

GUT RENOVATIONS: USING CRITICAL AND COMPARATIVE RHETORIC TO REMODEL HOW THE LAW ADDRESSES PRIVILEGE AND POWER

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I. INTRODUCTION

This essay engages with the concept of *traditional legal rhetoric*, legal rhetoric that uses deductive reasoning in the form of a syllogism, illustrated

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by the well-known law school acronym IRAC.¹ Traditional legal rhetoric descends from classical Western rhetoric, formulated in ancient Greece and Rome, with Aristotle being a predominant influencer.² As a “foundation of western education for over 2000 years,”³ classical Western rhetoric has deeply influenced legal education.⁴ Traditional legal rhetoric also animates legal formalism, which holds itself out to be rational, linear, logical, and dependent on rigid categories.⁵ While legal formalism has been heavily critiqued within American jurisprudence, the style of thought still dominates our legal culture.⁶

In this essay, we advocate that traditional legal rhetoric should be remodeled and renovated through two new disciplines—*critical legal rhetoric* and *comparative legal rhetoric*. We should, through critical scholarship and teaching, unmask legal rhetoric’s power and infuse it with alternative modes of generating legal meanings. As legal writing professors and scholars, we bring a unique perspective to this issue. We must train our students to work in this legal universe, to be successful practicing attorneys, but to also think outside of it to ethically and successfully challenge its existing boundaries.

In Part II of our essay, Professor Lucy Jewel explains that traditional legal rhetoric should be held up, interrogated, and remodeled because (1) it is deeply infected with racism, sexism, and elitism; and (2) because it carries such great power. In Part III of our essay, Professor Elizabeth Berenguer examines strategies for deploying critical legal rhetoric and comparative legal rhetoric in both legal education and practice. And finally, in Part IV of our essay, in the spirit of LatCrit, Professor Teri McMurtry-Chubb considers how the marriage of Latinx and African Diasporic rhetoric creates oppositional legal discourse to dismantle systems of privilege and power in lawyering and in the delivery of legal education.

II. WHAT’S WRONG WITH ARISTOTLE?

This part of our essay seeks to answer the question of whether classical rhetoric is just a neutral tool that becomes harmful only when bad (i.e., discriminatory) thoughts or ideas are infused into the form, or whether traditional rhetoric inherently biased, discriminatory, and founded upon a deep-seated belief in natural inequality. Our thesis here is that traditional legal

¹ IRAC stands for Issue, Rule, Analysis, Conclusion. Lucille Jewel, *Old School Rhetoric and New School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEG. COMMUNICATION & RHETORIC: J. ALWD 39, 59, n.125 (2016).

² *Id.* at 41, 43.

³ Daphne O’Regan, *Eying the Body: The Impact of Classical Rules for Demeanor, Credibility, Bias, and the Need to Blind Legal Decision Makers*, 37 PACE L. REV. 379, 382 (2017).

⁴ *Id.* at 380 citing Gerald Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1555 (1990).

⁵ Jewel, *Categories*, *supra* note 1, at 47, 55 (explaining that, with formalism, a student or lawyer organizes the law into a coherent, ordered system of rules and principles that can be scientifically applied to solve legal problems).

⁶ *Id.* at 57-59.

rhetoric is not just a neutral tool; rather, it is a foundational system that is deeply interlaced with inequality that preserves concentrated power in a select group of predetermined elites. The substrate itself (e.g., IRAC) tends to reinforce inequality in terms of race, gender, and class; yet legal rhetors are expected to speak from this infected foundation and use its problematic norms to enter the profession. It is difficult to step off this foundation.

Two premises emerge from this inquiry. First, traditional legal rhetoric sits on a foundation that is White-supremacist, patriarchal, and elitist. Second, traditional legal rhetoric is harmful because it carries so much power to categorize in a discriminatory way. From these two foundational premises comes our thesis that traditional legal rhetoric must be interrogated, criticized, and reformed. The decolonizing theme that we surface in this paper has been examined before, particularly in the realm of the culture wars that took place in the 1990s.⁷ The unique perspective we offer is our expertise in the discipline of legal writing and communication. We are charged with teaching students the powerful formula to create legal meaning—even though the formula is irreducibly tainted with elitist and inegalitarian norms. In the context of legal rhetoric, very few voices in the professoriate have wrestled this dilemma. As legal writing professors, we must teach our students the forms, but we should also guide them in constructing alternative ways of creating legal meanings. In this part of our essay, we commence with Plato, then review Aristotle, and then consider the impact that their views have had on U.S. legal culture.

A. *Traditional Legal Rhetoric is founded upon White-supremacist, patriarchal, and elitist ideals*

Traditional legal rhetoric derives from Aristotle and Plato, both of whom accepted human hierarchy and inequality in a society that encompassed male domination, slavery, and elitist governance norms. Classical Western ideas about inequality formed a recurrent refrain in both Enlightenment philosophy and early American thought.⁸ Further, these classical thought patterns have heavily influenced American jurisprudence and argument norms.⁹ For instance, in *Palko v. Connecticut*, 302 U.S. 319, 324–25

⁷ LEE MORRISSEY, *DEBATING THE CANON 1-2* (2005) (describing the 1990s debate over what, if any, Western canonical texts should be studied in the humanities).

⁸ See generally, IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2017) (exhaustive study of the racist ideas that influenced American political thought from the colonial era into the twentieth century).

⁹ For a discussion of the influence of “classical” ideas on American law, see Morton J. Horwitz, *The Transformation of American Law 1870-1960, The Crisis of Legal Orthodoxy* (1992) (describing American law’s focus on “classical” thought patterns, heavily dependent on syllogistic and categorical reasoning, which gradually fell out of favor as legal realism and the legal process schools of jurisprudence took hold); see also Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 1996 *Law & Contemp. Probs.* 263, 271 (“Aristotle’s influence on the concept of equity in Anglo-American law can hardly be overstated.”); Jewel, *Categories*, *supra* note 1, at 60.

(1937), Justice Cardozo identifies the principle of ordered liberty as the animating principle behind the Fourteenth Amendment's due process clause. Ordered liberty originates in Aristotle's political science theory, particularly the belief in an "order of nature" in which "almost all things rule and are ruled according to nature."¹⁰

Both Plato and his pupil Aristotle believed that a hierarchical social order was natural and good. Plato believed that only guardians had the wisdom and knowledge to govern, rule, and solve society's problems.¹¹ The choice of who would accede to the guardian class was based on the predetermined makeup of the person; only the wise and virtuous few were acceptable candidates.¹²

There is also a strong class-based elitism within Plato's model state, particularly his view that women, children, servants, and working-class persons were generally too emotional to rule as guardians, in contrast to those people who had the capacity for reason, who were to be found "only in a few . . . the best born and best educated."¹³ Plato's rulers were supposed to be philosopher-kings, monarchs with few material needs who could leisurely deploy their unique wisdom to solve societal problems.¹⁴ Plato's ideas about innate ability would later surface in a Western belief system that privileges the flawed concept of merit, as determined by performance on high-stakes tests.¹⁵ Plato also believed that society would work best in a structured hierarchy, where everyone stayed in their allocated place and no one acted like a "busybody" to question the system.¹⁶

Even more so than Plato's *Republic*, Aristotle's *Politics* devotes a great deal of text to lauding the virtues of a rigid social hierarchy. Aristotle believed that hierarchy was natural:

[A]lmost all things rule and are ruled according to nature. But the kind of rule differs[.] The freeman rules over the slave after an-

¹⁰ ARISTOTLE, *POLITICS* bks. I, XII, & XIII (Benjamin Jowett trans.), available at <http://classics.mit.edu/Aristotle/politics.html>, archived at <https://perma.cc/SN5H-E238>; RUSSELL KIRK, *THE AMERICAN CAUSE* 49, 53, 55 (ISI Books 2002) (Ordered liberty is premised on a worldview of inequality, where people differ in character, talents, and needs and where "it is the nature of things that the few must lead and the many follow.").

¹¹ PLATO, *REPUBLIC* bk. V (Benjamin Jowett trans.), available at <http://classics.mit.edu/Plato/republic.html>, archived at <https://perma.cc/5EK4-YJX9>.

¹² *Id.* at bk. IV.

¹³ *Id.* To Plato's credit, he did conceive that women could be members of the guardian governing class. *Id.* at bk. VII.

¹⁴ *Id.* at bk. V. Nonetheless, in Plato's *Republic*, ruling ability was not necessarily inherited, as in an aristocracy. A guardian's child may or may not be selected as a guardian if his/her innate ability was not up to par. *Id.*

¹⁵ See Lucille Jewel, *The Biology of Inequality*, 95 DEN. L. REV. 609, 639-40 (explaining that the belief that innate individual merit explains and justifies unequal social outcomes ignores evidence that "merit" is not inherited, but is instead highly contingent upon pre-existing capital and nurturing environments); LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 68, 268 (2002) (explaining that high-stakes tests like the LSAT systemically disadvantage black and white people with low socio-economic status).

