roles the defendants played in the enslavement of

<sup>148</sup> Eric J. Miller, *Representing the Race: Standing to Sue in Reparations Lawsuits*, 20 HARV. BLACKLETTER L.J. 91, 93 (2004) (explaining that the first model of the suit brought for reparations against a defendant was brought by the descendants of slaves).

<sup>149</sup> Plaintiffs’ Memorandum in Opposition to Defendants’ Joint Motion to Dismiss the Second Amended and Consolidated Complaint at 2, *In re African-Am. Slave Descendant’s Litig.*, 471 F.3d. 754 (N.D. Ill. 2006).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Plaintiffs’ Memorandum, *supra* note 150, at 2 (“In addition, there are particular Plaintiffs – Cain Wall and his children, and the Estate of Emma Clark – whose allegations of actual enslavement in the 20th century further satisfy the requirement of an ‘injury-in-fact.’”).

<sup>154</sup> *Id.* (“In the SACC, some plaintiffs . . . have already filed to be administrators of the estates of their enslaved ancestors thus removing one more alleged obstacle to standing. Other plaintiffs will soon file the requisite papers.”).

<sup>155</sup> Second Consolidated and Amended Complaint at ¶ 108, *In re African-Am. Slave Descendant’s Litig.*, 471 F.3d. 754 (N.D. Ill. 2006).

<sup>156</sup> *Id.* at ¶ 104.

African people.”<sup>157</sup> Plaintiffs further claimed injury through defendants’ alleged continuing violation of state consumer protection laws.

The judge flatly rejected the plaintiffs’ claims of standing to raise these claims. In doing so, Judge Norgle first relied on the words of another, quoting from a law review article in which the author seemed to reject standing for the descendants of slaves, stating, “Descent from slaves is not of itself an injury, rather the sorts of legally relevant injuries are harms suffered by individuals that are attributable to the ongoing effects of slavery.”<sup>158</sup> This assertion in the law review article led the judge to state, on his own, that plaintiffs could not meet the standing requirement because they based their claim on “injuries to their long-dead ancestors,” which, in the judge’s view, could not possibly be “causing them concrete harm today.”

Going further, Judge Norgle came close to ridiculing the plaintiffs’ claim that they had standing because they suffered some derivative harm due to the enslavement of their ancestors. The plaintiffs asserted in their complaint that “[e]ach Plaintiff African-American slave descendant has suffered by the Defendants[’] failure to pay their ancestors for their labor as slaves or as sharecroppers, peons or even slaves.”<sup>159</sup> However, the judge said this was not enough. Judge Norgle’s rejection of the plaintiffs’ derivative claim for standing was a mortal wound to the plaintiffs’ case, since it was one of the most substantial of the plaintiffs’ claims. By any ordinary reading, the plaintiffs’ claims for redress were simple and clear; therefore, the “actual injury” requirement was plainly fulfilled. The plaintiffs stated the corporations had harmed either them or others whom they were legally entitled to represent – including elderly relatives, some who died a long time before and some who had died only recently. There is ample jurisprudence in the area of wrongful death claims that allows family members to “step into the shoes” of plaintiffs who died before a case could be brought.<sup>160</sup> The judge’s ruling, however, never considered the applicability of this type of claim.

Ideographs are too often the romantic and idealized view of our own

<sup>157</sup> *Id.*

<sup>158</sup> *In re African-Am. Slave Descendants Litig.*, 375 F. Supp 2d. 721, 747 (N.D. Ill. 2005); see Miller, *supra* note 149, at 97.

<sup>159</sup> Second Consolidated and Amended Complaint, *supra* note 156, at ¶ 111.

<sup>160</sup> THOMAS R. VAN DERVORT, *AMERICAN LAW AND THE LEGAL SYSTEM: EQUAL JUSTICE UNDER THE LAW* 128-29 (Marlene McHugh Pratt ed., Thomson Learning 2000) (noting that unlike common-law concepts, modern legislative enactments provide for “status to sue on behalf of the estate of the deceased person”).

normative commitments.<sup>161</sup> They exist as reductions of the interaction of lived reality and what is hoped for, both in the past, as well as in the present and future. The analysis presented above shows how slavery and standing function as ideographs in *Slave Descendants*. I now turn to a discussion of characterizations.

### E. Characterizations

Characterizations are perhaps the most fundamental, yet the most difficult to articulate of Hasian's discursive units.<sup>162</sup> The notion of "forming one's character" describes the process whereby one creates a persona that places oneself within a community of discourse. Such communities are bound by common cultures, interests and languages.<sup>163</sup> These characterizations are contingent and are constantly being redefined and mediated. Moreover, characterizations involve a *mélange* of literary, psychological and sociological overtones.<sup>164</sup>

In the literary realm, interpreting character is largely akin to understanding a character via descriptions of that character in a novel by a narrator. Of course, narrators vary—they may be omniscient or partially omniscient, reliable or unreliable, among other things. Ultimately, however, a reader must respond to the narrator's assertions in order to interpret a text. Reading for character requires interpreting a text, not the personality of the author. Yet this itself is a matter of some dispute.<sup>165</sup>

The psychological aspects of character provide the normative element in addition to the literary aspect.<sup>166</sup> Character in this sense has traditionally been seen as the sum of who a person is. Character as a sociological concept refers to the unity of the "psychic" aspect of a person and the social roles that person fulfills.<sup>167</sup> All aspects of character, however,

<sup>161</sup> Michael C. McGee, *The Origins of "Liberty": A Feminization of Power*, in 47 COMM. MONOGRAPHS 23, 45 (1980) (stating that Americans have "romanticized [their] own normative commitments" in an effort to combat new European political ideologies).

