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### Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy, 21 The Scholar 255 (2019)

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**STILL WRITING AT THE MASTER’S TABLE:  
DECOLONIZING RHETORIC IN LEGAL WRITING  
FOR A “WOKE” LEGAL ACADEMY<sup>1</sup>**

**TERI A. MCMURTRY-CHUBB\***

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\* The author thanks God for the beauty of life; her husband, Mark Anthony Chubb, for his love; and gives thanks for the fellowship and counsel of friends.

1. © Teri A. McMurtry-Chubb 2019. Dr. Lori Patton Davis, the first African American woman president of the Association for the Study of Higher Education (ASHE), inspired the title for this article. Dr. Patton convened the 2018 ASHE Conference under the theme “Envisioning the Woke Academy.” The theme focused on “wokeness,” which was “embedded throughout the conference as a colloquium to provide opportunities for members to engage with ideas and activities that promote critical consciousness, history and memory, intersectionality, transdisciplinary, representation, and activism.” Karen Bussey, *ASHE Grads Prepare for the Woke Academy*, ASHE GRADS (Apr. 11, 2018), <https://ashegrads.wordpress.com/2018/04/11/ashe-grads-prepare-for-the-woke-academy/> [<https://perma.cc/ZRX5-JJVY>].

**Woke** (wōk): *An awakening to racial and social injustices*

As the trees adorned their leaves in brilliant, fiery, and bittersweet, fall semester plodded along definitively toward anxiety, taking infrequent rests in apathy. During one such rest, I called my Critical Race Theory/Critical Race Feminism class to order in a classroom located in the Deep South at a law school named for a vocal proponent of school segregation. Our presence in that space at that particular time was nothing short of miraculous. The class was comprised primarily of African American students, taught by a tenured African American female law professor of legal writing, and offered at a law school that had graduated its first African American law student in 1972. The week's lesson was about legal storytelling and narrative, and designated by topic on the course syllabus as "History, Herstory, Our(legal)story?" The 1½-hour class session began with a discussion of counter-storytelling as a means to expose history as "story," to critique and tear down dominant normative universes as they exist in law, and to provide alternate analytical frameworks for addressing legal problems. My shock blazed brilliant, burned fiery, and cooled more bitter than sweet when an African American student raised her hand to state confidently, "There is no African American history or culture." Her remark proved the existence of a dominant normative universe birthed from a collision of White supremacy, patriarchy, capitalism, and imperialism. In this universe, a singularity extracted African Diasporic his/her/ourstories, so as to protect itself from being known and subsequently challenged, if not outright destroyed. My epiphany from this blunt exchange was that my student and her likeminded peers' mis-education<sup>2</sup> would form a basis for their

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2. See generally CARTER GODWIN WOODSON, *THE MIS-EDUCATION OF THE NEGRO* (1933). Woodson writes: "The so-called modern education, with all of its defects, however, does others so much more good than it does [people of African descent], because it has been worked out in conformity to the needs of those who have enslaved and oppressed weaker peoples. For example, the philosophy and ethics resulting from our educational system have justified slavery, peonage, segregation, and lynching. The oppressor has the right to exploit, to handicap, and to kill the oppressed. [People of African descent] daily educated in the tenets of such a religion of the strong have accepted the status of the weak as divinely ordained, and during the last three generations of their nominal freedom they have done practically nothing to change it. Their pouting and resolutions indulged in by a few of the race have been of little avail. No systemic effort toward change has been possible, for, taught the same economics, history, philosophy, literature and religion which have established the present code of morals, [people of African descent's] minds have been brought under the control of [their] oppressor. The problem of holding [people of

interpretation of the law, inform their reasoning as they built legal arguments as advocates, and reveal itself to damaging effect as they communicated that reasoning through writing. As a law professor of legal writing, teaching students the communication processes by which to replicate the power structures that marginalized them and maintained the legal academy, without a critique of those processes, was the price I paid for us all to write at the master's table. Perhaps I should have taught them the value of writing at a table in a room of one's own.<sup>3</sup>

When I wrote *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*<sup>4</sup> almost ten years ago, my aim was to bring a Critical Race Theory/Feminism (CRTF) analysis to scholarship about the marginalization of White women law professors of legal writing.<sup>5</sup> I focused on the convergence of race, gender, and status to highlight the distinct inequities Women of Color face in entering their ranks.<sup>6</sup> My concern was that barriers to entry for Women of Color made it less likely that the existing legal writing professorate, predominantly White and female, would problematize the ways students are taught legal reasoning, analysis, and writing. I argued: "If the traditional [dominant] legal analytical process is normalized and passed off as objective, both in the content of the legal writing curriculum and in the body of the person teaching the curriculum, most students unwittingly will continue to replicate racist and elitist legal structures as they learn the very process of legal reasoning and analysis in law school and as they undertake the practice of law."<sup>7</sup>

I pick up that major theme in this article by focusing on how law professors of legal writing are forced to serve as handmaidens of hierarchy in the maintenance of the legal academy as an elite and closed discourse community. It considers how in teaching students how to "do" law—employ legal reasoning and analysis through written communication—legal writing curricula provide for no critique of the

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African descent] down, therefore, is easily solved. When you control a man's thinking you do not have to worry about his actions." *Id.* at 4.

3. Reference to VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (1929) (calling for a literal and figurative space to center one's self and one's stories).

4. 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).

5. *Id.* at 44-45.

6. *Id.*

7. *Id.* at 54-55.

colonized formal rhetorical structures in which critical thinking, reading, analysis, and writing skills are grounded.<sup>8</sup>

I. WESTERN THOUGHT & *INVENTIO* AND *DISPOSITIO*  
AS BARRIERS TO SOCIAL JUSTICE

*If they don't give you a seat at the table, bring a folding chair.*

—Shirley Chisholm

As the first African American woman to win a seat in Congress and to seek a major party nomination for President of the United States,<sup>9</sup> Shirley Chisholm was no stranger to the series of inhospitable tables to which she carried multiple folding chairs. For the “unbossed and unbought”<sup>10</sup> Chisholm, the master’s table was the hostile forum of U.S. politics. For law professors of legal writing, the master’s table is the legal academy. Legal analysis and writing as taught in the legal academy is based on the five canons of rhetoric, also known as “classical rhetoric,” as well as Aristotle’s emotional appeals.<sup>11</sup> The five canons of rhetoric are *Inventio* (invention or discovery), *Dispositio* (arrangement or organization), *Elocutio* (style), *Memoria* (memory), and *Pronuntiatio* (delivery).<sup>12</sup> Of particular interest to the study of legal reasoning, analysis, and writing are the canons *Inventio* and *Dispositio*. *Inventio* concerns the sources for arguments, and the process by which advocates categorize and connect

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8. This work engages pioneering feminist scholar Kathryn Stanchi’s work on how legal writing pedagogy aids in marginalizing outsider voices. See Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998). However, it goes beyond Professor Stanchi’s call to integrate critical theory as an antidote to marginalization by examining the role of rhetoric itself in creating it. This article is also a response to critical rhetoric scholar Lucy Jewel’s invitation for an analysis of comparative rhetorics in her work. Lucy Jewel, *Neurorhetoric, Race, and the Law: Toxic Neural Pathways and Healing Alternatives*, 76 MD. L. REV. 663, 694-95 (2017).

9. Debra Michals, *Shirley Chisholm (1924-2005)*, NAT’L WOMEN’S HIST. MUSEUM (2015), <https://www.womenshistory.org/education-resources/biographies/shirley-chisholm> [<https://perma.cc/ZMF3-K6EH>]; see also Chisholm, Shirley Anita, U.S. HOUSE REPRESENTATIVES, <https://history.house.gov/People/Detail/10918> [<https://perma.cc/CN2G-CDRF>].

10. BARBARA WINSLOW, *SHIRLEY CHISHOLM: CATALYST FOR CHANGE, 1926–2005*, at ix (2014).

11. Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 483, 489 (2003) (arguing that modern legal reasoning and analytical processes are derived from classical Greek and Roman texts).

12. EDWARD P. J. CORBETT & ROBERT J. CONNORS, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 17-22 (4th ed. 1999).

information in those sources to formulate arguments.<sup>13</sup> *Dispositio* is the means of organizing arguments into communication forms that are appropriate and effective to their purpose.<sup>14</sup> Aristotle's Persuasive Appeals: *logos* (using evidence and Western based epistemology to persuade),<sup>15</sup> *pathos* (using acceptable Western based modes of emotion to persuade),<sup>16</sup> and *ethos* (using Western based conceptions of character to persuade)<sup>17</sup> are tools used to marshal arguments for maximum impact. Both the classical rhetorical canons and Aristotle's persuasive appeals operate within the *nomos*, or the normative universe in which they function.<sup>18</sup> Although not always explicit in most legal writing curricula, these canons and persuasive appeals have become foundational to teaching the processes of communicating legal reasoning and analysis in written form.<sup>19</sup>

Classical rhetoric is rooted in Western/European epistemology and ontology, or Eurocentric ways of knowing and being.<sup>20</sup> Critical rhetoricians have problematized the relationship between the two as they recreate dominant ideologies under the guise of neutrality, and erase marginalized epistemologies and ideologies.<sup>21</sup> This relationship is particularly troublesome given that as language is used to describe an experience or reality it also acts to create the experience or reality it seeks

13. Jeanne Fahnestock & Marie Secor, *The Rhetoric of Literary Criticism*, in TEXTUAL DYNAMICS OF THE PROFESSIONS: HISTORICAL AND CONTEMPORARY STUDIES OF WRITING IN PROFESSIONAL COMMUNITIES 88-91 (Charles Bazerman & James Paradis eds., 1991).