¹⁶ PLATO, *REPUBLIC*, *supra* note 11, bk. IV.

other manner from that in which the male rules over the female, or the man over the child.¹⁷

For Aristotle, a happy home required hierarchical divisions between “master and slave, husband and wife, father and children.”¹⁸ “Within the family, the “male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle, of necessity extends to all mankind.”¹⁹ A woman’s courage is expressed “in obeying;” a man’s courage is expressed in “commanding.”²⁰ Although Aristotle’s *Politics* does not cover rhetoric in any great detail, he does intimate that women have no place in his rhetorical universe. This is because “all classes must be deemed to have their special attributes [in their mode of speaking].” And, in this regard, “[s]ilence is a woman’s glory.”²¹

Aristotle believed in natural slavery, unequivocally stating:

[S]ome should rule and others be ruled[.] [This] is a thing not only necessary but expedient; from the hour of their birth, some are marked out for subjection, others for rule.²²

Aristotle’s ideas about slavery also connected to ethnic identity, as Aristotle believed that it was proper for the victorious Greeks to enslave any non-Greek “barbarians” conquered in war.²³ Aristotle’s categorical thinking would reappear later, as Enlightenment thinkers theorized equality for all men, except for enslaved persons beyond the color line.

Aristotle’s belief about human hierarchy is profoundly entangled with his theory of *logos*, or rationality. For instance, he did not believe that enslaved persons had the capacity to engage in rational reasoning, or *logos*.²⁴ For Aristotle, enslavement was a matter of not having a strong enough intellect to overcome passionate “soulful” inclinations.²⁵ His theory was that a strong intellect rules the body in a “constitutional” and “royal” way, whereas the unruly soul rules in a “despotal” way.²⁶ In a circular fashion, Aristotle categorized enslaved individuals as a “lower sort [who] are by nature slaves, [explaining that it is] better for them as for all inferiors that they should be under the rule of a master.”²⁷

¹⁷ ARISTOTLE, *POLITICS*, *supra* note 10, bk. I, pt. XIII.

¹⁸ *Id.* at bk. I, pt. III.

¹⁹ *Id.* at bk. I, pt., pt. V.

²⁰ *Id.* at bk. I, pt. XIII.

²¹ *Id.* at bk. I, pt., pt. XIII.

²² *Id.* at bk. I, pt. IV.

²³ *Id.* at bk. I, pt. II. See also KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 76 (2002) (describing Plato and Aristotle’s conception of natural slavery as holding that “Greeks and barbarians are unequal by nature.”).

²⁴ ARISTOTLE, *POLITICS*, *supra* note 10, bk. I, pt. XIII. (“For the slave has no deliberative faculty at all.”).

²⁵ *Id.* at bk. I, pt. V.

²⁶ *Id.*

²⁷ *Id.*

Aristotle's idea—that lower-class individuals have base natures, beholden to physical and emotional yearnings whereas higher-class individuals have powerful intellect and discipline—has remained in Western culture for thousands of years. This mind-body dichotomy is elitist and classist and also lends itself to theories of racial subordination. Themes focusing on embodied greed, lust, and gluttony are discernible, for instance, in the racialized “Welfare Queen” trope applied to Black women,²⁸ and the “Bogeyman” trope applied to Black men.²⁹ Racialized stereotypes concerning intellectual ability also surface in the legitimizing myths of merit that characterize U.S. capitalism.³⁰

Like Plato's concept of ruling guardians, Aristotle's conception of good governance is baldly classist. Indeed, Aristotle extolled aristocracy as a model form of government.³¹ Aristotle's participating citizens were distinguished persons who had the right to participate in state governance.³² Ordinary workers, women, seniors, resident aliens, and enslaved persons were excluded from citizenship.³³ Like Plato's philosopher kings, Aristotle believed that citizens should have ample leisure time.³⁴ Citizens should not work for a living (trade, mechanics, husbandry), because that kind of life would be “ignoble” and “inimical to virtue.”³⁵ For Aristotle, virtue is the keystone of good governance in a civil society.³⁶ But unfortunately, Aristotelian virtue is not achievable for all; it is conditioned upon one's wealth and privilege.³⁷

Until the eighteenth century, Aristotle's ideas about natural human hierarchy were widely accepted.³⁸ During the Enlightenment, Aristotle's ideas about natural hierarchy were displaced as thinkers developed natural law theories holding that all individuals possess equal rights.³⁹ Crucially how-

²⁸ Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & Soc. JUST. 233, 248 (2014) (explaining the various base nature stereotypes leveled at black women over the decades since slavery, including jezebels with “loose morals and outsized sexual desire”; mummies with “asexual [desires] who prioritized the care of White children over their own”; and sapphires with attributes of being a “strong, masculine workhorse”).

²⁹ Nick J. Sciuillo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201, 206-207, 226 (2015) (describing how the bogeyman trope associates fear and dangerousness with the physical bodies of black men).

³⁰ See *supra*, note 15.

³¹ Aristotle, General Theory on Constitutions and Citizenship, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, available at <https://plato.stanford.edu/entries/aristotle-politics/#ConCit>, archived at <https://perma.cc/3GZJ-BKYY>.

³² *Id.*

³³ *Id.*

³⁴ ARISTOTLE, POLITICS, *supra* note 10, bk. VII, pt. IX.

³⁵ *Id.* See also, *id.* at bk. III, pt. V (“[N]o man can practice virtue who is living the life of a mechanic or laborer.”).

³⁶ *Id.* at bk. I, pt. VI (recognizing the connection between virtue and power and explaining that “the superior in virtue ought to rule, or be master”).

³⁷ *Id.* at bk. VII, pt. IX; bk. III, pt. V.

³⁸ STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *Equality*, available at <https://plato.stanford.edu/entries/equality/>, archived at <https://perma.cc/L27E-SJ33>.

³⁹ *Id.* (discussing Hobbes, Locke, Rousseau, and Kant).

ever, indigenous persons and individuals of color were not included in the equal rights calculation. In *The Racial Contract*, Charles Mills devastatingly takes down Enlightenment thought as hopelessly hypocritical, elitist, and racist:

In [Enlightenment] philosophy, one [can] trace this common [racial] thread through Locke's speculations on the incapacities of primitive minds, David Hume's denial that any other race but whites had created worthwhile civilizations, Kant's thoughts on the rationality differentials between blacks and whites, Voltaire's poly-genetic conclusion that blacks were a distinct and less able species, John Stuart Mill's judgment that those races "in their nonage" were fit only for "despotism." The assumption of nonwhite intellectual inferiority was widespread, even if not always tricked out in the pseudoscientific apparatus that Darwinism would later make possible.⁴⁰

Although they were radical in postulating theories of natural law, Enlightenment thinkers conservatively clung to Aristotle's circular belief that out-group individuals must be ruled and subjugated because they do not have the capacity for deliberative reason.⁴¹ In other words, at same time that Enlightenment thinkers were postulating grand theories of natural rights, they were justifying violent race-based enslavement for colonial exploitation.⁴² In part because the founding fathers held these Enlightenment ideas in such high esteem,⁴³ these ideas are embedded in the foundation of U.S. law. Classical ideas about "natural" hierarchy justified legalized slavery, Jim Crow regimes of "separate but equal," the subjugation of women, and so on. These classical ideas are the substrate that traditional legal rhetoric is founded upon.

⁴⁰ CHARLES MILLS, *THE RACIAL CONTRACT* 59-60 (1999).

⁴¹ *Id.*

⁴² Historian Ibram X. Kendi thoroughly outlines how Enlightenment thinkers such as Robert Boyle, Francois Bernier, Carl Linnaeus mirrored Aristotle's beliefs about natural slavery. KENDI, *supra* note 8, at 17, 45, 50, 55-56, 82. For instance, Enlightenment thinker François Bernier wrote that that "[t]hose who excel in the powers of the mind . . . [should] command those who only excel in brute force." *Id.* at 67. Bernier's friend, John Locke, (who helped draft South Carolina's pro-slavery constitution) justified colonial slavery because "slaves, who being captives taken in a just war, are by the right of nature subjected to the absolute dominion and arbitrary power of their masters." *Id.* at 59-60.

⁴³ KIRK, *supra* note 10, at 47 (explaining the influence of John Locke and other Enlightenment thinkers on the founding fathers); KENDI, *supra* note 8, at 90 (explaining that Thomas Jefferson was deeply influenced by John Locke and David Hume).

B. Traditional legal rhetoric should be problematized because it restricts outsiders from participating in the discourse and because it is an elitist tool that has great power to reinforce inequality

What does Aristotle's problematic conceptions about race, class, and gender tell us about practical legal reasoning? Yes, Aristotle was hopelessly misogynistic, inegalitarian, xenophobic, and classist, but hasn't he given us a great set of tools⁴⁴ from which to make solid legal arguments, some of which might actually reform the law in progressive ways? Feminist philosophers have wrestled with this question as well.⁴⁵ These philosophers have asked the following: Given that the norms informing Western philosophy are gendered male, should traditional concepts of reason be rejected outright, or should they merely be subjected to critical scrutiny?⁴⁶ While we are not advocating that classical logical tools (i.e., IRAC) should be abruptly thrown out the window wholesale,⁴⁷ we do argue that it is time for IRAC to be cross-examined and, through a crucible of critical analysis, modified and revamped. This is where the future work lies, through additional scholarship, study of alternative rhetoric traditions, and new teaching strategies. Here, we argue that traditional legal rhetoric should be subjected to critical scrutiny and reconceptualized from a more egalitarian standpoint. Traditional legal rhetoric should be critiqued and remodeled for two reasons: First, because traditional legal rhetoric privileges elite positions and voices, it does not encourage a democratic or inclusive approach to legal meaning making; and second, because traditional legal rhetoric carries so much power, it has the capacity to reproduce and reinforce inequality.