<sup>162</sup> CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 201 (Univ. of Ill. Press 1994) (explaining that it is easy to create forceful characterizations, but that it is "equally difficult" to challenge such characterizations directly).

<sup>163</sup> HASIAN, *supra* note 1, at 133 ("'Forming one's character' means creating a persona that places one's self within communities of discourse, which share cultures, interests, and languages.").

<sup>164</sup> Frug, *supra* note 33, at 873 (deciding to discuss persuasion in terms of the word "character" precisely because of "its overlapping literary, psychological and sociological overtones").

<sup>165</sup> *Id.* (noting that reading for character is a "controversial matter," and the relationship between a narrator of a text and its author "is itself a matter of interpretation").

<sup>166</sup> See *id.* at 873–74 (stating that the sociology of explaining a person's character helps illuminate not only who a person is, but also how the person appears to society).

<sup>167</sup> *Id.* at 874 ("Finally 'character' is a familiar sociological concept: 'It refers to the relatively stabilized integration of . . . a person's psychic structure linked with the social roles of the person.'")

particularly those in a legal setting, ultimately provide society with normative bearings for understanding how reasonable, "law-abiding citizens ought to act or behave."<sup>168</sup>

According to Hasian, characterizations in the law are often conceived along a spectrum that defines "conservative, moderate and radical" examples of behavior.<sup>169</sup> This is so that characters "can dramatize, even embody, contrasting ways of life."<sup>170</sup> In service to this goal, judicial actors, rather than simply interpreting law, perform prudential characterizations that are drawn from "the broader 'rhetorical culture.' In order to offer greater clarification of Hasian's notion of characterization in critical legal rhetoric, below I discuss Hasian's illustration of characterization via the case of Leo Frank.<sup>171</sup>

a. An Example of the Creation and Function of Characterization: The Leo Frank Case

Leo Frank was a Jewish manager of a pencil factory in Atlanta, Georgia accused of raping and murdering an employee, thirteen-year-old Mary Phagan, the daughter of white tenant farmers. Initially, two black workers were arrested and interrogated about the crime, but, according to prosecutors, all evidence pointed to Frank. Frank was tried and convicted. Although the governor of Georgia ultimately commuted Frank's death sentence to life imprisonment, Frank was taken from custody and lynched.<sup>172</sup>

Hasian uses the *Frank* case to illustrate his notion of characterization in the critical legal rhetorical sense by describing the characterizations that were seized upon both by the legal establishment and the public at large, and how these characterizations were crucial in determining how the trial was categorized and blame apportioned. According to Hasian, Mary Phagan was a "perfectly innocent child,"<sup>173</sup> a "Northern Jew"<sup>174</sup> who was a

(quoting HANS HEINRICH GERTH AND C. WRIGHT MILLS, *CHARACTER AND SOCIAL STRUCTURE: THE PSYCHOLOGY OF SOCIAL INSTITUTIONS*, 22 (Harcourt, Brace & World, 1964)).

<sup>168</sup> HASIAN *supra* note 1, at 133.

<sup>169</sup> *Id.* at 133–34.

<sup>170</sup> *Id.* at 135 (quoting Frug, *supra* note 33 at 875).

<sup>171</sup> *Frank v. Mangum* 27 U.S. 309, 323 (1915) (affirming the lower court's denial of a Due Process motion for a new trial).

<sup>172</sup> Eric M. Freedman, *In Memoriam: Frank M. Johnson, Jr.: Milestones in Habeas Corpus – Part II Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1496–97 (2000) (detailing that after the commutation, riots began throughout the streets and Frank was taken from prison and lynched by a number of important citizens).

<sup>173</sup> HASIAN, *supra* note 1, at 132.

“the victim of a pervert.”<sup>175</sup> One of the principal prosecution witnesses, a black janitor named Jim Conley, was initially accused of committing the crime. Conley played the role of the “good Negro,” docile, single-minded, and truthful. He testified with such veracity that “[t]he leading prosecutor would later write in a pamphlet that Conley’s circumstantial evidence was as strong as ‘cables.’”<sup>176</sup> Ultimately, according to Hasian, the characterizations created in the *Frank* case required the reconstruction, in some cases radical, of certain widely held beliefs about gender and race.

b. Reconstructions of Gender in the *Frank* Case

According to Hasian, through characterization, Mary Phagan, became emblematic of white Southern womanhood.<sup>177</sup> Southern womanhood was understood as a key narrative in giving context to what it means to be “Southern.” At least since the Civil War and probably well before, the South had been in a contest for control over the characterizations that formed the body of its narratives. Hence, the South saw itself as peopled by “gallant cavaliers” who struggled to preserve race and culture.<sup>178</sup> The Southern lady was exemplary of the highest ideals of both notions.<sup>179</sup> The North, in contrast, viewed the South as “relatively static, stratified, economically sluggish, insulated, and quasi-aristocratic.”<sup>180</sup> It was, according to Hasian, within this contested terrain that new characterizations about the notion of Southern womanhood were formulated. Mary Phagan became the “iconic representation of a rural South that found itself violated by a financially healthy North.”<sup>181</sup> She was a symbol of the “Old South,”<sup>182</sup> and, through her diverse interest, groups such as upper class whites, religious fundamentalists, and poor rural whites found in her a common cause.<sup>183</sup>

c. Reconstructions of Race in the *Frank* Case

It is perhaps difficult to imagine the events occurring in the *Frank* case between 1913 and 1915 as having in any way radically reformulated the

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 137.

<sup>177</sup> HASIAN, *supra* note 1, at 141.

<sup>178</sup> *Id.* at 140.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> HASIAN, *supra* note 1, at 141.