14. CORBETT & CONNORS, *supra* note 12, at 20.

15. SHARON CROWLEY & DEBRA HAWHEE, ANCIENT RHETORICS FOR CONTEMPORARY STUDENTS 12, 118, 170 (5th ed. 2012).

16. *Id.* at 12, 170.

17. *Id.* at 170.

18. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); CROWLEY & HAWHEE, *supra* note 15, at 12.

19. *But see* Kristen K. Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 324 (2011) (acknowledging the teaching of classical rhetoric in legal writing curricula); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS'N LEGAL WRITING DIRECTORS 129 (2006).

20. Robbins-Tiscione, *supra* note 19 at 326.

21. *See, e.g.*, DEXTER B. GORDON, BLACK IDENTITY: RHETORIC, IDEOLOGY, AND NINETEENTH-CENTURY BLACK NATIONALISM 11-13 (2003). Gordon argues that an Afrocentric theory of rhetoric acknowledges "'African ownership of values, knowledge, and culture' as a way to understand the discourse of African people and that of other oppressed groups and, even more important, as the lenses through which we can understand and achieve other ways of knowing[.]" *Id.* (quoting MOLEFI KETE ASANTE, THE AFROCENTRIC IDEA 181 (1987)).

to describe—language is epistemic.<sup>22</sup> The problem with having Western ideals undergird knowledge sources for U.S. legal analytic and communication frameworks, and the use of those frameworks, is that the United States is a country where the epistemologies and ideologies of its inhabitants are constantly in conflict. This country began with Indigenous decimation, continued with African chattel slavery, and mythologized its existence as a nation of immigrants. A Western epistemological rhetorical canon that does not problematize the existence of White supremacy, patriarchy, capitalism, and imperialism (hereinafter referred to as the imperialist, capitalist, White supremacist patriarchy)<sup>23</sup> serves as fertile ground for *Inventio* and *Dispositio* that perpetuate untruths, and seek to solidify them through legal argument as memorialized in American jurisprudence. As critical rhetorician Dexter B. Gordon argues in *Black Identity: Rhetoric, Ideology, and Nineteenth-Century Black Nationalism*:

The symbolic revolution in rhetorical studies since the 1960s has highlighted the inadequacy of Europe-centered rhetoric to account for the discourse of the oppressed. This European rhetoric invariably sides with the dominant culture, forcing scholars to confront the need for a radical ideological break from Eurocentrism to facilitate the liberation of the oppressed. . . . Eurocentric views reflect the program of colonization whereby Europe dominated not only the geopolitical world but also the information about the world, including the language in which it was communicated. Such a process intensifies the domination and, as Kenyan novelist Ngugi[] wa Thiong'o notes in *Decolonizing the Mind*, promotes mental death and despair for those among the colonized who seek liberation[.]<sup>24</sup>

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22. See generally Robert L. Scott, *On Viewing Rhetoric as Epistemic*, in CONTEMPORARY RHETORICAL THEORY: A READER 131-39 (John Louis Lucaites et al. eds., 1998); Robert L. Scott, *On Viewing Rhetoric as Epistemic: Ten Years Later*, 27 CENT. STATES SPEECH J. 258 (1976); Pat J. Gehrke, *Teaching Argumentation Existentially: Argumentation Pedagogy and Theories of Rhetoric as Epistemic*, 35 ARGUMENTATION & ADVOC. 76 (1998) (calling for a connection between argumentation pedagogy and rhetorical theory that considers how the process of argumentation creates knowledge); Scott F. Alkin, *Three Objections to the Epistemic Theory of Argument Rebutted*, 44 ARGUMENTATION & ADVOC. 130, 130 (2008) (stating as its thesis that “the epistemic theory of argument is the view that arguments are to be evaluated in terms of their comprising epistemic reasons.”).

23. bell hooks, *WE REAL COOL: BLACK MEN AND MASCULINITY* (2004).

24. GORDON, *supra* note 21, at 12.

The struggle to resituate *Inventio* and *Dispositio* in something other than Eurocentricity, in efforts to liberate the oppressed, is vividly illustrated in the legal battle over historical experience waged by the NAACP Legal Defense Fund (LDF) against the State of Mississippi and its adoption of school textbooks.

A. *Mississippi History: Conflict and Change*

The first shot in this battle, which would come to characterize the current U.S. culture wars,<sup>25</sup> began on the campus of a Historically Black College and University (HBCU) in Mississippi. On the first day of class, sociologist James Loewen asked the seventeen students in his freshman sociology seminar at Tougaloo College: “O.K., what is Reconstruction? What comes to your mind from that period?”<sup>26</sup> In an exchange eerily reminiscent of my own, Professor Loewen recounts that sixteen of the seventeen students responded, “Well, Reconstruction was the period right after the Civil War when blacks took over the government of the Southern states. But they were too soon out of slavery and so they screwed up and white folks had to take control again.”<sup>27</sup> Of the exchange, Loewen remembers, “My little heart sank. I mean, there’s at least three direct lies in that sentence.”<sup>28</sup> The lies:

Blacks never took over the government of the Southern states—all of the Southern states had white governors throughout the period. All but one had white legislative majorities.

Second, the Reconstruction governments did not screw up. Across the South without exception they built the best state constitutions that the Southern states have ever had. Mississippi, in particular, had better government during Reconstruction than at any later point in the 19th century.

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25. See generally JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

26. Anya Kamenetz, ‘Lies My Teacher Told Me,’ and How American History Can Be Used As a Weapon, NPR: EDUC. (Aug. 9, 2018, 6:00 AM), <https://www.npr.org/2018/08/09/634991713/lies-my-teacher-told-me-and-how-american-history-can-be-used-as-a-weapon> [https://perma.cc/T8PV-UCVA].

27. *Id.*

28. *Id.*

A third lie would be, whites didn't take control. It was white supremacist Democrats—indeed, it was the original Ku Klux Klan.<sup>29</sup>

Echoing what Ngugi wa Thiong'o notes in *Decolonizing the Mind*,<sup>30</sup> Loewen recalls thinking “My gosh, what must it do to you to believe that the one time your group was center stage in American history, they screwed up?”<sup>31</sup> He was neither the first nor last educator to ask this question,<sup>32</sup> but his inquiry marked the beginning of his nearly eight-year fight to end the imperialist, capitalist, White supremacist patriarchal domination of Mississippi history, and consequently U.S. history.

Professor Loewen's solution to his students' mis-education was to write a textbook. Along with kindred spirit and fellow scholar, Professor Charles Sallis, the two enlisted the help of undergraduate students, K-12 teachers, and colleagues to form the Mississippi History Project (MHP) in 1970.<sup>33</sup> The group set about the difficult task of creating an engaging, interdisciplinary, history textbook to be used for the instruction of ninth graders in the Mississippi history course. Prior to the group's efforts, the state-adopted textbooks for fifth and ninth grade Mississippi history glorified the Confederacy and slaves' alleged docility and loyalty, demonized emancipation and Reconstruction, and lauded the removal of federal troops from the South in 1877 and Redemption as a triumph for the state and a return to order.<sup>34</sup> With their textbook, MHP's primary goal was to create a comprehensive state history where people of African

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29. *Id.*

30. NGUGI WA THIONGO'O, *DECOLONIZING THE MIND* 88 (1986) (“[H]ow we view ourselves, our environment even, is very much dependent on where we stand in relationship to imperialism in its colonial and neo-colonial stages; [] if we are to do anything about our individual and collective being today, then we have to coldly and consciously look at what imperialism has been doing to us and to our views of ourselves in the universe.”).

31. *Id.*

32. See IRVING SLOAN, *THE NEGRO IN MODERN AMERICAN HISTORY TEXTBOOKS* (4th ed. 1972); Melton McLaurin, *Images of Negroes in the Deep South Public School State History Texts*, 32 *PHYLON* 237 (1971); Mark M. Krug, *Freedom and Racial Equality: A Study of “Revised” High School History Texts*, 78 *AM. J. EDUC.* 297 (1970); I. A. Newby, *Historians and Negroes*, 54 *J. NEGRO HIST.* 32 (1969); Sol M. Elkin, *Minorities in Textbooks: The Latest Chapter*, 66 *TEACHERS C. REC.* 502 (1965); Kenneth M. Stamp et al., *The Negro in American History Textbooks*, 2 *EQUITY & EXCELLENCE EDUC.* 9 (1964); CHARLES W. EAGLES, *CIVIL RIGHTS, CULTURE WARS: THE FIGHT OVER A MISSISSIPPI TEXTBOOK* 78-79 (2017).