1. Traditional legal rhetoric is not democratic or inclusive

In a highly undemocratic way, traditional legal rhetoric limits the kinds of knowledge and voices that can contribute to its discourse. Traditional legal rhetoric generally forces the speaker to speak from one position and to use only one mode of knowledge production. In this manner, only certain

⁴⁴ When racially and economically privileged groups continue to control the production of knowledge in a way that reproduces and advances discrimination, "tools" are rarely neutral. See ANDRE LORDE, *THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE* (2018). Legal writing processes, the metaphorical table that we write on, are also not neutral. Teri McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric for a "Woke" Legal Academy*, 21 ST. MARY'S SCHOLAR 255 (2019); Teri McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41 (2009).

⁴⁵ Charlotte Witt, *Feminist History of Philosophy in FEMINIST REFLECTIONS ON THE HISTORY OF PHILOSOPHY* 7 (Kluwer Academic Publishers 2004).

⁴⁶ *Id.*

⁴⁷ For a brilliant exposition of the frustrations that IRAC poses for one's authentic voice, see Leslie Culver, *(Un)wicked Analytical Frameworks and the Cry for Identity*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3402173&dgcid=ejournal_htmlmail_law:rhetoric:ejournal_abstractlink, archived at <https://perma.cc/DBY5-ZXHD>.

meanings are allowed to surface. Traditional legal rhetoric assumes the speaker's voice derives from a position of elite privilege. This premise has roots in classical rhetoric. Professor Daphne O'Regan explains that in Ancient Greece, a rhetor's credibility derived from the adoption of an "aristocratic, upper class demeanor, including the physical habits of wealthy foot soldiers."⁴⁸ These mannerisms were "linked with rationality and truth," whereas the delivery style of more democratic, popular, non-elite speakers was denigrated as non-credible, too emotional, and irrational.⁴⁹ Norms associated with elite social status became deeply embedded in Western legal culture, which associates the elite demeanor of the ancients (i.e., restrained but confident) with rationality and truth.⁵⁰

Traditional legal rhetoric also incorrectly assumes that its rhetors are comfortable, wealthy, and in a dominant, unsubordinated position. This assumption is visible in U.S. legal culture, where lawyers have long been associated with the identity of the class-privileged, White, aristocratic man who practices law free from any material concern.⁵¹ For instance, in 1859, the University of Georgia pronounced that its new law school would provide great value to the "large number of young men who intend to devote themselves to the honorable employment of cultivating the [slave plantations] they inherit from their fathers. To them a knowledge of the general principles of law is [of] inestimable value."⁵² In the mid-1800s, an ideal of upper-class masculinity shaped the emerging canons of professional responsibility, which were founded on the premise that attorneys should passively await business from paying clients "[l]ike young maidens awaiting suitors."⁵³

The Olympian nature of the traditional rhetor's voice implies a man, sitting in a comfortable mansion on a hill where he can freely pontificate and analyze.⁵⁴ Like Aristotle's governing guardians, who had plenty of leisure time to exercise practical wisdom, the legal speaker is presumed to be free from material concerns, unworried about her law firm's overhead expenses, crushing student loans, or childcare logistics. Traditional legal rhetoric forces the speaker to adopt the mien of a White, upper-class man—for many, this is

⁴⁸ O'Regan, *supra* note 3, at 387.

⁴⁹ *Id.* at 387-391.

⁵⁰ *Id.* at 389.

⁵¹ In 1835, Alexis De Tocqueville explained: "[L]awyers form the highest political class and the most cultivated portion of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and bar." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (1954).

⁵² ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 21 (1983) (quoting Announcement, Univ. of Ga. Law Dep't (June 1, 1959)).

⁵³ JEROLD S. AUERBACH, *UNEQUAL JUSTICE, LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 41 (1976).

⁵⁴ Horwitz, *supra* note 9, at 271 (explaining U.S. jurisprudence as emphasis on "neutral principles" indicated a "persistent yearning to find an Olympian position from which to objectively cushion the terrors of social choice."); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings L.J.* 814, 820 (1987) (Richard Terdiman trans.) (legal speech obtains collective buy-in when it conveys neutrality, expresses general rather than specific concepts, and indicates that it is free from embedded values).

an unauthentic identity that can create intense psychic turmoil.⁵⁵ The very essence of the legal profession is irrepressibly entangled with class, race, and gender subordination.

2. The frightening power of traditional legal rhetoric

The tremendous power of traditional legal rhetoric is that it literally has the power to construct reality.⁵⁶ First, traditional legal rhetoric as it appears in briefs, court opinions, and statutes has the immense, and sometimes toxic, power to generate collective buy-in for which ideas should structure our social world. Because traditional legal rhetoric has this ability to generate collective buy-in, it has immense power to exert social control and organize group relations.⁵⁷ French sociologist Pierre Bourdieu argued that legal meanings are constructed to produce a robust collective mindset, or *habitus*.⁵⁸ Everyone who operates in the legal “field” believes in the rules of the game and, by virtue of playing the game, grows the *habitus*.⁵⁹ The *habitus* operates like an apparatus, exerting a powerful form of social control to organize group relations.⁶⁰ Order is maintained because but all the actors involved buy into a *habitus*, or mindset, comprised of a complex set of rules, customs, and attitudes that constitute the social and cultural ecosystem.⁶¹

Further, legal language is uniquely powerful because, unlike other forms of language, legal words are imbued with the power of the sovereign state.⁶² Consider a judge who declares that a defendant is guilty. That declaration, vested with the power of the state to both categorize the person as a defendant and restrict the defendant’s liberty, becomes material reality. Importantly, this categorization not only impacts this person’s status tempora-

⁵⁵ See Leslie P. Culver, *Conscious Identity Performance*, 55 SAN DIEGO L. REV. 577, 612 (2018) (describing the “huge burden” placed on outsider group members who must strategize on how to perform their identity in elite work spaces). In addition to the internal conflicts created by having to perform one’s identity in an inauthentic way, the exposure to persistent micro-aggressions and bias also creates health effects. See also, Pamela J. Smith, *The Tyrannies of Silence of the Untenured Professors of Color*, 33 U.C. DAVIS L. REV. 1105, (2000) (discussing the physical, emotional, and physical toll that comes from being an untenured law professor of color); Liane Jackson, *Minority Women Are Disappearing from Big Law—and Here’s Why*, ABA JOURNAL, March 1, 2016, http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why, archived at <https://perma.cc/XH3Y-T2RQ> (describing how exposure to routine gender and racial biases inherent in corporate law firm practices have toxic physical and mental effects on minority lawyers).

⁵⁶ Bourdieu, *supra* note 55, at 827, 831.

⁵⁷ *Id.* at 818-819.

⁵⁸ *Id.* at 818-819, 833.

⁵⁹ *Id.* at 818, 820, 831.

⁶⁰ *Id.* at 818-819.

⁶¹ *Id.* In a similar vein, Harold McDougal has compellingly written about *imagined realities*, for which there is collective buy-in, which help sustain human hierarchy. See Harold McDougal, *Humans, Hierarchy, and Human Rights*, 74 NATIONAL LAWYERS GUILD REV. 129, 130-131 (2017). An imagined reality can take the form of a legend, myth, and/or religion, which “coalesces a set of beliefs, discourses, institutions and practices that explain and support the social order.” *Id.* at 131.

⁶² Bourdieu, *supra* note 55, at 837-838.

rily, but it irrevocably transforms this person's identity into one that is inherently inferior and perpetually subjugated. In our common law system, the realities constructed with legal rhetoric become even more entrenched because of the necessarily iterative nature of the legal process.⁶³ When we repeat terms of art, key words, and *verbatim* language from a rule, those concepts become entrenched in our collective mindset.⁶⁴ In other words, when something is repeated over and over again, the concept becomes "sticky."⁶⁵ Consider that the longstanding Westlaw Key Number category for employment law is "Master and Servant." This hierarchical category influences how we think about employment law. The employer is obviously the master, the worker the subordinate servant. The categories utilized by the Key Number system can be traced all the way back to ancient times, to the hierarchy-loving Aristotle (and his English translators).⁶⁶

However, not everyone meaningfully participates in the legal meaning-making process. Legal rhetoric's power to make reality resides in the individuals who possess the most juridical power: the power, in the words of Captain Picard, to "make it so."⁶⁷ Because law's reality is constructed in a way that benefits those groups who are already in power, law reifies majoritarian norms and tends to ignore and silence minority voices.⁶⁸ In the U.S. criminal justice system, perhaps traditional legal rhetoric's greatest power is to determine life and death: "[J]udges *deal* pain and death."⁶⁹ Consider the example of a state attorney general pursuing the death sentence for a Black defendant who committed a capital crime, even though structural racism tainted his jury selection at trial, even though he suffered from serious mental illness exacerbated by the severe abuse he suffered as a child (which was not fully disclosed at trial), and even though the victim's family no longer supports his death sentence.⁷⁰ From the attorney general's perspec-

⁶³ Lucille Jewel, *Neuro-Rhetoric, The Law, and Race: Toxic Neural Pathways and Healing Alternatives*, 76 UNIV. OF MARYLAND L. REV. 663, 682-83 (2017).