<sup>183</sup> *Id.* at 141.

racial climate of the South. During this period the racist policies of the Jim Crow laws were in full vigor, and the gulf between blacks and whites was arguably as vast as ever. Jim Crow laws were a series of laws enacted mostly in the Southern United States in the latter half of the nineteenth century that restricted most of the new privileges granted to blacks after the Civil War.<sup>184</sup> Lynching, the extra judicial killing of racially different Others, especially blacks, by vigilante groups, was at an all time high.<sup>185</sup> Lynching was, according to one commentator, a “racial project” which was, for some period of United States history and in some regions of the United States, the rule and not the exception in meting out punishment to certain black males for perceived transgressions.<sup>186</sup> And yet, according to Hasian, the *Frank* case represented a reorientation in the way that race was understood in the South.

Before *Frank*, the public understanding of race was very much linked to a simplistic black/white binary in which blacks and whites were opposite poles on the moral, social, economic and legal planes. Blacks were bad, , poor, not legitimate legal subjects, and existed outside of “decent” white society. In contrast, whites were good, and constituted the center of the social milieu. Whites, if not rich, were certainly either middle class or proud working class. Extremely poor whites existed on the margins, and were often excoriated as “trash” whose only redeeming attribute was their whiteness. Whites were, as “canonical people,”<sup>187</sup> those by whom and for whom the law courts had been created; in the courts, whites dispensed justice and received justice. The case of Leo Frank, however, brought a new and complex element to the understanding of race. This was true for two reasons.

First and perhaps foremost, before reaching the decision to prosecute Leo Frank, two blacks had been considered and then passed over for prosecution. This in and of itself was seminal—both during the Jim Crow period and in more contemporary times, blacks were often constructed as

<sup>184</sup> RICHARD WORMSER, *THE RISE AND FALL OF JIM CROW* (St. Martin's Press 2003) (stating that the phrase Jim Crow was used to describe a complex system of racial laws in the South that help to establish and maintain white social, political, economic and legal domination of blacks and that Jim Crow laws began in the 1880's in the Northern states and proliferated throughout the country by World War I).

<sup>185</sup> See MICHAEL J. PFEIFER, *ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY 1847-1947*, 13–37 (Univ. of Ill. Press 2004) (elaborating on the concept of Jim Crow laws).

<sup>186</sup> JONATHAN MARKOVITZ, *LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY* xx (Univ. of Minn. Press 2004) (defining racial project as “simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.”).

<sup>187</sup> RICHARD J.F. DAY, *MULTICULTURALISM AND THE HISTORY OF CANADIAN DIVERSITY* 30 (Univ. of Toronto Press 2002).

criminals and the notion of choosing a white man in their stead to stand accused was well outside legal and social norms. Moreover, one of the principal witnesses in the case was black, and this case is often cited as the first instance in which a black man was allowed to testify in a Southern court against a white man.<sup>188</sup> Though dubious as a harbinger of racial reform, the *Frank* case gave Southern blacks some small hope that they might gain more access to the courts and even ultimately receive justice in the courts.<sup>189</sup> However, what the *Frank* case changed most about the ways in which race was understood was not necessarily or even at all the way in which blackness was perceived. Rather, it was *whiteness* that was reconstructed. Whiteness in the South was no longer clearly defined between black and white; whiteness was now openly contested and in some cases contingent.

I now turn to the use of characterizations in the *Slave Descendants* case.

#### d. Characterizations in the *Slave Descendants* Case

##### i. Slaves as Characterizations

Slaves as characterizations are particularly provocative examples of Hasian's notion of character for purposes of critical legal rhetoric analysis. This is because, if characterizations in Hasian's purview are to be conceived along a spectrum of behavior norms in society, slaves are at something of a unique disadvantage. They were in law and in fact "non-persons." It was their very status as non-persons that allowed them to occupy their role as unpaid and often unacknowledged servitors.

In the *Slave Descendants* case, we are informed that slaves were, first and foremost, items of personal property, both as a result of law and as a result of widely held social understandings. In the beginning of his discussion of the history of slavery, Judge Norgle tells the reader that Europeans were drawn to Africa for two reasons: gold and slaves.<sup>190</sup> The conjoining of gold and slaves, and the placement of slaves first in this formulation, makes clear that slaves were thought of in quite neutral terms as an asset similar to gold, a treasure that might be obtained not through the fixed intent of the slave traders, but through serendipity.

<sup>188</sup> HASIAN, *supra* note 1, at 141–42 (noting the historical value of Jim Conley's testimony, in which, he became the first black man allowed to testify against a White man in a Southern court).

<sup>189</sup> *Id.* at 142 (discussing the impact of Mr. Conley's ability to testify had on African Americans).

<sup>190</sup> See *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 727 (N.D. Ill. 2005) (examining the main reasons why Europeans were drawn to Africa).