33. EAGLES, *supra* note 32, at 78-79, 87, 89-90, 102-04.

34. See generally *id.* at 88-119.

descent were visible and portrayed as autonomous actors in each stage of Mississippi's development.<sup>35</sup>

Four years later, the MHP produced the textbook *Mississippi: Conflict and Change* for use in the ninth grade Mississippi history course. The book offered a counter-story to those found in the existing Mississippi history textbooks, specifically with respect to its representations of Mississippi's Indigenous, Chinese, and Black populations.<sup>36</sup> In response to tales honoring the Confederate fallen, it answered with a raw recital of plantation life for the enslaved.<sup>37</sup> In response to the narrative of a botched emancipation period underscored by freed people's unpreparedness and inability to handle freedom and leadership, it answered with a narrative of Black political self-determination and participation.<sup>38</sup> In response to Redemption as Mississippi's salvation, its answer was Jim Crow, disenfranchisement, Ku Klux Klan domestic terrorism, and the scourge of lynching.<sup>39</sup> Due to these answers, the Mississippi State Textbook Purchasing Board declined to include *Mississippi: Conflict and Change* among its permitted textbook adoptions for ninth grade Mississippi history in 1974.<sup>40</sup>

The Mississippi State Legislature created the Mississippi State Textbook Purchasing Board in 1940.<sup>41</sup> The originating legislation for the Board staffed it with the governor, the state superintendent of education, and one gubernatorial appointee from each of Mississippi's three supreme court electoral districts.<sup>42</sup> A rating committee for each discipline would advise the Board on which textbooks it should adopt for each discipline.<sup>43</sup> Legislation effective as of 1959 gave the superintendent of education the authority to appoint three members to each rating committee who were "competent teacher[s] or supervisor[s] of instruction professionally trained" in the relevant discipline.<sup>44</sup> Likewise, the legislation gave the governor the authority to appoint four

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35. *Id.*

36. *Id.*

37. *Id.* at 105-07.

38. *Id.* at 101-02.

39. *Id.* at 140.

40. *Id.* at 157.

41. *Id.* at 146.

42. *Id.*

43. *Id.*

44. *Id.* at 146-47.

members to each rating committee who were “competent to participate in the appraisal of books.”<sup>45</sup> The Board, on the advice of each ratings committee, adopted a third of the books used to educate Mississippi school children.

The rating committee that weighed in on Loewen and Sallis’s *Mississippi: Conflict and Change* was staffed with two White men, two African American men, and three White women.<sup>46</sup> The Committee was one in name only; the members neither met as a body, nor spoke with each other.<sup>47</sup> Rather, each offered individual opinions about the textbooks to the Board. With the exception of the two African American participants, the rating committee for *Mississippi: Conflict and Change* declined to rate the book and overwhelmingly rejected it because of its depiction of slavery, the Civil War, Reconstruction, Jim Crow, lynching, and the Civil Rights Movement.<sup>48</sup> Although it could have approved up to five books for adoption in the Mississippi history course,<sup>49</sup> the Board chose only one: a revised version of John K. Bettersworth’s *Mississippi: A History* (1959) named *Your Mississippi* (1975).<sup>50</sup> Prior to the publication of *Your Mississippi*, *Mississippi: A History* and its revisions dominated Mississippi’s elementary and high school textbook market since its approval in 1958.<sup>51</sup> Referring to Bettersworth and his textbooks in a 1976 literary review for *Mississippi: Conflict and Change*, Robert Coles wrote, “The author teaches at Mississippi State University and has not gone out of his way to offend the state’s segregationists. On the contrary, they have used his interpretation of the state’s history for years, much to the dismay and increasing outrage of black activist educators, not to mention ordinary parents, and certainly, in my experience, young men and women in high schools.”<sup>52</sup> Coles quoted one of these young high school women:

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45. *Id.*

46. *Id.* at 148-50.

47. *Id.* at 150.

48. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1146-47, 1154-55 (N.D. Miss. 1980).

49. *Id.* at 1148.

50. Prior to YOUR MISSISSIPPI’s publication in 1975, Bettersworth offered a revision to MISSISSIPPI: A HISTORY titled MISSISSIPPI: YESTERDAY & TODAY (1967). EAGLES, *supra* note 32, at 59, 78, 157.

51. EAGLES, *supra* note 32, at 59-61.

52. Robert Coles, *Much More Than A Textbook*, 52 VA. Q. REV. (1976).

But why should we go to school and read books that tell us that racists like Ross Barnett and [Theodore G.] Bilbo were nice men and that the blacks and whites always got along real nice, except for the Yankees who came down here—and set us free, and tried to keep us free, but they stopped, and then the whites started lynching us and treating us like slaves again, with the segregation! I went to Freedom School in the summer of 1964, and in 1965, and I haven't forgotten what I learned. Now I'm supposed to forget all that, and pay attention to the teacher, when she tells us that "this is right, what the book says." If I speak up, they'll throw me out. If I keep quiet and repeat in class what the book says, I'll feel like a white man's nigger, that's what. My mother says to remind myself what I really do know, and try to stay in school and on the teacher's good side, because you have to have a high school diploma, if you're going to get a good job later. But it's no joke, sitting there and holding in your temper. We leave the building and we say to each other that it's all a big lie, what they're trying to stuff down us. My mother agrees. My father agrees. They say the world is full of lies, and that's what you have to find out, when you're growing up. I asked them why they don't march into the high school and tell everyone that, but they tell me they'd be arrested, and I know they would. So, I guess you have to go along and keep your mouth shut.<sup>53</sup>

In chronicling the tale of *Mississippi: Conflict and Change*, Charles W. Eagles in his book *Civil Rights, Culture Wars: The Fight over a Mississippi Textbook* describes the struggle over the textbook as a struggle between the prescriptive view of education versus education as a free market of ideas.<sup>54</sup> Under the prescriptive view, schools serve as tools for a state to indoctrinate students with what dominant society deems acceptable knowledge, so that they in turn will reflect "proper" societal values.<sup>55</sup> In contrast, under a free market view of education, schools serve as educational marketplaces in presenting multiple, contradictory ideas as catalysts for critical thought and inquiry.<sup>56</sup> The clash of these two educational worldviews was evident as Loewen and Sallis's case went forward, even in the manner it was pleaded and argued

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53. *Id.*

54. EAGLES, *supra* note 32, at 166.

55. *Id.*

56. *Id.* at 166-67.

in the United States District Court for the Northern District of Mississippi over an eight-day trial.<sup>57</sup>

*B. Loewen v. John Turnipseed & the Mississippi State Textbook Purchasing Board*

Led by LDF attorney Melvyn Leventhal, the MHP lawyering team pleaded facts in its complaint stating that the Mississippi Textbook Purchasing Board adopted those books that downplayed and erased Black people's contributions to history, and that were "sympathetic to principles of racial segregation and discrimination, black inferiority and 'white supremacy.'"<sup>58</sup> The lawyers further noted that those involved in the process of creating, publishing, and marketing textbooks for use in Mississippi schools pandered to these principles in order that their textbooks might be approved for adoption.<sup>59</sup> The result was that the Textbook Purchasing Board summarily rejected as viable adoptions books challenging White supremacist views.<sup>60</sup>

The first allegation in the LDF's complaint was that the State of Mississippi, through the Textbook Purchasing Board, violated the plaintiffs' Fourteenth Amendment Right to Due Process and Equal Protection under the laws and their freedom to contract with the State of Mississippi by "fail[ing] to adopt and implement regulations establishing hearing procedures" for book adoptions.<sup>61</sup> Second, the plaintiffs alleged that the Textbook Purchasing Board violated the Fourteenth Amendment Equal Protection Clause, 42 U.S.C. section 1983, the Thirteenth Amendment, and 42 U.S.C. section 1981 by approving only those books for adoption that "espouse notions of 'white supremacy' and/or minimize the role of Blacks in the history of Mississippi."<sup>62</sup> Plaintiffs further argued that the Board rejected the MHP text because "that text questions notions of 'white supremacy,' and records the role of all Mississippians, black and white, in the State's history."<sup>63</sup> The third averment in the MHP complaint stated that by solely adopting history textbooks that supported

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57. See generally *id.* at 170-224.

58. *Id.* at 173-74.

59. *Id.* at 174.

60. *Id.*

61. *Id.* at 174-75.

62. *Id.* at 175.

63. *Id.*

White supremacist ideals, the State of Mississippi violated the school children's rights under the Fourteenth Amendment and 42 U.S.C. section 1983 in failing to offer a public educational experience free from racial discrimination.<sup>64</sup> Lastly, the complaint asserted that Mississippi's textbook adoption process prevented the "free exchange of ideas and information without state restrictions" in violation of the First Amendment.<sup>65</sup> Among the remedies they requested, the MHP plaintiffs asked the Court to short circuit "policies or practices which discriminate against textbooks containing perspectives on history at odds with those traditionally acceptable in Mississippi."<sup>66</sup>

As the case moved through the legal discovery process, the LDF lawyers jettisoned the civil rights claims in favor of the First Amendment, Fourteenth Amendment Due Process, and 42 U.S.C. section 1981 claims. The Court ruled for the plaintiffs, and determined that no legal justification existed for the rating committee not to approve the Loewen and Sallis textbook.<sup>67</sup> Instead, the Court found that the rating committee's actions were the intended result of the Mississippi legislature's creation of the Textbook Purchasing Board, which was designed to present an accurate version of "the Southern and true American way of life" and to "[reflect] the predominant racial attitudes of the day."<sup>68</sup>

The Court began its analysis of plaintiffs' claims with a brief statement on the applicability of 42 U.S.C. sections 1981 and 1983. After efficiently setting out the requirements for section 1983 and deciding that it applied, the Court described section 1981 as a statutory means to address tort violations, specifically as it concerned giving non-White persons "the full and equal benefit of all laws and proceedings for the security of persons and property enjoyed by white citizens . . ."<sup>69</sup> Presumably, the Court's treatment of the plaintiffs' section 1981 claim was in the sole context of the plaintiffs' ability to enter into a contract with the state of Mississippi for the adoption of its textbook free of

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64. *Id.*

65. *Id.*

66. *Id.* at 176.

67. *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1148 (N.D. Miss. 1980).