⁶⁴ *Id.*

⁶⁵ The "sticky" concept has also been used to explain how frequently-repeated contract language becomes entrenched as boilerplate. See Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design*, 40 HOFSTRA L. REV. 1, 4 (2011).

⁶⁶ See ARISTOTLE, *POLITICS*, *supra* note 10, bk. I, pt. III (We have therefore to consider what each of these three relations is and ought to be: I mean the relation of master and servant. . .)

⁶⁷ *Id.* at 827. On this point, Bourdieu is borrowing from Speech Act Theory, a philosophical theory that engages with the power of words to make social meanings. See Richard Terdiman, *Translator's Introduction The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L. J. 805, 809 (1987) (citing J. Austin, *How to Do Things With Words* (1962) and J. Searle, *Speech Acts: An Essay in the Philosophy of Language* (1969)).

⁶⁸ Bourdieu, *supra* note 55, at 817; Elizabeth Berenguer, *Disaster Unaverted; Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 262-63 (Citing WINSTON P. NAGAN, *CONTEXTUAL-CONFIGURATIVE JURISPRUDENCE: THE LAW, SCIENCE, AND POLICIES OF HUMAN DIGNITY* at 69 (2013)).

⁶⁹ Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1609 (1986) (emphasis added).

⁷⁰ See, e.g., *Tennessee Attorney General Asks State Supreme Court to Schedule Nine Executions and Undo Plea Deal that Took A Tenth Prisoner Off Death Row*, DEATH PENALTY

tive, death is the correct outcome, the correct reality, because a jury verdict of death was the original outcome after the appropriate legal process. But the process systematically silenced voices that would surface the defendant's mental illness, his history of childhood abuse, and the undeniably racist way that his trial process unfolded. The process also refused to listen to the voices of the crime's victims, who supported commuting his sentence from death to life.⁷¹ The post-conviction process, through labyrinthine procedures and onerous review standards, shut the door on competing perspectives. In this manner, only certain legal meanings remain in the sieve; others are quickly washed away down the drain.⁷²

Thus, traditional legal rhetoric, through its logocentrism, preordained process, and straight-line structure, limits what meanings can be constructed. Traditional legal rhetoric, steeped as it is in Western thought structures, denies that "there are many different and legitimate ways of thinking."⁷³ As legal writing scholars, this is an especially difficult position. In 1998, influential legal rhetoric scholar Kathryn Stanchi summarized the point perfectly:

Because legal writing pedagogy reflects the biases in legal language (including legal reasoning), its effectiveness in "socializing" law students comes at the price of suppressing the voices of those who have already been historically marginalized by legal language.⁷⁴

As this piece of our essay has sought to show, traditional legal rhetoric marginalizes the voices of others because it is founded on an ancient and deeply rooted substrate that has long embraced racism, sexism, economic, and other forms of inequality. We are not arguing that IRAC should be shelved and that students should do legal analysis in a stream of consciousness way. However, the inegalitarianism and elitism that can be traced throughout Western thought makes it difficult to step off the plate and visualize alternative modes of knowledge construction. Thus, our thesis is that we should and must critique the inegalitarian and racist roots of traditional legal rhetoric and strive to infuse it—and sometimes replace it—with alternative rhetorical practices.

INFORMATION CENTER, September 27, 2019, <https://deathpenaltyinfo.org/news/tennessee-attorney-general-asks-state-supreme-court-to-schedule-nine-executions-and-undo-plea-deal-that-took-a-tenth-prisoner-off-death-row>, archived at <https://perma.cc/N5MZ-XHCH>; JUSTICE FOR ABU, <https://www.justiceforabu.org/>, archived at <https://perma.cc/N9FK-QFBS>.

⁷¹ See *id.*

⁷² Reparations provide another compelling example of how traditional legal rhetoric shuts down alternative methods of understanding the world, see Teri A. McMurtry Chubb, *The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham's Sycamore Row*, 48 UNIV. OF MEM. L. REV. 889 (2018) (explaining that a complaint in favor of reparations for slavery cannot be told in court because of law's insistence upon atomized cause and effect, that gives a remedy only for individual and intentional harms) [hereinafter McMurtry-Chubb, *The Rhetoric of Race*].

⁷³ EDWARD T. HALL, BEYOND CULTURE 7 (1976) (quoted in Teri A. McMurtry Chubb, *The Rhetoric of Race*, *supra* note 74, at 897).

⁷⁴ Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICKINSON L. REV. 7, 9 (1998).

III. INDOCTRINATION VS. EDUCATION: RENOVATING AND REMODELING WESTERN RHETORIC

The very structure of legal education is designed to replicate the toxic White patriarchal hierarchies examined in Part II of this Essay. As law professors, we like to believe that we are educating lawyers. We tell our students over and over, “Law school teaches you to think like a lawyer,” and we claim to value legal education. In reality, though, we indoctrinate students to replicate the toxic hierarchies that traditional legal rhetoric was created to preserve.⁷⁵ We even call the subjects we teach doctrine and privilege doctrinal professors over clinical and writing professors by excluding clinical and writing professors from the traditional tenure track and paying them lower salaries while simultaneously expecting them to do more work. At many law schools, clinical and legal writing faculty, who are overwhelmingly women and women of color, are not even permitted to vote.⁷⁶ Moreover, faced with demands from the legal profession to produce practice-ready lawyers, law schools continue to privilege the indoctrination of students with abstract legal theory over their practical education.⁷⁷

But to a certain extent indoctrination is necessary; it is simply not sensible to send graduates out into practice without a basic understanding of legal doctrine, traditional legal rhetoric, and, most importantly perhaps, the legal syllogism.⁷⁸ After all, the legal syllogism is the *sine qua non* of logical, rational legal thought. It is the lawyer’s principal tool of persuasion.⁷⁹ And so, we teach our students that an argument rooted in *logos* is the essential foundation for any sound legal argument.⁸⁰

⁷⁵ The first key finding of the Carnegie Report is: “Law School Provides Rapid Socialization into the Standards of Legal Thinking.” The Carnegie Foundation for the Advancement of Teaching, *Summary, Educating Lawyers: Preparation for the Profession of Law*, 5, http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf, archived at <https://perma.cc/5N22-66BK> (last visited December 13, 2019).

⁷⁶ Teri A. McMurtry-Chubb, *On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 *J. Legal Educ.* 575 (2017), citing Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 *UMKC L. REV.* 467 (2004); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School’s Dirty Little Secrets*, 16 *BERKELEY WOMEN’S L. J.* 3 (2001); Jo Anne Durako, *Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing*, 50 *J. LEGAL EDUC.* 562 (2000); Maureen J. Arrigo, *Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs*, 70 *TEMP. L. REV.* 117 (1997). *But see* Lorraine K. Bannai, *Challenged X3: The Stories of Women of Color Who Teach Legal Writing*, 29 *BERKELEY J. GENDER L. & JUST.* 275 (2014) (considering the multiple marginalizations that female legal writing professors of color face); Teri A. McMurtry-Chubb, *Writing at the Master’s Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 *DREXEL L. REV.* 41 (2009) (discussing the convergence of race, gender, and status and its negative impact on legal writing professors of color).

⁷⁷ *Educating Lawyers: Preparation for the Profession of Law*, *supra* note 78, at 8-11.

⁷⁸ The common example is: All men are mortal. Socrates is a man. Therefore, Socrates is mortal. ROBBINS-TISCIONE, *supra* note 59, at 117–20.

⁷⁹ MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 1–7 (Aspen 2002).

⁸⁰ PIERRE SCHLAG & DAVID SKOVER, *TACTICS OF LEGAL REASONING* 11 (Carolina Academic Press 1986).

From the first day of law school, we actively encourage students to leave behind their personal experiences to learn how to think like lawyers, as if the legal world is some form of alternate reality.⁸¹ Through the development of our thesis, what we expose is that the law actually is an alternate reality constructed by an exclusive subsection of society comprised of predominantly wealthy, elite, powerful, White men. For our students to gain entry, therefore, we must indoctrinate them into the way of life in this toxic alternate reality.

We reward students with high grades when they quickly learn to identify the relevant rule of law and the legally relevant facts. We praise those students who can clearly articulate the holding and apply it to a hypothetical with slightly different facts, and we publicly humiliate those who struggle to do so. We create cut-throat competition and isolation amongst them by grading them comparatively and eschewing independent identity in favor of relational status and hierarchical positioning. These practices discourage students from questioning the correctness of the rule of law and reinforce that lawyers are constrained by status and place as dictated by the realities of rigid rules of law, despite absurd outcomes.