## ii. Slave Traders as Characterizations

It is remarkable, given contemporary history's broad indictment of the role played by European slave traders in creating and sustaining the slave trade, that the judge in *Slave Descendants* manages to paint slave traders in such a different light. To the court, they are hapless, and possibly even blameless, individuals who traveled to Africa with a secondary motive of finding slaves. Once there, Judge Norgle writes, slave traders "simply kidnapped individuals who appeared before them by happenstance."<sup>191</sup> By this account, stealing human beings to cast them into a life of bondage often accompanied by physical abuse is treated as the venial act of misguided individuals and not the horrific crime against humanity that it was. Such an account, as one observer wrote when discussing widespread and apparently sanctioned police violence against blacks and other racial minorities, has the effect of localizing "systematic violence in order to submerge the contradiction of unfreedom in the land of the free."<sup>192</sup> Moreover, Judge Norgle hastens to implicate other Africans in the American slave trade, writing that a "great deal," and "perhaps even the majority," of the slave trade was made possible by "African leaders who sold African slaves to European slave traders."<sup>193</sup>

This mention of the role of Africans in supporting the slave trade is misleading and facile in that it fails to account for the complexities of slavery and human captivity among Africans. First, a number of such captives were prisoners taken in wars between ethnic groups.<sup>194</sup> Next, while slavery was practiced in some parts of Africa, the institution often took place under markedly different material and structural conditions than were present in white dominated countries. For example, the domestic household slavery sometimes practiced in some regions of Africa was in a number of cases more akin to a master-servant relationship where the slave might, for any number of reasons, ultimately become a member of the master's household on par with other members.<sup>195</sup> In addition, the historic practice of domestic slavery in some parts of Africa was in many respects similar to the prison system in many contemporary nations; it was a means

<sup>191</sup> See *id.* (speaking of the European's practice of "kidnapping" Africans and sending them to the slave trade).

<sup>192</sup> Aimee Carrillo Rowe, *Whose "America"? The Politics of Rhetoric and Space in the Formation of U.S. Nationalism*, 89 *RADICAL HIST. REV.* 115, 116 (2004) (examining America and its ironic alias "the land of the free").

<sup>193</sup> See *Slave Descendants*, 375 F.Supp. 2d at 727.

<sup>194</sup> ANNE C. BAILEY, *AFRICAN VOICES OF THE ATLANTIC SLAVE TRADE: BEYOND THE SILENCE AND THE SHAME* 136, 157-60 (Beacon Press 2005).

<sup>195</sup> *Id.* at 59.



of ridding societies of transgressors.<sup>196</sup> The harsher practices of domestic slavery eventually seen in some regions of Africa apparently evolved as Africans frequently drew on customs they learned from how Europeans practiced slavery.<sup>197</sup>

Finally, even where Africans provided slaves to Europeans for enslavement in Europe and the New World, placing the onus of slavery on Africans alone is deeply reminiscent of the “supply side” rhetorical mechanisms employed in fighting the contemporary “drug war” in the West.<sup>198</sup> Frequently, Western politicians and media sources blame Latin American or Asian growers of drug plants as well as a nebulous assortment of other “cartels, traffickers, and dealers” for the scourge of drugs in Western countries.<sup>199</sup> Moreover, the public rhetoric employed in the United States frequently demands punishment for the supply-side actors while supporting relatively benign sanctions such as treatment and recovery options for middle and upper class demand-side drug users in the United States.<sup>200</sup>

As is the case with blaming off-shore drug suppliers for the United States drug epidemic, Judge Norgle’s blaming Africans themselves for the enslavement of African-ancestored people ignores the fact that without a virulent and apparently insatiable demand for slaves in Western countries, there could be no slavery, just as without such high demand for drugs in the West there could be no drug trade.<sup>201</sup>

Starting in the early 1800s, as slavery took hold in the United States, “slave fever,”<sup>202</sup> or the fervent demand for black slaves, grew exponentially

<sup>196</sup> *Id.* at 89.

<sup>197</sup> *Id.* at 157–160 (exhibiting the harshness of domestic slavery through various firsthand accounts).

<sup>198</sup> EVA BERTRAM ET AL., *DRUG WAR POLITICS: THE PRICE OF DENIAL* 25 (Univ. of Cal. Press 1996) (proposing that the importance of preventing drug use in the U.S. is sometimes obscured by rhetoric from public officials and the media).

<sup>199</sup> *Id.* (explaining how U.S. policies in the war on drugs primarily have been focused on the sources of illegal drugs instead of the substantial demand for them).

<sup>200</sup> See *id.* (describing how public rhetoric at times obscures the war on drugs); see also A. BELDEN FIELDS, *RETHINKING HUMAN RIGHTS FOR THE NEW MILLENNIUM* 195 (Palgrave 2003) (stating that in contrast to the leniency that is shown to middle income drug users, the penalties for lower income racial outsider drug users are often harsh and unforgiving, considering; for example, the differential penalties imposed on upper class, mostly white users of cocaine versus lower income, mostly racial minority crack users in the United States).

<sup>201</sup> See *COMING TOGETHER?: MEXICO-U.S. RELATIONS* 18 (Bosworth, et. al. eds., Brookings Institution Press 1997) (distinguishing the American focus on Mexican suppliers of drugs in attempting to eradicate U.S. drug problems from Mexico’s focus on the persistent demand existent in the U.S. as being a substantial cause of the problem).

<sup>202</sup> GAYLE T. TATE & LEWIS A. RANDOLPH, “*There is No Refuge in Conservatism*”: A Case Study of Black Political Conservatism in Richmond, Virginia, in *DIMENSIONS OF BLACK CONSERVATISM IN THE UNITED STATES: MADE IN AMERICA* 43 (Gayle T. Tate & Lewis A. Randolph eds., Palgrave

as middle class whites attempted to achieve their dreams of wealth by exploiting black labor.<sup>203</sup> Like junkies yearning for a fix,<sup>204</sup> slave owners were ever in search of new sources of slaves, even after the Migration and Importation Clause of the United States Constitution ostensibly barred further imports from outside the United States.<sup>205</sup> It has been estimated, for example, that at least 270,000 slaves were illegally brought into the United States between 1808 and 1860.<sup>206</sup>

I now turn to a discussion of narratives and myths.