68. *Id.* at 1149 (quoting the then-governor and legislative history).

69. *Id.* at 1152.

racially discriminatory process.<sup>70</sup> Citing the reasons (and non-reasons) given by the members of the rating committee who rejected *Mississippi: Conflict and Change*, as well as the impetus for the Mississippi textbook adoption legislation, the Court found that the rating committee and subsequently the Textbook Purchasing Board acted in a racially discriminatory manner in violation of sections 1981 and 1983.<sup>71</sup>

The Court gave the longest, comprehensive analysis to plaintiffs' First Amendment and Fourteenth Amendment Due Process claims. It framed its treatment of these claims as an issue of "whether or not, given the accepted principle that curriculum choice is a matter of local educational concern, state officials may have unfettered authority to decide which books children may read in school, without providing for a method by which those affected by such decisions may oppose them."<sup>72</sup> In endorsing the free market view of education, the Court responded "no" to its question. It went on to discuss curricular decisions as an exercise in the First Amendment's Freedom of Speech—"academic freedom, it can be argued, is the adaptation of those specific constitutional rights to protect communication in the classroom as a special market place of ideas."<sup>73</sup> Keeping with its First Amendment analytical framework, the Court declined to find, as the plaintiffs urged, that the Betterworth textbook was "a symbol of resistance to integration in Mississippi schools" or "an unlawful perpetuation of racial discrimination."<sup>74</sup> It reasoned that doing so would undermine academic freedom and free speech by endorsing the substance of one book over another.<sup>75</sup>

The Court, however, made this decision under the brightness of a constellation of facts that revealed Mississippi's selection of the Betterworth text as a symbol of resistance to integration and an attempt to perpetuate racial discrimination. As the only text approved for adoption in ninth grade Mississippi history, Betterworth's history of White supremacy would have stood as truth absent court intervention. The Court's remedy placed *Mississippi: Conflict and Change* on the state's approved textbook adoption list with the Betterworth text as its

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70. *Id.*

71. *Id.* at 1148-50.

72. *Id.* at 1152-53.

73. *Id.* at 1154 (quoting *Cary v. Bd. of Educ.*, 427 F. Supp. 945, 949 (D. Colo. 1977)).

74. *Id.* at 1155.

75. *Id.*

sole competition and left it to the Mississippi legislature to remedy the procedural defects in the textbook approval process.<sup>76</sup>

Despite calling out the Mississippi legislature's desire to infuse the values of the imperialist, capitalist, White supremacist patriarchy into its textbook approval and adoption process, the Court stopped short of dismissing the practice itself as an unconstitutional exercise of state power. Rather, it endorsed Mississippi's process of reviewing and adopting textbooks as an exercise in state's rights. When cast in terms of the Court's framing of the issue and its subsequent ruling, the Court's resounding declaration was that if a state provides for a method by which those negatively affected by the Textbook Purchasing Board may oppose it, then the Board may have virtually unfettered authority to decide which books children may read in school. While the Court's decision required the State to approve the Loewen and Sallis textbook for adoption in ninth grade Mississippi history, it declined to address how its focus on the battle over historical memory and experience as a controversy between the named parties obscured the broader fight over the role of history in providing legal justification for oppressive and violent structures.

*C. Litigation, Legal Education, & the Dominance of the Western Rhetorical Canon*

The legal battle, the LDF's sources for arguments, and its presentation of those arguments (*Inventio* and *Dispositio*) harken back to another conflict between prescriptive and free market views of education—legal education. The first-year law curriculum of the twenty-first century has remained virtually unchanged since the nineteenth century. It originated during Charles W. Eliot's presidency at Harvard University with Eliot's appointment of his friend and former Harvard classmate, Christopher Columbus Langdell, as Dean of Harvard Law School in 1870.<sup>77</sup> Under Langdell's leadership, legal education transitioned from an apprenticeship model to a formal curriculum.<sup>78</sup> Significantly, the formal curriculum implemented the case method of study, or the study of law

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76. *Id.* at 1155-56.

77. 1 HENRY JAMES, CHARLES W. ELIOT: PRESIDENT OF HARVARD UNIVERSITY 1869-1909, at 255-56, 258 (1930).

78. *Id.* at 267-69; W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 11-13 (1997); Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L.Q. 597, 601-08 (1981).

through decisions in appellate cases to determine which legal analytical frameworks courts used to resolve the legal problems before them.<sup>79</sup> Langdell's case method of legal study became the national standard for legal education by 1879.<sup>80</sup>

It would be ill-considered to examine the popularity of Langdell's case method outside of its historical context. The year 1879 marked a period of rapid industrialization in the United States that led to the country's dominance of the world market by the 1900s.<sup>81</sup> Dubbed the "Gilded Age" by Mark Twain,<sup>82</sup> literary historian Vernon Louis Parrington remarked about this period:

Freedom had become individualism, and individualism had become the inalienable right to pre[e]mpt, to exploit, to squander. Gone were the old ideals along with the old restraints[,] . . . and with no social conscience, no concern for civilization, no heed for the future of democracy it talked so much about, the Gilded Age threw itself into the business of money-getting.<sup>83</sup>

Langdell's evolving legal curriculum arguably was designed to meet the legal needs of Industrial America. Thriving American capitalism required legal protections to survive.<sup>84</sup> The most heavily weighted courses in Langdell's Gilded Age curriculum remain a fixture of the 1L legal curriculum to this day: Property, Equity (Equitable Remedies),<sup>85</sup>

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79. 1 JAMES, *supra* note 77, at 269; *see generally* Bruce A. Kimball, *The Langdell Problem: Historicizing the Century of Historiography, 1906–2000s*, 22 L. & HIST. REV. 277 (2004).

80. GORDON E. GEE & DONALD W. JACKSON, FOLLOWING THE LEADER? THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA 18 (1975).

81. 2 A COLLEGE HISTORY OF THE UNITED STATES 511-12 (David Burner et. al, eds. 1991); WALTER W. JENNINGS, A HISTORY OF ECONOMIC PROGRESS IN THE UNITED STATES 490-91 (1926).

82. MARK TWAIN & CHARLES DUDLEY WARNER, THE GILDED AGE: A TALE OF TODAY (1873).

83. 3 VERNON LOUIS PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 17 (1930).

84. J. F. NORMANO, THE SPIRIT OF AMERICAN ECONOMICS: A STUDY IN THE HISTORY OF ECONOMIC IDEAS IN THE UNITED STATES PRIOR TO THE GREAT DEPRESSION 123 (1943); Teri A. McMurtry-Chubb, *The Chronicle of the Disappeared White Law Professors*, in 2 CONTROVERSIES IN AFFIRMATIVE ACTION 317 (James A. Beckman ed., 2014).

85. Lester B. Orfield, *The Place of Equity in the Law School Curriculum*, 2 J. LEGAL EDUC. 26 (1949). An equitable remedy in this context refers mainly to those remedies taught as part of Contract and Tort courses. *Id.*

Contracts, and Torts.<sup>86</sup> These courses endure as a reflection of and tools to maintain the imperialist, capitalist, White supremacist patriarchy.

Legal scholars critique the case method of study for its sanitary presentation of the law as unmarred by history, politics, and human experience.<sup>87</sup> By elevating the study of appellate cases, narrowly drawn legal narratives framed to serve the interests of *stare decisis* (precedent) and maintain Western canons of rhetoric, legal education became prescriptive. In its current incarnation, it acts to transmit the values of U.S. society through knowledge as constructed through its curriculum. Paradoxically, legal education became prescriptive (pedagogically and curricularly) in its embrace of free market ideals.

For Leventhal and the LDF lawyering team, *Inventio* and *Dispositio* rested in Western ideals of individualism and freedom of contract, which eventually became the source for the arguments that would result in *Mississippi: Conflict and Change*'s approval for adoption. *Inventio* and *Dispositio* grounded in Western epistemology elevated contractual principles over civil rights protections.<sup>88</sup> Leventhal's choice to pursue freedom of contract as his main legal theory underscores legal education's dominant normative universe that makes the West's relationship to the classical rhetorical canon invisible. Legal education perpetuates prescription by ordering its curricula in accordance with free market principles without a critique of how those principles exacerbate the social justice divide. Freedom to enter into a contract to have a book adopted that challenges the imperialist, capitalist, White supremacist patriarchy is of little import if no protections exist for the book as it competes in a market hell-bent on excluding and/or destroying it.

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86. GEE & JACKSON, *supra* note 80.

87. Sharon L. Beckman & Paul R. Tremblay, *Foreword: The Way to Carnegie*, 32 B.C. J.L. & SOC. JUST. 215, 216 (2012). The authors state in relevant part: "The case method misses a great deal of the *practice* of law by neglecting clients, the role of fact development and ambiguity, the importance of judgment and reflection, and the ethical underpinnings of serving others in a professional role. It erases the context of practice and, in doing so, fails to teach students to recognize and take account of the social, economic, and political forces constraining the choices of others." *Id.*; see generally David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003); Carter, *supra* note 78; Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517 (1991).

88. *But see* Robin West, *The Right to Contract as a Civil Right*, 26 ST. THOMAS L. REV. 551 (2014) (arguing that civil rights are not in conflict with freedom of contract).