Early in the law school experience, we tend to exaggerate the extent to which the law exists independently of our own constructs.⁸² After all, it is dangerous to allow novice legal thinkers in on the secret that the law is simply a construct—it would have the effect of pulling back the proverbial curtain to reveal that the Wizard is just a man. And to a certain degree, this makes sense. Just because the reality has been constructed does not mean that it is not real. So, it would be incredibly irresponsible for law schools to graduate students who do not understand the basic law of contracts or torts, for example. Graduates must have a working understanding of existing principles of law so that they can effectively engage in the practice. On the other hand, we should also be equipping our graduates with the ability to identify harmful systems and providing them with skills to ethically deconstruct and remodel or replace them in favor of more just and equitable outcomes.

A first step toward teaching ethical deconstruction is to teach students how the law is constructed. In their book, *Minding the Law*, Harvard professors Anthony G. Amsterdam and Jerome Bruner tell us that:

1. Categories are made, not found;
2. Categorizing is an act of meaning making;
3. Categories imply a world that contains them;
4. Categories are not always clean-cut;
5. Categories serve a particular function;
6. Categories become entrenched in practice; and

⁸¹ “In their all-consuming first year, students are told to set aside their desire for justice.” *Educating Lawyers: Preparation for the Profession of Law*, supra note 78, at 6.

⁸² Elizabeth Berenguer, Gideon’s *Legacy: Taking Pedagogical Inspiration from the Briefs that Made History*, 18 *Barry L. Rev.* 227, 233-34 (2013).

7. Categories are never final.⁸³

Amsterdam and Bruner note that once “you inquire where categories come from, you quickly recognize that they are almost never constructed arbitrarily. Typically, they are extracted from some larger-scale, more encompassing way of looking at things—either from some theory about the world or from a narrative about the human condition and its vicissitudes.”⁸⁴ Thus, accepting these principles of category construction as true, the obvious flaw in the U.S. legal system is that the categories were created nearly exclusively by powerful, elite White men. These men created meaning based on their personal experiences and their understanding of the world within the categories was necessarily influenced by their personal experiences. The categories they created served the purpose of preserving their position of power and supremacy in Western society.⁸⁵

It follows that when we indoctrinate our students into the practice of law, we are expecting them to replicate these very same systems of power. Classic Western rhetoric as a mode of inquiry perpetuates the power of the elite White patriarchy. Through *logos*, it deploys the legal syllogism to ratify laws historically created by powerful, elite White men to reach conclusions that privilege them.⁸⁶ Through *pathos* and *ethos*, those laws and rules are interpreted through a lens that inevitably results in an outcome beneficial to the powerful, elite White men who wrote the law to begin with.⁸⁷

The glimmer of hope offered by Amsterdam and Bruner is that, although categories may become entrenched over time, they are never final. This “never final” principle is where teaching, rather than indoctrination, occurs. The paradox is that students who were once reticent to learn how to “think like a lawyer” have quickly become so conditioned to identify and apply the law that they are terribly uncomfortable questioning it. The very thought that the world’s boundaries are malleable creates discomfort and anxiety. They do not know how to responsibly or ethically raise questions about boundaries and systems. The notion that the law *can* be questioned seems radical, foreign, and wrong.

⁸³ Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (Harvard Univ. Press 2000).

⁸⁴ *Id.* at 11-12.

⁸⁵ It has been noted that:

cultures seem to have been and continue to be enormously tenacious in holding onto and passing on their traditional theories, narratives forms, and normative system.

. . . .

. . . Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don’t fit. We will miss the opportunities that might have existed in all the alternative categories we did *not* use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.

AMSTERDAM & BRUNER, *supra* note 85, at 40, 49.

⁸⁶ See *The Rhetoric of Race*, *supra* note 74 at 910-912 (arguing that *logos* cannot be understood apart from the epistemological foundation upon which it operates).

⁸⁷ *Id.* at 938-939 (explaining the racialized roots of *pathos* and *ethos*).

But if we are to have any hope that the law will ensure justice and equity for all, we must teach law students how to be *in* this world, and yet not *of* this world. We must continue to equip them with the knowledge of doctrine and legal methods so that they can speak the language of lawyers. Law schools have a strong history of doing this part well, and it is the only way young lawyers will enter the profession. Once inside, however, these lawyers must know how to interrupt the discourse and deconstruct harmful paradigms using a better toolkit than traditional legal rhetoric is capable of providing. In this respect, law schools have not prepared students well for the creative practice of law. Even more innovative methods like storytelling are situated relationally to the classic rhetoric traditions of *logos*, *ethos*, and *pathos*.⁸⁸

Historically, we can find examples within our legal traditions where the law has successfully been deconstructed to achieve justice. By the same token, we can identify numerous examples where the law created, endorsed, or perpetuated great injustice. Studying these cases, including the opinions and the briefs, serves as a guide to students who may have a hard time understanding that they are permitted to challenge the status quo. Eventually, they may even come to understand that they have a duty to do so. As students study briefs and opinions, they should be given opportunities to practice using the same interruption skills that appear in the briefs and opinions they study.

There are numerous cases one could study to identify successful interruptions in the history of American jurisprudence. Any seminal case that has drastically changed a legal standard is ripe for study: *Brown v. Board*, *Loving v. Virginia*, *Roe v. Wade*, *Gore v. Bush*, and so on. One of my favorite cases to work with is *Gideon v. Wainwright* because it provides examples of various styles of interruptions. *Gideon* is the case that required states to appoint an attorney to criminal defendants accused of a crime.⁸⁹ Prior to *Gideon*, states were not required to appoint counsel for criminal defendants unless the defendant was charged with a capital offense *or* there was some other special circumstance warranting appointment of counsel.⁹⁰ This rule led to great inconsistencies across jurisdictions, but by the time of *Gideon*, nearly every state had adopted some sort of system for ensuring the representation of criminal defendants. Florida, however, was one of the hold-out states.⁹¹

Clarence Earl Gideon was charged with burglary of a billiard hall, and before he was tried, he asked the court to appoint an attorney to represent

⁸⁸ Gideon's *Legacy*, *supra* note 84, at 238-243; *see also The Rhetoric of Race*, *supra* note 74, at 894-910 (arguing that the *nomos*, the legal universe in which *logos*, *pathos*, and *ethos* function, is racialized and infected with White supremacy).

⁸⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹⁰ Gideon's *Legacy*, *supra* note 84, at 227-28.

⁹¹ Brief for Petitioner at 18, *Gideon v. Cochran*, 135 So. 2d 746 (1961) (No. 155), 1962 WL 115120 at 13.

him.⁹² The trial court denied his request, and Gideon was ultimately convicted and sentenced to prison. From there, he sent a hand-written petition to the United States Supreme Court begging for relief. The Supreme Court granted review and posed the question, “Should this Court’s holding in *Betts v. Brady* be overruled?”⁹³ It then appointed Abe Fortas to represent the indigent Clarence Earl Gideon and answer this question.⁹⁴

Here are a few examples of interruptions from the *Gideon* Petitioner Brief:

A. *Boldness as an Interrupter*

One of the most striking aspects of the brief filed by Abe Fortas is how boldly he embraces the fact that Gideon’s case was decided correctly under the existing law. Early in the brief, he unapologetically proclaims, “[W]e cannot urge that the circumstances presented by the case are “special” rather than typical. The Petitioner is not illiterate, mentally incompetent, or inexperienced.”⁹⁵ The classic syllogism obviously dictated that Gideon was not entitled to appointment of an attorney, and that is precisely what the State of Florida argued.⁹⁶

The classic syllogism informs that the law is neutral and that the correct application of the law leads to correct and just results. Logically, therefore, Gideon’s conviction was correct and just because the law required proof of a special circumstance which Gideon did not have. Generally, pointing out that you do not meet the minimum legal standard will not result in victory in court. So, why did it work out in *Gideon*?

As I see it, it worked out in *Gideon* because the law was inherently unjust, and Fortas was able to demonstrate that to the Court. Had Fortas beat around the bush, the Court might not have so readily understood the extent of the injustice. The audacity with which he embraced the fact that the law did not apply to Gideon demonstrated the absurdity of carrying the rule to its logical conclusion. Boldness creates an interruption because it shocks the audience and makes it question its own assumptions about the correctness of a legal standard.

B. *Invisibilization as an Interrupter*

Invisibilization is another interrupter Fortas deploys in the Petitioner’s brief by relegating Gideon’s facts to an appendix. Basic first year legal writ-

⁹² *Gideon*, 372 U.S. at 336–37.

⁹³ Brief for Petitioner, *supra* note 92, at 6 (internal citations omitted).

⁹⁴ “At the time that Abe Fortas was appointed to represent Gideon he was . . . one of the premier lawyers in Washington. Indeed, . . . measured by any standard, Abe Fortas was one of the best lawyers of his generation.” *Symposium, Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 137 (2004) (Abe Krash presenting).

⁹⁵ Brief for Petitioner, *supra* note 92, at 7.

⁹⁶ Brief for the Respondent, *Gideon v. Cochran*, , 1963 WL 105476.

ing advice is to personalize the client, tell a compelling story, hook the reader, and make the client sympathetic because judges tend to rule in favor of people they can identify with. In the petitioner brief, however, Fortas does none of that. He barely even mentions Gideon's name.