#### *F. Narratives and Myths in Slave Descendants: The Causes of the Civil War*

The term "narrative" describes a range of discursive practices, including such diverse forms of communication as gossip and anecdote, novels and short stories, television presentations and plays, and legal documents and legal opinions.<sup>207</sup> A common thread or theme in the varying forms of communication that may be described as narratives is the ordering of events or experiences in a sequence.<sup>208</sup> While narratives establish the relationship between and among things via plot, narratives do more than relate events sequentially.<sup>209</sup> The plot transforms a sequence in a structure

Macmillan 2002) (explaining how southern middle class slaveholders depended on slaves to achieve their goals).

<sup>203</sup> See *id.* (acknowledging that great dependence on black labor fed large currents of slave resistance).

<sup>204</sup> See *id.* (noting that the term "junkie" has become sufficiently a part of everyday parlance in North American English and in other variants of English that most readers will recognize that it is synonymous with "addict;" similarly, most will recognize "fix" as a term describing a dose or infusion of drugs); OXFORD ENGLISH DICTIONARY ONLINE (Oxford Univ. Press 2009), <http://www.oed.com> (explaining the term "jones". I have employed this metaphor in order to convey the almost pestilential demand for slaves that had overtaken much of the American South in the period leading up to the Civil War); see also TATE & RANDOLPH, *supra* note 203, at 43-44 (stating, as an example, that the Virginia colony imported a substantial slave population in the early eighteenth century).

<sup>205</sup> See U.S. CONST. art. I § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."); see also Lolita K. Buckner Inniss, *Tricky Magic: Blacks As Immigrants and the Paradox Of Foreignness*, 49 DEPAUL L. REV. 85, 90 (1999) ("Although the Migration and Importation Clause did not explicitly mention slavery, the legislative history of the clause is clear.")

<sup>206</sup> VERNON M. BRIGGS JR., IMMIGRATION AND AMERICAN UNIONISM 12-13 (Cornell Univ. Press 2001) (discussing the amount of slaves illegally smuggled into the United States between 1808 and 1860).

<sup>207</sup> WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION, 14 (Univ. of Cal. Press 1988) (listing different types of narratives).

<sup>208</sup> JASINSKI, *supra* note 46, at 390; ROBERT E. SCHOLES, JAMES PHELAN & ROBERT KELLOGG, THE NATURE OF NARRATIVE 207, 326 (Oxford Univ. Press 1966) (explaining that a narrative involves a sequence).

<sup>209</sup> JASINSKI, *supra* note 46, at 390.

of actions.<sup>210</sup> Narratives, however, may in fact serve as the principal paradigms for human communication.<sup>211</sup>

Myths are related to narratives in that myths are master narratives drawing on archetypal images that have implications sometimes well beyond a specific community.<sup>212</sup> Myths are a way of explaining the world, and may suggest mechanisms for resolving problems, reconciling differences, or simply for accepting situations that may be to all appearances impossible to change. Myths may be of many types, but have been described by one commentator as generally fulfilling one of four purposes.<sup>213</sup> Myths may be societal, offering instruction on how to live.<sup>214</sup> Myths may be the basis of identity claims, and may thereby offer members of a particular group a basis for understanding who they are.<sup>215</sup> Myths may also be eschatological, helping people to understand their future and what life after death may entail.<sup>216</sup> Finally, myths may be cosmological, and in this function may serve to explain the origins of a people and why and how they came to exist.<sup>217</sup>

For Hasian, writing in the specific context of critical legal rhetoric, narratives are story forms with structured plots that help a people or society organize the way in which they regard values and beliefs.<sup>218</sup> Narratives are ways of speaking about events that are far more than forms of representation. Myths are, according to Hasian, more enduring forms of narratives, and have endured the test of time. Myths frequently involve cross-cultural perspectives and ideas. In addressing narratives and myths in the context of critical legal rhetoric, I will focus only on myth as the broader and more expressive form of the narrative.

The Civil War is probably one of the most enduring myths of United

<sup>210</sup> *Id.* ("Plot, then, is simply a *structure of actions*.").

<sup>211</sup> DIDIER COSTE, NARRATIVE AS COMMUNICATION 4 (1989) (describing when narratives are communication).

<sup>212</sup> JASINSKI, *supra* note 46, at 383 ("Myths, in short, are narratives that report the struggles and heroic exploits from a community's past; frequently, mythic stories drawn on archetypal images (particular characters, events, etc.) that transcend the boundaries of a specific community.").

<sup>213</sup> See RODERICK P. HART & SUZANNE M. DAUGHTON, MODERN RHETORICAL CRITICISM 243–51 (3rd ed. 2005) (describing various purposes for myths).

<sup>214</sup> See JASINSKI, *supra* note 46, at 383–84 (detailing different myths that describe how various societies live).

<sup>215</sup> *Id.* ("Identity myths provide the members of a community with a story that serves as the basis for their sense of who they are as a collectivity.").

<sup>216</sup> *Id.* ("Societal myths offer instruction on 'the proper way to live (e.g., the story about George Washington and the cherry tree, the novels of Horatio Alger).").

<sup>217</sup> See *id.* at 383 ("Cosmological myths explain 'why we are here, where we came from, [and] what our ancestors were like.'").

<sup>218</sup> See HASIAN, *supra* note 1, at 15 ("As story forms, narratives have structured plots, and they help us organize the way we think about our values and beliefs.").

States history. One of the long entrenched narratives that prevailed in historical accounts until relatively recently concerned the causes of the civil war and more importantly, the causes for the South's loss. In the decades after the Civil War, white Southerners were chagrined by their crushing defeat at the hands of the North. Reeling from the social and economic upheaval caused by the end of slavery and the loss of slave-based industries, some white Southerners created what has been called the myth of the "Lost Cause."<sup>219</sup> This set of beliefs served to assuage the pain of their defeat, to validate their actions in the decades immediately before the war and during the war years, and to justify the enormous cost of life and suffering that the South had paid in its effort to win independence.<sup>220</sup> The myth has been incorporated into the civic culture of generations of white Southerners and has accordingly influenced many aspects of life in the South and the interpretation of Civil War history.