## II. FROM CANONICITY TO CENTERING OPPOSITIONAL RHETORICS

*Now, I don't want to bite the hand that'll show me the other side, no.  
But I didn't want to build the land that has fed you your whole life.*

—Solange Knowles, “Don’t You Wait”  
from the album *A Seat at the Table*<sup>89</sup>

In 2013, recording artist Solange Knowles drew criticism from White music critics when she defended singer Brandy’s *Two Eleven* album against their criticism. Solange Tweeted: “Some of these music blogs could actually benefit from hiring people who REALLY understand the culture of R&B to write about R&B,” and “Like you really should know about deep Brandy album cuts before you are giving a ‘grade’ or a ‘score’ to any R&B artist.”<sup>90</sup> One of the critics, Jon Caramanica from the New York Times wrote in response to Solange, “I went to Solange’s concert and I noted who her audience was, and if I were her, I’d be careful of making these statements because I’d be careful not to bite the hand that feeds me [the White fans].”<sup>91</sup> Caramanica’s statements were memorialized in the song “Don’t You Wait” from Solange’s album *A Seat at the Table*. Her retort to Caramanica was to remind him that “[t]he music business was built brick by brick off the backs, shoulders, [heartache] and pain, of black people, and everyone is just exhausted.”<sup>92</sup> After the release of *A Seat at the Table*, Solange Tweeted at Caramanica directly, “Don’t you EVER tell a Black woman, not to ‘Bite the hand that feeds you’ while speaking in reference to white people.”<sup>93</sup>

The Solange/Caramanica exchange highlights the epistemic nature of knowledge and its role in interpretation, whether it is art or law that is

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89. SOLANGE KNOWLES, *Don't You Wait*, on *A SEAT AT THE TABLE* (Columbia Records 2016).

90. *Solange Goes on Twitter Rant, Defends Brandy's Album 'Two Eleven'*, HUFFINGTON POST: BLACK VOICES, [https://www.huffingtonpost.com/2013/01/07/solange-defends-brandys-album-two-eleven\\_n\\_2425888.html](https://www.huffingtonpost.com/2013/01/07/solange-defends-brandys-album-two-eleven_n_2425888.html) [<https://perma.cc/KA8R-J3QP>] (last updated Jan. 10, 2013).

91. Leah Rodriguez, *Solange Says Male Critics Inspired Her Song 'Don't You Wait'*, CUT (Dec. 8, 2016), <https://www.thecut.com/2016/12/solange-discusses-male-critics-who-inspired-dont-you-wait.html> [<https://perma.cc/S2SK-ERQB>].

92. Tom Breihan, *Solange Goes in on Race in the Music Business, Blast New York Times Critic*, STEREOGUM (February 4, 2016, 10:25 AM), <https://www.stereogum.com/1857305/solange-goes-in-on-race-in-the-music-business-blasts-new-york-times-critic/wheres-the-beef/> [<https://perma.cc/P6GZ-8QB2>].

93. *Id.*

interpreted. The Western concept of the “canon” or canonicity is a contested ideology precisely because inclusion into a canon reinforces who and what is important.<sup>94</sup> Just as the legal curricular canon emerged in the Harvard of the late nineteenth century, so did the literary canon from which arises a scholarly critique of canonization.<sup>95</sup> The idea of a literary canon in U.S. secondary and post-secondary education comes from Harvard undergraduate admissions practices dating back to the early 1870s, which required applicants to write an essay from a list of acceptable books.<sup>96</sup> Due to the inclusion of certain books on the list, middle and high school teachers felt compelled to teach the listed texts, lest their students be unprepared for an “elite” education.<sup>97</sup> By 1885, the “literary canon” created by Harvard’s admission requirements was a fixture in secondary school English curricula.<sup>98</sup> The canon became enshrined after a meeting of The National Association of Education’s Committee of Ten<sup>99</sup> issued its 1894 report, which made “literary study with a loosely codified set of texts from Western traditions a universally offered secondary school subject.”<sup>100</sup>

Like the canonization of literary and historical texts, canonizing rhetorical processes of argumentation is an exercise in exclusion and reification. Each time a court makes a choice to accept some legal

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94. TEACHING THE CANON IN 21ST CENTURY CLASSROOMS: CHALLENGING GENRES, at xi (Michael Macaluso & Kati Macaluso eds., 2019); see also James A. Banks, *The Canon Debate, Knowledge Construction, and Multicultural Education*, 22 EDUC. RESEARCHER 4 (1993).

95. Specific to this conversation see, e.g., Francis J. Mootz III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977 (1994); Cass R. Sunstein, *In Defense of Liberal Education*, 43 J. LEGAL EDUC. 22 (1993); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); see also Smith, *supra* note 19; THE CANON OF AMERICAN LEGAL THOUGHT (David Kennedy & William W. Fisher III eds., 2006). Although published in 2006, this book lists no clinicians and legal writers who are the primary faculty members who teach the process of legal thought. See also Randall Kennedy, *Race Relations Law in the Canon of Legal Academia*, 68 FORDHAM L. REV. 1985 (2000). For critiques of canonization in history, see NATIONAL HISTORY STANDARDS: THE PROBLEM OF THE CANON AND THE FUTURE OF TEACHING HISTORY (Linda Symcox & Arie Wilschut eds., 2009).

96. TEACHING THE CANON IN 21ST CENTURY CLASSROOMS, *supra* note 94.

97. *Id.*

98. *Id.*

99. *Id.* The editors of the volume describe the Committee of Ten as “a panel of White men commissioned by the National Association of Education and chaired by the president of Harvard at the time[.]”

100. *Id.*

arguments over others, some histories over others, it makes a choice about which values it wishes to protect and which it denigrates. Each time a professor teaches a case and the reasoning processes that led to its outcome benignly, the professor fails to “[decenter] and disrupt the implicit and explicit narratives—like Eurocentrism, conflict-resolution through violence, gender stereotypes, and racism—that canonical texts can foster in contemporary classrooms.”<sup>101</sup> Formalistic and abstract legal reasoning are situated in the West. Relocating canons of rhetoric outside of the West problematizes the structures by which reasoning takes place by offering oppositional rhetorics as alternatives. What follows is a brief survey of Indigenous, African Diasporic, Asian Diasporic, and Latinx rhetorics, how they conceptualize *Inventio* and *Dispositio*, and how they can be used to create oppositional discourse—discourse that engages “the dominant culture’s language, idiom, and rhetoric”<sup>102</sup> while advancing the writer’s cultural concerns.

#### A. Indigenous Rhetorics

Indigenous histories of invasion, decimation, resistance, and survival have forged Indigenous rhetorics on the contested terrain of the colonizer and colonized. Indigenous rhetorics are characterized by the need for Indigenous peoples to have sovereignty in representations of themselves and their stories. Rhetoric and communication scholar Scott Richard Lyons calls for the same in his foundational article, *Rhetorical Sovereignty: What Do American Indians Want from Writing?*<sup>103</sup> Using the boarding school as an ideological site for the convergence of cultural violence, Lyons argues:

... [T]he duplicitous interrelationships between writing, violence, and colonization developed during the nineteenth-century—not only in the boarding schools but at the signings of hundreds of treaties, most of which were dishonored by whites—would set into motion a persistent distrust of the written word in English, one that resonates in homes and schools and

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101. *Id.* at x.

102. Daniel Cole, *Writing Removal and Resistance: Native American Rhetoric in the Composition Classroom*, 63 C. COMPOSITION & COMM. 122, 136 (2011); see also THEORIZING COMPOSITION: A CRITICAL SOURCEBOOK OF THEORY AND SCHOLARSHIP IN CONTEMPORARY COMPOSITION STUDIES 50 (Mary Lynch Kennedy ed., 1998).

103. Scott Richard Lyons, *Rhetorical Sovereignty: What Do American Indians Want from Writing?*, 51 C. COMPOSITION & COMM. 447 (2000).

courts of law still today. If our respect for the Word remains resolute, our faith in the written word is compromised at best.<sup>104</sup>

In response, Lyons offers rhetorical sovereignty as a set of rhetorical practices based on Indigenous peoples' requirements for communication that preserves cultural dignity and autonomy.<sup>105</sup> Rhetorical sovereignty is an oppositional discourse to rhetorical imperialism, which is defined as "the ability of dominant powers to assert control of others by setting the terms of debate."<sup>106</sup> These terms are descriptions of the parties that have legal meanings and consequences detrimental to those that did not chose them.<sup>107</sup> With respect to Indigenous peoples, descriptors that increasingly cast them as beneficiaries of their colonizer's paternalism has led to legal divestments of their sovereignty, while simultaneously shifting the site of resistance to how those divestments would be remembered.<sup>108</sup>

Thus, rhetorical sovereignty rests in how Indigenous peoples chronicle their own culture and history (story and representation), which throws dominant accounts of their realities into discord.<sup>109</sup> This is especially true when dominant stories of Indigenous/colonizer conflict are mined as acceptable sources for argument and frame interpretation.<sup>110</sup> Sovereignty, given Indigenous peoples' particular experience with colonization, is a place-centric principle of wholeness, one that aims to preserve and continue community and culture.<sup>111</sup>

Also key to Indigenous rhetorical practice is survivance (survival + resistance).<sup>112</sup> Coined by writer and scholar Gerald Vizenor, "Native survivance stories are renunciations of dominance, tragedy, and victimry. Survivance is resisting those marginalizing, colonial narratives and polices so indigenous knowledge and lifeways may come into the present

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104. *Id.* at 449.

105. *Id.* at 449-50.

106. *Id.* at 452.

107. *Id.* at 452-53.

108. *Id.* at 453; *see also* SURVIVANCE, SOVEREIGNTY, AND STORY: TEACHING AMERICAN INDIAN RHETORICS 6-7 (Lisa King et al. eds., 2015).