From a strategic standpoint, this is wise. Gideon was a ne'er-do-well. Supreme Court justices were not going to identify with him personally. Instead of trying to force a false connection, Fortas simply removed Gideon from the equation. He replaced him with the reified idea of fundamental fairness and justice.⁹⁷ By making the case about fairness and justice instead of about Gideon, Fortas interrupted the inherent biases against a man with multiple convictions and replaced them with positive principles fundamental to our American identity. Invisibilization works as an interrupter to prevent inherent biases from triggering prejudiced responses.

C. *Flattery as an Interrupter*

Throughout the brief, Fortas also deploys flattery to appeal to the egos of the justices. Consider this excerpt from the first section of his Argument:

The necessity for counsel in a criminal case is too plain for argument. No individual who is not a trained or experienced lawyer can possibly know or pursue the technical, elaborate, and sophisticated measures which are necessary to assemble and appraise the facts, analyze the law, determine contentions, negotiate the plea, or marshal and present all of the factual and legal considerations which have a bearing upon his defense. Even a trained, experienced criminal lawyer cannot - and will not, if he is sensible - undertake his own defense.⁹⁸

Essentially, what Fortas is saying is that to deny counsel to an indigent defendant would be the same as admitting the indigent defendant is capable of self-representation. And if that is true, then it means that there is really nothing so special about being a lawyer. This principle was similarly articulated by Erwin Chemerinsky when he claimed that "the best predictor of whether the U.S. Supreme Court finds a violation of the Fourth Amendment is whether the justices could imagine it happening to them."⁹⁹ Flattery works as an interrupter because it makes the decision maker the center of attention and demonstrates how a favorable decision would preserve or promote their position. Human beings tend to act in ways that protect and preserve their own self-interests.

⁹⁷ Gideon's *Legacy*, *supra* note 84, at 266.

⁹⁸ Brief for Petitioner, *supra* note 92, at 13-14.

⁹⁹ Erwin Chemerinsky, *The Court and the Fourth Amendment*, THE NAT'L. L.J. (May 7, 2012).

D. *The Problem with Interruptions*

While interruptions may be effective for advocating a change in the legal standard, for the most part they still presume the correctness of the classic Western rhetoric paradigm. An interrupter may cause the audience to question the correctness of a legal standard, for example, but it still seeks to identify a just or fair standard to apply in the classic syllogistic form of *logos*. Similarly, invisibilization may neutralize negative bias against a subordinated party, but it will never humanize that party. Instead, it works within traditional legal rhetoric through *pathos* to trigger values that resonate with the powerful elite while simultaneously hiding values that would trigger negative reactions. Likewise, flattery promotes hierarchy through *ethos* by ratifying the decision maker's elite position of power and encouraging decisions that will preserve that superiority.

Traditional legal rhetoric has a powerful hold on the way we understand fundamental justice and fairness. It demands that legal analysis and solutions conform to its structure regardless of whether the outcome makes sense. This rigidity is necessary to ensure that the boundaries remain impenetrable by outsiders so that the vice-grip elites hold on power cannot be weakened. True justice and equality cannot be consistently achieved if its appeals must always conform to traditional rhetoric because traditional rhetoric is designed to exclude those values except as they pertain to the wealthy, powerful elite. Thus, the legal canon requires renovation and remodeling through critical legal rhetoric and comparative legal rhetoric to unmask traditional rhetoric and infuse it with alternative modes of generating legal meanings. In the next Section, we examine one method of doing so.

IV. AFRO-LATINX RHETORIC AND THE PULL TOWARD LIBERATORY EDUCATION

Critical and comparative legal rhetoric are a departure from Western rhetoric in several important ways. First and foremost, they *disrupt*—break apart, destroy, disorder—Western rhetorical devices (i.e., *logos*, *pathos*, and *ethos*) and analytical frames rather than *interrupt* them. Multicultural rhetoric - Indigenous, Latinx, African and Asian Diasporic rhetoric - are not situated in the market values of the West, but stand in opposition to them. Has the reference to this footnote been deleted? I am confused because fn 105 is an “id.” Indigenous, Latinx, African and Asian Diasporic rhetoric are not implements to do the work of imperialist and colonialist regimes. On the contrary, they exist outside those regimes as a means to do justice in full recognition of their existence. Critical and comparative rhetoric are powerful in that they help to create alternate conversations, oppositional discourse, to Western discourses of privilege and power.¹⁰⁰ This oppositional discourse

¹⁰⁰ *Id.* at 273-274.

simultaneously exposes interlocking systems of oppression as it works to dismantle them. The following account of employment discrimination litigation involving a new lawyer and a prominent law firm is instructive.

A. *Law Practice as an Imperialist, Colonialist Enterprise: A Case Study*

The law firm of Perez, Danticat & Diggs (PDD) is a respected law firm well-known for its highly competitive Mergers and Acquisitions (M&A) Division. The M&A Division at the firm is responsible for most of the U.S. and European business development in Latinidad.¹⁰¹ The firm is unique in that its managers and partners across all divisions are predominantly Latinx. While all Latinx women and men, including Afro-Latinx women and men, are represented in the leadership ranks, the top leadership personnel are lighter skinned Latinx people. The unspoken motto at the firm is “to get to the top, you have to look like the top.” Eduardo Betancourt, a light-skinned Latinx man of Venezuelan descent, is the managing partner for M&A. M&A is known as one of the toughest divisions at PDD; the “wash out” rate for new attorneys is higher than any other division at the firm due to the demanding nature of the work.

PDD hired Kayla Grayman as a Junior Litigation Associate in M&A. She was a particularly attractive candidate due to her rank at the top of her classes both at Hampton University School of Business and Howard University School of Law. Ms. Grayman’s direct supervisor is Emilia Zayas. Ms. Zayas, a Latinx woman of Puerto Rican descent, is a Senior Associate with five years on the partnership track. She has dark skin and long, straight hair. Ms. Zayas is known for her intellect as well as her “go for the jugular” vibe, and averages 2,500 billable hours per year. Mr. Betancourt has referred to her as “a rainmaker” and an asset to the Division. In her capacity as Ms. Grayman’s direct supervisor, Ms. Zayas assesses Ms. Grayman’s progress, makes appropriate work assignments based on those assessments, conducts oral and written performance reviews, and serves as Ms. Grayman’s mentor at the firm. It is customary for all new associates to be evaluated every two months. Bonuses and promotions are decided by performance reviews in tandem with Mr. Betancourt’s recommendations and assessments of the employees in his charge.

Ms. Grayman is an Afro-Latinx woman of Cuban and African descent; her mother is Cuban and her father is African-American. She has dark skin and naturally kinky-curly hair. She neither heat straightens nor chemically straightens her hair. Ms. Grayman wears ethnic clothing to work to express

¹⁰¹ Miguel Salazar, *The Problem with Latinidad*, *The Nation*, September 16, 2019, available at <https://www.thenation.com/article/hispanic-heritage-month-latinidad/>, archived at <https://perma.cc/L6BT-SB32> (last visited 12/12/19). In this article, Miguel Salazar problematizes the definition of “Latinidad” as “[a] particular geopolitical experience that contains the complexities of immigration, colonialism, race, color, legal status, class, nation, language, and the politics of location.” I use Salazar’s article to highlight what the case study illuminates: the absence of Afro-Latinx experiences and how Afro-Latinx rhetoric addresses that absence.

her African heritage. She often wears scarves and purses made of Kente cloth, and African-inspired jewelry, such as jewelry made of cowrie shells or representing aspects of her African heritage. Ms. Zayas has said on numerous occasions that Ms. Grayman should “stop acting like a ‘Black girl’ and claim her Latina heritage.” When Ms. Zayas and Ms. Grayman were working on a case together, Ms. Zayas told Ms. Grayman, “It’s a shame that your skin is so dark, but it can’t be helped. You should try to compensate for that by straightening your hair. You know, it would make you more Latina.”

During Ms. Grayman’s first in-person performance review, Ms. Zayas stated, “Your performance on the job is fine, but you would get more opportunities if you carried yourself as something other than Black. You should dress less Afrocentric and more American. I may be dark, but at least my hair says ‘Latina.’ You need to try harder.” On the written portion of the review, the review Ms. Zayas submitted to Mr. Betancourt, she wrote “[Ms. Grayman] lacks ambition and the fire to advance at the firm. Solid work product, but not a ‘go getter.’” Ms. Zayas ranked Ms. Grayman at a 3.5 out of the possible 6 points she could receive on the evaluation.

PDD has an annual firm mixer shortly after the New Year. At the mixer, Ms. Zayas asked Ms. Grayman to meet her in the restroom. After checking under the stalls to see if anyone else was in the restroom, Ms. Zayas said to Ms. Grayman, “Come on girl, you are killing me with this ‘fro. Don’t you want people to know you are Latina too? You look like a slave.” The following day, Ms. Zayas sent Ms. Grayman an email with the subject line “How to Navigate Law Firm Culture.” When Ms. Grayman opened the message, she was greeted by the text “Look more like this.” The content of the message consisted solely of images of light-skinned Latina celebrities like Jennifer Lopez, Zoe Saldana, America Ferrara, and Natalie Martinez.