The myth of the Lost Cause posits the notion that the Confederacy was doomed from the start in its struggle against the superior might of the Union, but its forces fought heroically against all odds for the cause of states' rights. In this account, slavery was not an ultimate cause of war, but rather a collateral cause, since its elimination would undermine the South's autonomy and the state's rights that yielded that autonomy.<sup>221</sup> A corollary to this myth is the belief that white soldiers, both Southern and Northern, gave their lives in part for unworthy collateral beneficiaries: the blacks who had been enslaved in the South.

To some extent, the judge in *Slave Descendants* adopts up this strain of mythologizing, starting with the judge's alleged uncertainty about the ultimate causes of the war. Judge Norgle begins by stating, "Historians have long debated whether slavery was the single driving force behind the regional tensions in the United States that eventually led to the Civil War."<sup>222</sup> The judge explores some of the contrasting views and concludes:

The court does not claim objective knowledge of the ultimate cause of the Civil War. Certainly, however, tensions marked by the North's moral outrage at the institution of chattel slavery, and the South's indignation at the North's promulgation of the Personal Liberty Laws, contributed significantly to the advent of

<sup>219</sup> ALAN T. NOLAN, *The Anatomy of the Myth*, in THE MYTH OF THE LOST CAUSE AND CIVIL WAR HISTORY 12 (Gary W. Gallagher & Alan T. Nolan eds., Indiana Univ. Press 2000).

<sup>220</sup> See *id.* at 13 ("Leaders of such a catastrophe must account for themselves. Justification is necessary.").

<sup>221</sup> See *id.* at 15 (mentioning the principle that slavery was not the cause of the secession).

<sup>222</sup> In re African-Am. Slave Descendants Litig., 375 F. Supp. 2d 721, 729 (N.D. Ill. 2006).

war.<sup>223</sup>

The immediate query in reading this section is why such a discussion is relevant to the plaintiffs' claims for reparations. The reason becomes clear as the judge in a subsequent section details the enormous loss of life suffered by both the North and the South.<sup>224</sup> These statements are relevant to the memory of whether reparations were paid to blacks.

### *G. Memories*

The relationship between memory and rhetoric dates back to rhetoric's origins.<sup>225</sup> Memory, or *memoria*, existed as the one of the five canons of classical rhetoric,<sup>226</sup> which consisted also of: *inventio* (invention), the process that leads to the development and refinement of an argument;<sup>227</sup> *dispositio* (disposition, or arrangement),<sup>228</sup> which is used to determine how the argument, once developed, should be organized for maximum effect, *elocutio* (style);<sup>229</sup> and *pronuntiatio* (presentation),<sup>230</sup> employed once the speech content is known and the structure is determined. *Memoria*, or memory, comes to play as the speaker recalls each of these elements during the speech, and *actio* (delivery)<sup>231</sup> is the final step as the speech is presented in a gracious and pleasing manner.

Memory is sometimes presented as a seemingly simplistic recalling of either a past event or something previously said,<sup>232</sup> and has been frequently ignored in service to the other canons of rhetoric.<sup>233</sup> However, memory is much more nuanced and complex. Exercises in memory, it has been said, are less like a book and more akin to making up stories anew each time the memory is accessed.<sup>234</sup> A memory of an event reflects a combination of information obtained at the time an incident occurred, and inferences based on knowledge, expectations, beliefs, and attitudes derived from other

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 780–81 (detailing the impact of the war on the troops and their families).

<sup>225</sup> See Mary J. Carruthers, *The Book of Memory: A Study of Memory in Medieval Culture*, in CAMBRIDGE STUDIES IN MEDIEVAL LITERATURE 104–05 (Mary J. Carruthers ed., Cambridge Univ. Press 1990) (discussing Aristotle's concept of the relationship between logic and memory).

<sup>226</sup> See CORBETT, *supra* note 34, at 22.

<sup>227</sup> *Id.* at 22–23.

<sup>228</sup> *Id.* at 20.

<sup>229</sup> *Id.* at 26–27.

<sup>230</sup> *Id.* at 28.

<sup>231</sup> See CORBETT, *supra* note 34, at 28.

<sup>232</sup> Carruthers, *supra* note 226, at 46–47.

<sup>233</sup> *Id.* at 9–13.

<sup>234</sup> FREDERIC C. BARTLETT, *REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY* 202–04 (Cambridge Univ. Press 1995).

sources. Memory is a rich and complex part of the pentad of rhetoric, and contemporary studies of rhetoric have fully textualized and contextualized memory discourse by dividing memory into several categories. Collective memory, popular memory, cultural memory, and public memory are just some of these.<sup>235</sup>

Collective memory has been described as “what is remembered by the dominant civic culture.”<sup>236</sup> It is, while the sum of group project in memory, ultimately a socially constructed notion.<sup>237</sup> Collective memory is not, as may be popularly assumed, a “mystical group mind;” rather, it draws strength and coherence from the individuals comprising a particular group.<sup>238</sup> Popular memory, a somewhat related term, often refers to the memories of the common, everyday actors within a populace.<sup>239</sup> Popular memory has been described as the “antithesis of written history” in that it does not rely on fixed or determined facts, but instead seizes on “omens, portents and signs.”<sup>240</sup> Cultural memory reflects the particularized worldview and ethos of a certain culture.<sup>241</sup>

Public memory is related to cultural memory in that it is an amalgam of the cultural memory of the ruling elite in any particular society and parts of the cultural memory of cultures within that same society that are appropriated by the ruling elite.<sup>242</sup> While all of these categories of memory may figure into legal decisions, in *Slave Descendants*, it is public memory that looms largest, since, in the regime of law, public memory frequently serves as a tool for motivating legal claims and justifying outcomes.<sup>243</sup>

#### a. The Role of Public Memory in Making Law

Public memory is typically concerned with a collective sense of what to

<sup>235</sup> FRANCES A. YATES, *THE ART OF MEMORY* (Univ. of Chi. Press 1966).