109. Lyons, *supra* note 103, at 458-59; *see also* SURVIVANCE, SOVEREIGNTY, AND STORY *supra* note 108, at 8-9.

110. Lyons, *supra* note 103, at 459-62.

111. *Id.* at 456-57.

112. Cole, *supra* note 102, at 125.

with new life and new commitment to that survival.”<sup>113</sup> Survivance is expressed through recognizing the existence of Indigenous rhetorics, identifying Indigenous peoples’ strategic use of Western rhetorical forms, and the epistemic nature of Indigenous communication.<sup>114</sup>

Classroom Exercises Utilizing Indigenous Rhetorics for Oppositional Discourse

- Teach Indigenous Nations as “third sovereigns” when introducing students to the concept of federalism<sup>115</sup>
- Use the song *All My Relations* by Ulali, First Nation A Cappella Trio<sup>116</sup> as an analytical framework to examine sovereignty, survivance, and story in *Johnson v. M’Intosh*,<sup>117</sup> *Cherokee Nation v. Georgia*,<sup>118</sup> and *Worcester v. Georgia*<sup>119</sup>
- Read and analyze *Dred Scott v. Sandford*<sup>120</sup> through the lens of sovereignty to examine how the court interpreted Indigenous nationhood and African enslavement
- Read and analyze the Mashpee Wampanoag application materials for federal recognition<sup>121</sup> through the lens of story,

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113. SURVIVANCE, SOVEREIGNTY, AND STORY *supra* note 108, at 7 (internal citation omitted).

114. *Id.*

115. See Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765 (2009).

116. ULALI, *All My Relations*, on MAHK JCHI (Corn, Beans & Squash Records 1994); see also Ulali - *All My Relations Lyrics*, SONGLYRICS, <http://www.songlyrics.com/ulali/all-my-relations-lyrics/> [https://perma.cc/8ZV4-R7BW]; see also tsalagiwaya, *All My Relations*, YOUTUBE (Mar. 12, 2007), <https://www.youtube.com/watch?v=b8LzOXVsC70>; see also Ulali, First Nation A Cappella Trio, FACEBOOK (Mar. 17, 2015), <https://www.facebook.com/FirstNationMusic/posts/all-my-relations-the-song-is-a-version-of-the-gary-owen-hail-song-which-was-a-iri/927971217237490/> (“All My Relations: The song is a version of the Gary Owen hail song . . . which was [an] Irish Beer Drinking song that was used to march into Indian Camps to slaughter.”); see also Native News Online Staff, *Ulali Project’s Debut Album in Pre-Production*, NATIVENEWSONLINE.NET (July 16, 2016), <https://nativenewsonline.net/currents/ulali-projects-debut-album-pre-production/> [https://perma.cc/KNC5-SDKK].

117. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

118. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

119. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

120. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

121. *Petitioner #015: Mashpee Wampanoag, MA*, U.S. DEP’T INTERIOR, <https://www.bia.gov/as-ia/ofa/015-mashpe-ma> [https://perma.cc/AZ57-R8DX].

and their subsequent battles for self-determination<sup>122</sup> through the lenses of sovereignty and survivance

### B. *African Diasporic Rhetoric*

The African holocaust forced Black bodies from the continent of Africa and scattered them throughout the world through the vehicle of human trafficking. Africans endured, and our encounters with non-Africans throughout the Diaspora forced cultural syncretism from shared history. In their path-forging work, *Understanding African American Rhetoric: Classical Origins to Contemporary Innovation*, rhetoric scholars Ronald L. Jackson II and Elaine B. Richardson position African American rhetoric as a valid subject of study in the academy worthy of scholarly inquiry.<sup>123</sup> The foreword by activist and critical rhetorician Orlando L. Taylor notes that this work is important because scholars of African Diasporic rhetoric who are African Diasporic people are its contributors, engaged in the enterprise of decolonizing the knowledge of the discipline and their place in it.<sup>124</sup> He writes, “Volumes such as these interrogate the flawed singularity of truth telling in rhetorical studies not only by exposing the limitations of the European-centered literature’s hegemonic intent, but also by centralizing and celebrating the uniqueness of another rhetorical tradition, that of African Americans.”<sup>125</sup>

*Understanding African American Rhetoric* moves us beyond an understanding of African American rhetoric as oratory to an introduction of its African Diasporic rhetorical practices and traditions.<sup>126</sup> It challenges Western “classical” rhetorical frameworks as “culturally generic paradigms” inadequate to examine the cultural specificity of rhetorical strategies.<sup>127</sup> Accordingly, Africology (the study of the histories and cultures of African peoples on the African continent) and Afrocentricity (an African centered worldview) are foundational to

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122. *Littlefield v. United States Dep’t of Interior*, 199 F. Supp. 3d 391 (D. Mass. 2016); see also Peter d’Errico, Opinion, *Mashpee Wampanoag Tangled in Federal (Anti-)Indian Law Mumbo-Jumbo*, INDIANZ.COM (Nov. 26, 2018), <https://www.indianz.com/News/2018/11/26/peter-derrico-mashpee-wampanoag-tribe-fa.asp>.

123. UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS (Ronald L. Jackson II & Elaine B. Richardson eds., 2003).

124. *Id.* at ix-x.

125. *Id.* at x.

126. *Id.* at xiii.

127. *Id.*

building the culturally specific paradigms and methods by which to study African Diasporic rhetorical practices.<sup>128</sup>

African Diasporic rhetoric marks the Kemetic texts of ancient Egypt as a starting point.<sup>129</sup> These texts are a conceptual departure from Greco-Roman rhetorical texts, in that the latter are connected to the marketplace while the former are not.<sup>130</sup> Rather, the Kemetic texts are an expression of community, an exercise in community building, and a practice of safeguarding community well-being.<sup>131</sup>

African Diasporic rhetoric originates in an oral tradition, rather than a written one. Scholar Maulana Karenga grounds the African oral tradition in the Black nationalist<sup>132</sup> Kawaida philosophy, described as “a cultural core that forms the central locus of our self-understanding and self-assertion in the world and which is mediated by constantly changing historical circumstances and an ongoing internal dialog of reassessment and continuous development[.]”<sup>133</sup> Kawaida is a lens that guides the scholarly interpretation of ancient African rhetorical texts.<sup>134</sup> The Book of Ptahhotep, an Egyptian text and the oldest rhetorical text in existence,<sup>135</sup> has two basic tenets: “rhetoric as eloquent and effective speech itself (*mdt nfrt—medet neferet*) and rhetoric as the rules or principles for eloquent and effective speech (*tp-hsb n mdt nfrt—tep-heseb*)

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128. *Id.* at xvi; see also Adisa A. Alkebulan, *The Spiritual Essence of African American Rhetoric*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 23-24 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003); Darlene Clark Hine, *The Black Studies Movement: Afrocentric-Traditionalist-Feminist Paradigms for the Next Stage*, 22 BLACK SCHOLAR 11 (1992). But see MICHELLE WALLACE, BLACK MACHO AND THE MYTH OF THE SUPERWOMAN (1978) (critiquing, in part, Afrocentricity as practiced in the Black Power Movement).

129. Maulana Karenga, *Nommo, Kawaida, and Communicative Practice: Bringing Good into the World*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 3 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003).

130. *Id.*

131. *Id.* at 3, 5.

132. See Ronald L. Jackson II, *Afrocentricity as Metatheory: A Dialogic Exploration of Its Principals*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 124 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003) (describing Maulana Karenga's Kawaida theory as “[a] Black nationalist theory, not a metatheory, nor is it a conceptual rubric of the Afrocentric paradigm[.]”).

133. *Id.* at 5.

134. *Id.* at 10.

135. *Id.* at 14.

*en medet neferet*)."136 This idea of eloquence as unity is reflective of ethical speech as a tool for community building, an expression of the ancient Egyptian moral tenet of *Maat*.137 *Maat*, or "rightness in the world" has seven principles: "truth, justice, propriety, harmony, balance, reciprocity, and order," truth being the most important.138 *Maat* also affirms the value of all people, regardless of race, class, or gender, and stresses the partnership between rhetor and audience in community building.139 Instructions for the practice of African rhetoric are found in the Book of Khunanup, which considers the rhetor's use of *Maat* to argue for justice.140 *Maat*'s loose parallels in the Western world are Aristotle's persuasive appeals (*logos*, *pathos*, and *ethos*).141

The African *nommo* or *nummo* is the universe in which invocations for justice function. In the Malian creation story "the Creator, Amma, sends *nommo*, the word (in the collective sense of speech), to complete the spiritual and material reorganization of the world and to assist humans in the forward movement in history and society."142 The word, *nommo*, makes community building, safeguarding, and well-being possible; it is the space that gives *Maat* meaning and form to achieve good in the world.143

As expressed in African American rhetoric, *nommo* is resistance to oppressive regimes that made it illegal for enslaved persons to read and write.144 As an import to the U.S. through the bodies of trafficked Africans, *nommo* persists as a weapon of cultural resistance and a testament to cultural retention.145 It embodies the ethics of speech found in the Book of Ptahhotep that unify African American rhetoric: "[1] the dignity and rights of the human person; [2] the well-being and flourishing of community; [3] the integrity and value of the environment [to repair ecological, social, and ontological damage in the world resulting from acts of commission and omission]; and [4] the reciprocal solidarity and

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136. *Id.* at 11.

137. *Id.*

138. *Id.*; see also Alkebulan, *supra* note 128, at 23-25.