A short time later, Ms. Grayman met with Mr. Betancourt to inform him how Ms. Zayas was treating her. At this time, Ms. Grayman requested that someone other than Ms. Zayas be charged with her supervision and work evaluation. Mr. Betancourt refused the request. Ms. Zayas’ behavior persisted into February. On Valentine’s Day, Emilia left a flat iron on Ms. Grayman’s desk with a bow tied around it, and a container of the skin lightening cream “Whitenicious.” The card accompanying these items read, “Happy Valentine’s Day! Girl. We have to get you beautiful! You want a promotion don’t you? Try harder. Your mentor, Emilia. P.S. I use the cream too. It really evens out the skin tone and helps with blemishes.” For the last two weeks in February, Ms. Grayman straightened her hair. She did not use the Whitenicious, but told Ms. Zayas that she did.

On Ms. Grayman’s written February performance review, the review submitted to Mr. Betancourt at the end of the month, Ms. Zayas wrote “It seems like Ms. Grayman is finding her way at the firm. Her work product has improved from ‘solid’” to ‘stellar’ in just a short time. She is showing renewed ambition and that killer attitude we admire in M&A. Her clothing is

not always work-appropriate, but that can be fixed easily.” On the February review, Ms. Zayas ranked Ms. Grayman at a 4.8 out of 6.

In the beginning of March, Ms. Grayman again complained to Mr. Betancourt. In response he said, “I understand your concerns, but Ms. Zayas gave you an absolutely stellar employment review. It was one of the highest in the Division for your cohort. It seems that you both have turned a corner in your working relationship with each other.” Mr. Betancourt took no further action. Shortly thereafter, Ms. Grayman filed a hostile work environment claim with the Equal Employment Opportunity Commission (EEOC). She was subsequently given a “right to sue” letter and filed a complaint against PDD in federal court.

B. Afro-Latinx Rhetoric in Praxis: A Case Study

This account, though compelling, is fictional. Kayla Grayman is a party in a litigation universe that I created to interrogate how White supremacy, patriarchy, imperialism and colonialism shape the lived experiences of Afro-Latinidad’s inhabitants.¹⁰² Through simulated litigation in a hostile work environment case involving colorism, my goal was to push my students toward centering Afro-Latinx women’s experiences in written client representation. To this end, Western rhetorical tools, the analytical reasoning tools by which law students are taught to read, comprehend, and write about the law, would prove inadequate. As we have argued throughout this essay, these tools function to perpetuate the colonization experiment of the law school curriculum, in that the price of wielding them is to remain oblivious to how Western epistemologies and ontologies operate and are rendered neutral through them. As explained in Part III of our essay, teaching students the skills of written persuasion using Western legal rhetorical forms would further contribute to Ms. Grayman’s marginalization, rather than problematize the law firm’s relationship to imperialism and colonialism. My failure to expose this relationship, both in the litigation universe and in walking students through their simulated practice, would have resulted in my students seeking to do justice with implements that ultimately undermined the justice they sought to do. The marriage of African Diasporic and Latinx rhetorical praxis was a necessary pedagogical intervention that I used to disrupt their academic colonization to facilitate the cause of justice.¹⁰³

¹⁰² See Madelaine C. Cahuas, *Interrogating absences in Latinx theory and placing Blackness in Latinx geographical thought*, available at <https://societyandspace.org/2019/01/23/interrogating-absences-in-latinx-theory-and-placing-blackness-in-latinx-geographical-thought-a-critical-reflection/>, archived at <https://perma.cc/NDN2-ZE9N> (last visited 12/11/19) (arguing for inclusion of Afro-Latinx experiences in Latinx interrogations of space and place).

¹⁰³ See generally, Karrieann Soto Vega & Karma R. Chavez, *Latinx rhetoric and intersectionality in racial rhetorical criticism*, 15:4 *Communication and Critical/Cultural Studies* 319 (2018) (discussing the intersectional nature of Latinx rhetorical criticism).

Latinx rhetoric draws upon Gloria Anzaldúa's call for meaningful engagement with the borderlands.¹⁰⁴ It functions to explode the border to deconstruct colonized consciousness and build new critical consciousnesses from its fragments. This reconstituted consciousness refocuses rhetoric as a performative practice, whether expressed through words, symbols or bodies.¹⁰⁵ Inherent in this critical consciousness is a recognition of Afrolatinidad, an acceptance of an invitation extended by African Diasporic rhetoric to do justice as an exercise in community-building through rhetorical strategies guided by "truth, justice, propriety, harmony, balance, reciprocity, and order."¹⁰⁶ The marriage of Latinx and African Diasporic rhetoric makes available analytic and reasoning tools sufficient to craft legal analytical frameworks inclusive of oppressed people's lived experiences. Far from additive, these frameworks are powerful enough to center these experiences to provide multiple pathways to justice.

Latinx rhetoric allows us to see colorism as performative rhetoric. Ms. Zayas' discriminatory acts are directives for Ms. Grayman to perform her Latinxness, her womanness within the confines of imperialist and colonialist imperatives that privilege and reward proximity to whiteness. Her employer as an entity is the hostile work environment, while her direct supervisor's individual acts are its tools to maintain colonial order. Moving within this universe of Ms. Grayman's reality allows students to draw upon Latinx and African Diasporic rhetorical strategies to build analytical frameworks effective to represent each party.

To establish a prima facie case of hostile work environment harassment, an employee must show that: (1) the employee belongs to a protected group; (2) the employee has been subject to unwelcome harassment; (3) the harassment was based on one of the prohibited categories in Title VII; (4) the harassment "was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment"; and (5) there is a basis for holding the employer liable.¹⁰⁷ In the *Grayman v. PDD* litigation universe, the first three elements of the claim were not at issue; I instructed students to focus on the fourth element of the claim – whether Ms. Zayas' actions towards Ms. Grayman amounted to severe or pervasive harassment, and the fifth element – whether there was any basis for holding PDD liable. For Ms. Grayman to prove that she suffered severe or pervasive harassment, she must show that she actually experienced Ms. Zayas' harassment as severe and pervasive (subjective component), and that a reasonable person in her position would have experienced it in the same way (objective component).¹⁰⁸ Courts assess whether the harassment was objectively severe or pervasive based on four factors weighed under a

¹⁰⁴ *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a 'Woke' Legal Academy*, *supra* note 45 at 285.

¹⁰⁵ *Id.* at 286.

¹⁰⁶ *Id.* at 279.

¹⁰⁷ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 23 (1993).

¹⁰⁸ *Id.* at 22.

“totality of the circumstances” test: (1) the frequency of the harassment; (2) the severity of the harassment; (3) whether the harassment was physically threatening or humiliating; and (4) whether the harassment unreasonably interfered with the employee’s work performance.¹⁰⁹ PDD is liable for Ms. Zayas’ conduct only if it had notice of it and failed to take prompt and remedial action.¹¹⁰ PDD conceded that it had notice of the harassment because Ms. Grayman met with M&A head Eduardo Betancourt, an appropriate contact person designated in PDD’s sexual harassment policy, to report the harassment.

Teaching students to draw upon the Latinx and African Disaporic rhetorical toolboxes simultaneously provides a path to justice for Ms. Grayman and reveals how successful representation of the employer is an exercise in the maintenance of imperialist and colonialist power structures. By contextualizing Ms. Grayman’s claim within a workplace where colorism is an organizing mechanism for punishment and promotion, student arguments about whether Ms. Grayman experienced Ms. Zayas’ conduct as frequent, severe, physically threatening or humiliating, and as an interference with her work performance receive additional weight. Moreover, in representing Ms. Grayman, students must enter into a meta-analysis of the possibility that victory for her means that she will be paid a settlement for her trouble and leave the work that is fulfilling to her – a victory that allows PDD to operate as usual, albeit without bad apples like Ms. Zayas. Alternately, a loss may mean that Ms. Grayman either loses her job or is consigned to navigate a workplace given free reign to punish her Afro-Latinx womanness, all while dangling before her the rewards that come with eschewing it.

Students who represent the employer must grapple fully with the position of the law firm in a global economy and how its internal order is a reflection of hierarchies that it helps to maintain societally and economically. For example, courts have not identified a clear standard for what constitutes “prompt” action in evaluating an employer’s liability for hostile work environment harassment claims.¹¹¹ An employer takes “remedial” action if its actions are “reasonably likely to prevent the misconduct from recurring.”¹¹² Given PDD’s organizational structure and its systems for rewards and punishments, the question is not whether any harassment based on colorism will recur; rather, the question is whether such harassment will recur to the extent that it interrupts PDD’s ability to do its work (business

¹⁰⁹ *Id.* at 23.

¹¹⁰ *See, e.g., Allen v. Tyson Foods, Inc.*, 121 F. 3d 642, 647 (11th Cir. 1997); *Walker v. Thompson*, 214 F.3d 615, 625 (5th Cir. 2000).