<sup>236</sup> RICHARD JOSEPH MORRIS, *SINNERS LOVERS AND HEROES: AN ESSAY ON MEMORIALIZING IN THREE AMERICAN CULTURES* 236 (State Univ. of N.Y. Press 1997).

<sup>237</sup> MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* 22 (Lewis A. Coser ed., Lewis A. Coser trans., 1992).

<sup>238</sup> *Id.*

<sup>239</sup> *See id.* (“Social classes, families, associations, corporations, armies, and trade unions all have distinctive memories that their members have constructed, often over long periods of time.”).

<sup>240</sup> RAPHAEL SAMUEL, *THEATRES OF MEMORY: PAST AND PRESENT IN CONTEMPORARY CULTURE* 6 (Verso 1994).

<sup>241</sup> *See id.* (discussing a number of historical events of culturally specific public memory).

<sup>242</sup> *See id.* at 16. (describing educational materials that select events from history).

<sup>243</sup> *See* Joachim J. Savelsberg & Ryan D. King, *Law and Collective Memory*, 3 ANN. REV. L. SOC. SCI. 189, 200 (2007) (“Memory of past injustice can influence our expectation of what constitutes justice . . . . Memory can spur feelings of retribution, when law is called upon to dispense criminal punishment.”); *id.* at 202 (“[S]ymbols of past evil can serve as analogical references that bolster calls for legal (and other) intervention in conflict.”).

remember and how to remember it.<sup>244</sup> Public memory is subject to the “history, hierarchies, and aspirations” of a particular community,<sup>245</sup> and is often a significant component in forging collective identities.<sup>246</sup> Public memory is, at bottom, contested and contingent,<sup>247</sup> and the contest is frequently between the “official culture”—that which exercises hegemony, and the “vernacular culture”—unofficial, subsidiary cultures.<sup>248</sup> As one scholar writes, “[m]emory is more likely to be activated by contestation, and amnesia is more likely to be induced by the desire for reconciliation.”<sup>249</sup>

One reason that public memory is often seen in the legal context is because public memory lives only if it is given voice in some “expressive form.”<sup>250</sup> An act of memory achieves expressive form when it is performed for others who receive it as an audience.<sup>251</sup> Because of the need for expressive form, public memory relies upon the “agency of a text”—that is, it relies upon some vehicle for transmission, such as speeches, letters, or judicial opinions.<sup>252</sup> Public memory shapes ideas and ideals, and helps to draw the parameters of social belonging. As one scholar has written, “[I]n our efforts to make sense of the present, we search the past for material, social, and political warrants that make the present what it is. In so doing, we re-collect and re-member pieces . . . that serve our particular purposes.”<sup>253</sup> Hence, an essential purpose of memory is to recall and maintain tradition.

<sup>244</sup> See PAUL CONNERTON, *HOW SOCIETIES REMEMBER* 3–4 (1989); JAMES FENTRESS & CHRIS WICKHAM, *SOCIAL MEMORY: NEW PERSPECTIVES ON THE PAST* 20–35, 202 (1992) (commenting on how and why traditions are remembered by groups); see generally JACQUES LE GOFF, *HISTORY AND MEMORY* (Steven Rendall & Elizabeth Claman trans., 1992) (noting the links between what groups remember in public memory and how it functions).

<sup>245</sup> Stephen H. Browne, *Reading, Rhetoric, and the Texture of Public Memory*, 81 Q. J. OF SPEECH 237, 248 (1995).

<sup>246</sup> See Stephen H. Browne, *Remembering Crispus Attucks: Race, Rhetoric and The Politics Of Commemoration*, 85 Q. J. OF SPEECH 169, 185–86 (1999) (positing questions about the function and workings of public memory where collective identity exists in tension with cultural norms).

<sup>247</sup> See MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 13 (Alfred A. Knopf 1991) (arguing for an explanation of why memory is “so often contested” by normative culture).

<sup>248</sup> JOHN BODNAR, *REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY* 14–16 (Princeton Univ. Press 1992).

<sup>249</sup> KAMMEN, *supra* note 248, at 13.

<sup>250</sup> Browne, *Reading*, *supra* note 246, at 248.

<sup>251</sup> *Id.* (“[P]ublic memory lives as it is given expressive form.”).

<sup>252</sup> EDWARD S. CASEY, *REMEMBERING: A PHENOMENOLOGICAL STUDY* 217–18 (2nd ed. 2000).

<sup>253</sup> See DEXTER B. GORDON, *BLACK IDENTITY: RHETORIC, IDEOLOGY AND NINETEENTH-CENTURY BLACK NATIONALISM* 4–5 (S. Ill. Univ. Press 2003) (discussing how people interpret historical facts for various purposes).

### b. Tradition as the Core of Public Memory

Tradition is often at the heart of public memory. Tradition is dual in nature; it refers to the narratives or customs that are passed down, as well as to the process by which the narratives or customs are handed down.<sup>254</sup> Traditions are, in most cases, received and not invented, notwithstanding the assertions of some scholars.<sup>255</sup> Therefore, tradition forms the core of public memory, and is too often viewed as unchanging.