139. Karenga, *supra* note 129, at 15-17.

140. *Id.* at 11-12.

141. *Id.* at 11.

142. *Id.* at 8; see also Alkebulan, *supra* note 128, at 28-29.

143. Karenga, *supra* note 129, at 8.

144. *Id.*

145. *Id.* at 9.

cooperation for mutual benefit of humanity [‘speak truth, do justice’].”<sup>146</sup> These tenets provide the source for petitions to justice, and guide their arrangement and the medium in which they are presented.<sup>147</sup>

Classroom Exercises Utilizing African Diasporic Rhetoric for Oppositional Discourse

- Utilize *nommo* as an interpretive framework for litigation<sup>148</sup> over the “zero tolerance” immigration policy that resulted in family separation at the border, and Presidential Executive Order 13841 *Affording Congress an Opportunity to Address Family Separation*<sup>149</sup>
- Use *Ella’s Song: We Who Believe In Freedom Cannot Rest Until It Comes* by the Africana women recording artists Sweet Honey in the Rock<sup>150</sup> as an analytical framework and expression of *Maat* to draft an alternative to Presidential Executive Order 13769 *Protecting the Nation from Foreign*

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146. *Id.* at 14-19.

147. *Id.* at 14. Speaking to the medium that conveys *nommo*, the author offers Molefi Asante’s explanation: “[T]he African sees the discourse as the creative manifestation of what is called to be. That which is called to be, because of the mores and values of society, becomes the created thing, the artist or speaker, satisfies the demands of society by calling into being that which is functional. And functional, in this case refers to the object (sculpture, music, poem, dance, speech) that possesses a meaning within the communicator’s and audience’s worldview, a meaning that is constructed from the social, political and religious moments in society’s history.” *Id.* at 10; see also Alkebulan, *supra* note 128, at 33. The author notes: “African orature according to the [African rhetorical scholar] Okpewho, does not departmentalize literature into poetry, prose, and drama. . . . [T]here is no line drawn between a speech act and a performance in African communities.” *Id.*

148. *Ms. L. v. United States Immigration and Customs Enf’t*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (declaring family separation without an unfit parent or present danger to the child determination violative of due process); see also *Ms. L. v. ICE*, ACLU, <https://www.aclu.org/cases/ms-l-v-ice> (last updated Apr. 25, 2019) (“Legal Documents”); *ICE Separated Parent’s Removal Form Pursuant to Ms. L. v. ICE Lawsuit*, AM. IMMIGR. LAW. ASS’N (July 5, 2018), <https://www.aila.org/infonet/ice-separated-parents-removal-form-pursuant> [<https://perma.cc/J6KN-GGMG>].

149. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).

150. SWEET HONEY IN THE ROCK, *Ella’s Song, on WE ALL . . . EVERY ONE OF US* (Flying Fish 1983); see also Azizi Powell, *Sweet Honey in the Rock - Ella’s Song: We Who Believe in Freedom Cannot Rest Until It Comes* (Lyrics, Videos, Information), C.R. SONGS (Dec. 2, 2014), <http://civilrightssongs.blogspot.com/2014/12/sweet-honey-in-rock-ellas-song-we-who.html> [<https://perma.cc/W2PT-PJ4F>]; see also Geepereet, *Sweet Honey in the Rock - Ella’s Song*, YOUTUBE (Dec. 2, 2008), <https://www.youtube.com/watch?v=U6Uus—gFrc>.

*Terrorist Entry Into the United States*<sup>151</sup> (a.k.a. the Muslim travel ban)

- Compare and contrast the FBI's Intelligence Assessment of "Black Identity Extremists"<sup>152</sup> to policies on domestic terrorism<sup>153</sup> to challenge the process of criminalization as a culturally generic paradigm
- Compare and contrast the United States Constitution and Confederate Constitution<sup>154</sup> as oppositional rhetorics to *nommo*.

### C. Asian Diasporic Rhetoric

The study of Chinese rhetoric dominates intellectual inquiry into Asian rhetoric.<sup>155</sup> Scholars of Asian rhetoric look to China for its origins and influence.<sup>156</sup> Arguably, rhetoric as a discipline did not emerge in China until the early 1900s.<sup>157</sup> However, rhetoric existed in China from

151. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017).

152. FEDERAL BUREAU OF INVESTIGATION, INTELLIGENCE ASSESSMENT, (U//FOUO) BLACK IDENTITY EXTREMISTS LIKELY MOTIVATED TO TARGET LAW ENFORCEMENT OFFICERS (2017), <https://assets.documentcloud.org/documents/4067711/BIE-Redacted.pdf> [<https://perma.cc/4A9Y-4DRB>].

153. JEROME P. BJELOPERA, CONG. RESEARCH SERV., DOMESTIC TERRORISM: AN OVERVIEW (2017), <https://fas.org/sgp/crs/terror/R44921.pdf> [<https://perma.cc/B97G-UAG3>].

154. CONST. OF THE CONFEDERATE STATES OF 1861, [http://avalon.law.yale.edu/19th\\_century/csa\\_csa.asp](http://avalon.law.yale.edu/19th_century/csa_csa.asp) [<https://perma.cc/R38V-3RG2>].

155. See, e.g., Massimiliano Tomasi, *Studies of Western Rhetoric in Modern Japan: The Years Between Shimamura Hōgestsu's Shin bijigaku (1902) and the End of the Taishō Era*, 16 JAPAN REV. 161 (2004) (setting the introduction of Western rhetoric as the beginning of Japanese rhetoric and discussing its waxing and waning relevance). But see Jon Sung-Gi, *Towards a Rhetoric of Communication, with Special Reference to the History of Korean Rhetoric*, 28 RHETORICA 313 (2010) (arguing for a general rhetoric inclusive of the East and West, while referencing a Korean rhetorical tradition); cf. A. Charles Muller, *Wōnhyo's Approach to Harmonization of the Mahayana Doctrines (Hwajaeng)*, 18 ACTA KOREANA 9 (2015) (citing the Chinese influence on the development of Korean rhetoric); Robert T. Oliver, *The Confucian Rhetorical Tradition in Korea During the Yi Dynasty (1392-1910)*, 45 Q.J. SPEECH 363 (1959).

156. See generally Min-Zhan Lu & Bruce Horner, *Foreword* to REPRESENTATIONS: DOING ASIAN AMERICAN RHETORIC, at vii-xiii (Luming Mao & Morris Young eds., 2008); LuMing Mao & Morris Young, *Introduction: Performing Asian Rhetoric into the American Imaginary*, in REPRESENTATIONS: DOING ASIAN AMERICAN RHETORIC 1-21 (LuMing Mao & Morris Young eds., 2008).

157. ANDY KIRKPATRICK & ZHICHANG XU, CHINESE RHETORIC AND WRITING: AN INTRODUCTION FOR LANGUAGE TEACHERS 13 (2012).

Ancient times, and its use in creating a discourse of persuasion was expressed in the following six terms:

[1] *Yan*: speech, talks and the use of language; [2] *Ci*: modes of speech, types of discourse, eloquence, style; [3] *Jian*: giving advice, persuasion; [4] *Shui/shuo*: persuasion/explanation, idea, thought; [5] *Ming*: naming, symbol using, rationality, epistemology; [and 6] *Bian*: distinction change, justice-eloquence, arguments, persuasion, debate, disputation discussion.<sup>158</sup>

Chinese rhetorics reflected the ideals of varied dynasties and philosophers in articulating the uses and purposes of language. For example, rulers of the Ming Dynasty and followers of Confucius viewed rhetoric as an ethical means to build knowledge in the service of social justice.<sup>159</sup> In contrast, the Mohists (Ancient Chinese philosophers) focused on rhetoric as means of “rational” argument or argument that draws on “metaphorical, anecdotal, analogical, paradoxical, chain reasoning, classification, and inference.”<sup>160</sup> Different still was the Daoist (Taoist) regime, which was most concerned with rhetoric as a tool of transcendental philosophy.<sup>161</sup> Lastly, the concept of legalism emerged to conceptualize language as a means to support the existing ruling power.<sup>162</sup>

*Li Ji* or *The Book of Rites* espoused the unifying principle for Chinese rhetoric as the preservation of relationship.<sup>163</sup> *Li Ji* underscored the most important of these relationships (Confucian in origin) as relationships between “prince and minister; father and son; husband and wife; elder and younger; [and] friends.”<sup>164</sup> To preserve these relationships, the rhetor had to be cognizant of audience and the epistemic function of argument as it supported *Yan*, *Ci*, *Jian*, *Shui/shuo*, *Ming*, and *Bian*.<sup>165</sup> The arrangement of language into arguments followed the “because-therefore” or “frame-main” sequence, an indirect style of argumentation where reasons (presented as stories, histories, and symbols) precede main

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158. *Id.* at 14.

159. *Id.*

160. *Id.* at 14-15.

161. *Id.*

162. *Id.*

163. *Id.* at 20-24.

164. *Id.*

165. *Id.*

assertions.<sup>166</sup> This arrangement style was part and parcel of a joint knowledge-making exercise that required the rhetor and audience to explore the relationship between “reasons.”<sup>167</sup> It gained increased significance as those native to Asian countries left for Europe and the Americas.