¹¹¹ *See, e.g., Wilcox v. Corrections Corporation of America*, 892 F.3d 1283, 1288 (2018) (stating specifically that “our cases have not established a bright-line rule for promptness”). *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998); *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F. 3d 1287, 1302, 1303 (2007); *Miller v. Kenworth of Dothan, Inc.* 277 F. 3d 1269, 1278 (2002); *Kilgore v. Thompson & Brock Management, Inc.*, 93 F. 3d 752, 753-754, (1996); *Steele v. Offshore Shipbuilding, Inc.*, 867 F. 2d 1311,1314, 1317 (1989); *Henson v. City of Dundee*, 682 F. 2d 897, 905, 909 (1982)

¹¹² *Kilgore v. Thompson & Brock Mgmt. Co.*, 93 F. 3d 752, 754 (11th Cir. 1996).

development in Latinidad) efficiently within the construct of global imperialism—a legally unacceptable result. Again, students’ use of Latinx and African Diasporic rhetorical strategies to navigate these legal issues exposes the operation of Western ways of knowing and being. Their use contributes to students’ understanding of the wider implications for the parties to the litigation in a global context.

In contrast, teaching students how to build viable legal analytical frameworks within a Western construct to represent their clients is ineffective to serve the cause of justice because doing so does not challenge the unexamined assumptions students have about the parties that lead them to make flawed legal arguments.¹¹³ Over the course of teaching this litigation universe to students, I learned of three major unexamined assumptions students made that impacted how they read, understood and interpreted the law: (1) colorism is just a part of life; (2) colorism doesn’t exist or isn’t relevant; and (3) colorism is the same as racism, which may or may not exist. First, students’ belief that colorism is just a part of life led them to set a high bar for what actions they considered severe or pervasive harassment. In essence, they had normalized their experiences with colorism or other people’s experiences with colorism and placed the burden on its recipients to cope with the fallout. Second, students being ignorant to, denying, and/or downplaying the existence of colorism resulted in their downplaying its pervasiveness. If they doubted its existence, they tended to view it as obscure and irrelevant, a belief in direct contradiction to the number of colorism claims filed since the 1992.¹¹⁴ Third, conflating racism and colorism is ill-considered given that the two are separate and distinct in Title VII jurisprudence.¹¹⁵

C. *Critical Pedagogies for Liberatory Education*

To disrupt students’ unexamined assumptions, I used various critical pedagogical interventions. Accessing the Latinx rhetorical concept of rhetoric as performative practice, I showed the class Afro-Dominican novelist and slam poet Elizabeth Acevedo’s performance of her poem “Hair.”¹¹⁶ In her performance, Acevedo’s body, specifically her curly hair, becomes the analytical framework for imperialist and colonialist epistemologies that seek to erase her personhood. She opens the poem with the simple line “[m]y

¹¹³ See generally, Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 *Washington L. J.* 531 (2019).

¹¹⁴ U.S. Equal Employment Opportunity Commission, *EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace*, available at <https://www.eeoc.gov/eeoc/newsroom/release/2-28-07.cfm>, archived at <https://perma.cc/N2XN-HX67> (last visited 12/11/19) (stating that “[t]he EEOC has also observed a substantial increase over the past 15 years in discrimination charge filings based on color, which have risen from 374 in [fiscal year] 1992 to 1,241 in [fiscal year] 2006.”)

¹¹⁵ See, e.g., *Walker v. IRS*, 713 F.Supp. 403 (N.D. Ga. 1989) (explaining that claims based on colorism are viable under Title VII and distinct from race based claims).

¹¹⁶ Elizabeth Acevedo, “Hair,” available at https://www.youtube.com/watch?v=0svS78Nw_yY, archived at <https://perma.cc/4R9D-C5H5> (last visited 12/11/19).

mother tells me to fix my hair and by fix she means straighten, she means whiten, but how do you fix this shipwrecked history of hair? The true meaning of stranded, with tresses held tight like African cousins in ship bellies. Did they imagine that their great grandchildren would look like us and would hate them how we do? Trying to find ways to erase them out of our skin”¹¹⁷ After having seen Acevedo perform this poem, students better understand how these dynamics shape Ms. Zayas’ expectations for Ms. Grayman’s body, skin and hair, as Ms. Grayman seeks to work and advance at PDD.

Drawing on the African Diasporic rhetorical tool of language as means of community-building and justice through balance, I invite professionals of color as expert witnesses to my classroom. For the *Grayman v. PDD* universe, I invited a Black male psychologist, Dr. Darren Moore, as an expert witness to the class. Students interviewed him to measure whether and to what degree a reasonable person would have experienced Ms. Zayas’ conduct as severe, pervasive, and physically threatening and humiliating, and to what extent her conduct may have interfered with Kayla’s work performance. Dr. Moore’s presence served two major purposes as a disruptor. First, due to the pervasiveness of anti-Black racism in the United States, most people do not view people of African descent as professionals. His presence served to balance the scales of professional representation. Second, Dr. Moore’s perspective as a Black man educated as a mental healthcare provider gave students a window into how people of color navigate the effects of racism as it manifests in their daily lives.

I also used the African Diasporic rhetorical tool of language as means of community-building and justice through truth. To this end, I introduced students to the skin cream Whitenicious, a product that exists in the marketplace as a luxury skin care cream, but is widely known as a skin whitening/lightening cream.¹¹⁸ This introduction opened up a class conversation about the global multibillion-dollar market for skin whitening cream, and how Ms. Zayas’ actions were representative of what drives that market.

In sum, educating without problematizing and disrupting unexamined assumptions undermines liberatory education. Ultimately it leaves the borderlands as they are, and allows the colonized legal academy to maintain its assault on those who dwell there. Afro-Latinx rhetorical strategies pull us toward liberatory education. We resist that pull at our peril, and close off new avenues for analysis that act in the service of justice.

¹¹⁷ *Id.*

¹¹⁸ See Whitenicious by Dencia, available at www.whitenicious.com, archived at <https://perma.cc/LRW9-NVKH>; ‘White means pure’ singer Dencia defends Whitenicious, Channel 4 News UK, available at <https://www.youtube.com/watch?v=ltuZXJg420>, archived at <https://perma.cc/N5NN-AVKG>.

V. CONCLUSION

The classic rhetoric system of inquiry enforces the law in favor of outcomes beneficial to the powerful elite who created those laws. When the Founders framed our Constitution and created our government, they were disciples of thinkers who believed in the inherent inequity of humankind. In fact, they went so far as to believe that those who did not belong to their ranks were less than human.¹¹⁹ They were not offended by the notions of owning and controlling their perceived unequals; in fact, ownership and dominion over them was essential to establishing in-group identities and preserving their power and hierarchical superiority.

Heretofore, perceived unequals have been fighting to gain entry and claim a place in the legal hierarchy to exercise their voices for the purpose of advancing social justice, equity, and equality. To stake those claims, they have had to learn and adopt the norms, systems, and traditions of classic Western rhetoric as manifested in traditional legal rhetoric. Even when interrogating and problematizing unjust outcomes, they have had little choice but to utilize traditional legal rhetoric's systems to fight injustice and inequality even though those systems were designed to perpetuate injustice and inequality. As a result, many advancements have been illusory and insufficient to resolve the crises facing the nation.¹²⁰

¹¹⁹ History is replete with examples of such dehumanization of the perceived unequals. Consider: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? . . . We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States." *Dred Scott v. Sandford*, 60 U.S. 393, 404, 15 L. Ed. 691 (1857), superseded (1868). "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Plessy v. Ferguson*, 163 U.S. 537, 561, 16 S. Ct. 1138, 1147, 41 L. Ed. 256 (1896), overruled by *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." *Loving v. Virginia*, 388 U.S. 1, 3, 87 S. Ct. 1817, 1819, 18 L. Ed. 2d 1010 (1967).

¹²⁰ "[M]any tout that the United States is now a 'postracial' society, meaning that race no longer plays a part in the mistreatment, discrimination, or prejudices individuals face in the United States, and that everyone is capable of achieving the American Dream with hard work and commitment. While strides have been made towards racial equality, the United States remains 'categorically unequal.'" Yolanda Vazquez, *Constructing Crimmigration: Latino Subordination in a Post-Racial World*, 76 OHIO ST. L.J. 599, 602 (2015); see, e.g., Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2008); Ian F. Haney Lopez, *Is the "Post" in Post-Racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807, 807 (2011); Douglas S. Massey, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 5-6 (2007); John A. Powell, *Tracing the History of Racial Inclusion and Debunking the Color-Blind/Post-Racial Myth*, 40 HUM. RTS. 17 (2013).

Through critical and comparative rhetoric, legal professionals can cultivate methods of situating out-group experiences to develop new pathways to justice. They can more effectively build analytical frameworks to expose injustice and inequity. They can more effectively identify their own unexamined assumptions in order to problematize these assumptions in advocating on behalf of clients.

Unquestionably, the experience of participating in Western rhetoric's system has exposed an impossible dilemma: on the one hand, we have gained entry, but on the other, we have expanded and perpetuated the toxic *habitus*. The time has come to strip the vestments of traditional legal rhetoric to disprove the assumption that it is a neutral mode of inquiry and persuasion. The time has come for all of us in the legal academy and legal profession to stop pretending traditional legal rhetoric is not a construct created by and to preserve existing systems of privilege and power. The time has come to acknowledge that classical rhetoric depends upon the subordination of out-group members to accomplish this goal. Equality, equity, and justice cannot be achieved through a system whose foundational tenets are dehumanization and subordination. The time is now to embark on new journeys to our liberation.