This static view of public memory is particularly problematic for critical legal rhetoricians, for while memory is a vehicle for tradition, it is also nonlinear and is a structure that is fabricated and gains and loses value over time.<sup>256</sup> Tradition is thus a rather imperfect deity, one standing with feet of clay, as it is too much subject to the whims of time. Because of these limits, tradition-centered public memory may easily degrade into an unreasoning and unreasonable master that dictates our actions. Tradition in such case is, as Nietzsche writes, a higher power that human beings obey, not because it commands what is useful to us, but because it commands.<sup>257</sup>

### c. Public Memory and Reparations in the *Slave Descendants* Case

Much of the public memory that asserts itself as tradition-based is contested, so much so that, in some cases, what asserts itself as part of the public memory seems more exemplary of amnesia and often stands in stark relief to the counter memories of the disenfranchised.<sup>258</sup> One of the public

<sup>254</sup> See JOHN BODNAR, *REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY* 17 (Princeton Univ. Press 1993) (providing an example of how the legacy of the pioneers has been handed down).

<sup>255</sup> Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1–14 (Eric Hobsbawm & Terence Ranger eds., Cambridge Univ. Press 1983) (“‘Traditions’ which appear or claim to be old are often quite recent in origin and sometimes invented.”).

<sup>256</sup> HASIAN, *supra* note 1, at 29 (“Critical legal rhetoricians would . . . try to replace linear ways of looking at both histories and memories with analyses that see these structures as fabrications that are constantly gaining and losing their rhetoricity.”).

<sup>257</sup> FRIEDRICH WILHELM NIETZSCHE, *THE NIETZSCHE READER* 87 (Keith Ansell Pearson & Duncan Large eds., 2006).

<sup>258</sup> See Mary Mason Williams, *The Civil War Centennial and Public Memory in Virginia* (Univ. of Va. 2005), <http://www2.vcdh.virginia.edu/civilrightstv/essays/williams.pdf> (last visited Oct. 18, 2009) (“Often the historical facts and public memory of events diverge, revealing a desire of Americans to warp the true events of the past into a sentimentalized and idealistic version of the past.”); see also DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 1 (Belknap Press 2001) (“When one is happy in forgetfulness, facts get forgotten.”) (quoting ROBERT PENN WARREN, *LEGACY OF THE CIVIL WAR* (1961)); GEORGE LIPSITZ, *TIME PASSAGES: COLLECTIVE MEMORY AND AMERICAN POPULAR CULTURE* 212 (Univ. of Minn. Press 1990) (“[S]ocially created divisions appear natural and inevitable unless we can tell stories that illustrate the possibility of overcoming unjust divisions.”); Peter McLaren & Tomaz Tadeu Da Silva, *Decentering Pedagogy: Critical Literacy, Resistance and the Politics of Memory*, in PAULO FREIRE: *A CRITICAL ENCOUNTER*, 47, 73–77 (Peter McLaren & Peter Leonard eds., 2001) (1993) (“[O]ne has to acknowledge that there may be some meanings repressed by the narrative structure.”).



memories in contest here, and in many ways essential to the plaintiffs' claim, is whether reparations were already paid to African-ancestored persons in the United States.

Although not explicitly in question, the judge seems to raise the matter of whether reparations were paid to African-Americans *sua sponte*, or on the court's own initiative, and as *obiter dictum*, as a passing comment that has no direct bearing and yet has significant negative implications for the plaintiffs' case. The use of *obiter dictum* to answer questions going beyond the claims of the plaintiff in order to suggest that the plaintiffs' claims for reparation are completely unfounded calls to mind another judicial use of *obiter dictum* in the context of slavery: Justice Roger Taney's declarations in *Dred Scott v. Sandford*<sup>259</sup> that the Missouri Compromise, which, among other things, barred slavery in some states, was unconstitutional.

### CONCLUSION

In this article I discuss the nature of critical legal rhetoric and show how it is a useful tool for uncovering the distinct ideological leanings that may be deployed to affect a systematic, articulable language-based subject positioning of the African-ancestored persons in *Slave Descendants*. Such a project is, of course, subject to the critique that its outcome may be highly dependent on the methodology selected for performing a language based analysis. This is especially true given the fact that critical legal rhetoric is a relatively recent development in the much broader field of critical discourse analysis. Critical legal rhetoric, like critical discourse analysis, concerns itself with the way in which language is deployed ideologically in texts. However, there are clear distinctions to be made between the two. Genres of rhetorical criticism such as critical legal rhetoric typically consider the mechanisms that texts employ to frame meaning, and the ways in which, and/or the extent to which, such meaning creates understanding and promotes identification between rhetoric and audience.<sup>260</sup> Discourse, by contrast, focuses on the interplay of texts (intertextuality) and discourses (interdiscursivity) in order to illuminate the nature of socio-political struggle and show the relationship between texts and macro-sociological issues. In short, critical legal rhetoric is about how language functions in law to produce and sustain power and legitimacy in the context of what is

<sup>259</sup> *Scott v. Sandford*, 60 U.S. 393, 455 (1857) (declaring the Missouri Compromise unconstitutional).

<sup>260</sup> Sharon Livesey, *Global Warming Wars: Rhetorical and Discourse Analytic Approaches to Exxonmobil's Corporate Public Discourse* 39 J. BUS. COMM. 117, 117 (2002).

very clearly an active rhetorical culture.<sup>261</sup> As such, it becomes a potent tool.

<sup>261</sup> Lucaites, *supra* note 13, at 446.