In his *Strangers from a Different Shore: A History of Asian Americans*, historian Ronald Takaki acquaints us with the Asian Diaspora through the encounters of diverse Asian peoples as they entered and settled beyond U.S. shores.<sup>168</sup> Asian American Studies professor Elaine H. Kim, in her review of Takaki’s text, positions the historian’s study as the manifestation of “Asian American historian Yuji Ichioki[’s] [call to center] Asian Americans as ‘subjects’ instead of as ‘objects’ of history[.]”<sup>169</sup> Ichioki is credited with originating the term “Asian Americans” as a unifier for Asian Diasporic peoples living in the U.S.<sup>170</sup> His descriptive term for inhabitants of the Asian Diaspora as they reside in the U.S. is a political, social, cultural, and rhetorical space. As if answering Ichioki’s call, Asian Diasporic rhetoricians identify a need for those involved in scholarly rhetorical inquiry to “treat the Others of transcultural communication as agents of knowledge making rather than the objects of ‘study’ and domination.”<sup>171</sup>

Because Asian Diasporic history is an immigrant one (real and mythologized), Asian American rhetoric studies are rooted in the study of language, specifically the fluidity of English as adapted by Asian native English and multiple language speakers for use in a variety of spoken and written contexts.<sup>172</sup> Scholars of Asian American rhetoric study, in part, how choices of words, idioms, and argument strategies reflect Asian worldviews and philosophies, just as a resistance to those

166. *Id.* at 18, 25-29, 42-45, 126-28; LUMING MAO, *READING CHINESE FORTUNE COOKIE: THE MAKING OF CHINESE AMERICAN RHETORIC* 70-71 (2006).

167. MAO, *supra* note 166, at 74-75.

168. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* (1989).

169. Elaine H. Kim, *A Critique of Strangers from A Different Shore*, 16 *AMERASIA* 101, 101 (1990).

170. Vanessa Arroyo, *Yuji Ichioka and Early Moments in the Asian American Movement*, U.N.C. (Apr. 20, 2018), <http://1968inmemory.web.unc.edu/2018/04/yuji-ichioka-the-asian-american-political-alliance-and-third-world-liberation-front-a-reverberating-legacy/> [<https://perma.cc/4U77-FVSL>].

171. Lu & Horner, *supra* note 156, at vii-viii.

172. *Id.* at x-xi.

choices result in oppressive structures that limit their expression.<sup>173</sup> For example, the ubiquitous sign found on lawns throughout the U.S., “Keep Off the Grass,” is translated into Chinese as “Little Grass Has Life.” Far from a humorous blunder, this “translation” reflects a philosophy of a person and/or animal’s legal and societal relationship to the environment.<sup>174</sup> In this sense, “Asian Americans use the symbolic resources of language in social, cultural, and political arenas to disrupt and transform dominant European American discourse and its representations of Asians and Asian Americans, thus re-presenting and reclaiming their identity and agency.”<sup>175</sup> When framed in this manner, language itself, its use and arrangement, becomes the source of argument. Language also becomes epistemic, as it seeks to recreate Asian Diasporic knowledge as Western knowledge by decentering Western knowledge as its source.<sup>176</sup> Lastly, the fluidity of language rejects canonization, and moves beyond categorization as a means of persuasion.<sup>177</sup>

Classroom Exercises Utilizing Asian Diasporic Rhetoric for Oppositional Discourse

- Compare and contrast *Meyer v. Nebraska*<sup>178</sup> and *Farrington v. Tokushige*<sup>179</sup> (both are cases about non-English language education) to examine how the parties and courts engaged in oppositional discourse in its representations of the “other”
- Using any set of cases, consider how lawyers (through pleadings and briefs) and courts (through opinions) frame arguments and issues as an exercise to determine how framing language itself becomes the argument
- Utilizing *Yian, Ci, Jian, Shui/shuo, Ming, and Bian* as an analytical framework, examine how a set of briefs and oral arguments meet its requirements, do not meet its requirements, and the reasons why

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173. *Id.* at xi-xii.

174. *Id.*

175. Mao & Young, *supra* note 156, at 2.

176. *Id.* at 2-3.

177. *Id.* at 4.

178. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

179. *Farrington v. Tokushige*, 273 U.S. 284 (1927).

- Using any set of cases, pleadings, briefs, and/or oral arguments, examine how the parties use Mohist rationality as persuasive appeals

#### D. *Latinx Rhetorics*

The study of Latinx rhetorics includes the rhetorical strategies for people within the idea and reality of Latin America.<sup>180</sup> Because Latinx histories encompass colonization and immigration, Latinx rhetorical strategies are similar to those of Indigenous people and Asian Diasporic people. This is especially true as Latinx rhetoric includes Chicanx/Mestix@s<sup>181</sup> rhetoric, as this group remains the largest Latinx group residing in the U.S.<sup>182</sup>

Latinx rhetorics are an engagement with the borderlands, in language, place, and space.<sup>183</sup> The colonized academy hosts an assault on the border, as it contends with Latinx students in its physical and intellectual spaces occupied by the Western rhetorical canon.<sup>184</sup> The guiding methodology of Latinx rhetorics is the disruption of the boundaries,

180. See generally RHETORICS OF THE AMERICAS: 3114 BCE TO 2012 CE (Damián Baca & Victor Villanueva eds., 2010); WALTER D. MIGNOLO, THE IDEA OF LATIN AMERICA (2005); CARLOS J. ALONSO, THE BURDEN OF MODERNITY: THE RHETORIC OF CULTURAL DISCOURSE (1998).

181. DAMIÁN BACA, MESTIZ@ SCRIPTS, DIGITAL MIGRATIONS, AND THE TERRITORIES OF WRITING, at xvi, 2 (2008). Baca describes the term “Mestiz@” as “a dynamic spectrum of shifting and contested subjectivity. At one extreme of this continuum are people who understand their individual and communal identity as primarily indigenous. At the other extreme are those who deny indigenous affiliation as part of their lineage and instead see themselves within a largely isolated Spanish Iberian inheritance of the past 400–500 years in America.” *Id.* at 2.

182. *Id.* at xvi, 2, 13-14.

183. Aydé Enriquez-Loya & Kendall Leon, *Chicanx/Latinx Rhetorics as Methodology for Writing Program Design at HSIs*, 45 COMPOSITION STUD. 212, 212-13 (2017); see also Victor Villanueva, *Metonymic Borders and Our Sense of Nation*, in CROSSING BORDERS, DRAWING BOUNDARIES: THE RHETORIC OF LINES ACROSS AMERICA 34-35, 41 (Barbara Couture & Patti Wojahn eds., 2016) (arguing that the border is a fiction within the idea of nation as fiction). See generally JOSUE DAVID CISNEROS, THE BORDER CROSSED US: RHETORICS OF BORDERS, CITIZENSHIP, AND LATINA/O IDENTITY (2014); BORDER RHETORICS: CITIZENSHIP AND IDENTITY ON THE U.S.-MEXICO FRONTIER (D. Robert DeChaine ed., 2012); GLORIA ANZALDÚA, BORDERLANDS/LA FRONTERA: THE NEW MESTIZA (1987).

184. Enriquez-Loya & Leon, *supra* note 183; see also BACA, *supra* note 181, at 1. The author also utilizes Anzaldúa’s “la conciencia de la mestizo” or “new mestizo consciousness.” Anzaldúa’s consciousness is a call to resist the subject-other binary in characterizing Mexican/Chicanx colonial and border encounters. ANZALDÚA, *supra* note 183, at 77-91.

“border insurrections.”<sup>185</sup> Articulated in literary trailblazer Gloria Anzaldúa’s work on the concept of *conocimiento*, centering Latinx rhetorics requires “developing a critical and decolonized consciousness that moves from rupturing, to fragmentation, to connecting, to assembling and rebuilding.”<sup>186</sup> Latinx rhetorics are also a disruption of the binary; the terms Latinx/Chicanx/Mestiz@ eschew gendered language and invite previously excluded Latinx, like Afro Latinx, into the community.<sup>187</sup> This disruption extends into written and performed symbols (e.g. painting, writing, movement/dance, religious symbols and texts) as rhetoric, and their role in creating new sources of knowledge in and about colonized spaces and the borderlands.<sup>188</sup>

Inherent in Latinx rhetorics is the idea of “epistemic delinking” or exposing the role of Western epistemology in Western rhetorical traditions, and its role in othering non-Westerners and non-Western rhetorics.<sup>189</sup> Ultimately, Latinx rhetorics:

[P]romote[] new modes of invention, new ways to think, read, and write that provide not only much-needed historiographical correctives, but also advance political expressions better suited to current material realities of Western global expansion. [Latinx/Chicanx/Mestiz@] rhetorics resist the hierarchical logic of conquest and assimilation through . . . “the stories we tell and the stories we deny.” This dynamic rhetorical strategy not only reinscribes our own history; it also asserts that the dominant narratives of Western rhetoric and writing must also be retold and revised.<sup>190</sup>

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185. BACA, *supra* note 181, at 5.

186. Enríquez-Loya & Leon, *supra* note 183. See generally IRIS D. RUIZ, RECLAIMING COMPOSITION FOR CHICANO/AS AND OTHER ETHNIC MINORITIES 1-25 (2016).

187. Christine Garcia, *In Defense of Latinx*, 45 COMPOSITION STUD. 210 (2017); BACA, *supra* note 181, at 2 (arguing that “[t]he reinvention of the typographic logogram ‘@’ is primarily for purposes of gender inclusivity.”).

188. BACA, *supra* note 181, at 2-5.

189. Iris D. Ruiz & Raúl Sánchez, *Introduction: Delinking*, in DECOLONIZING RHETORIC AND COMPOSITION STUDIES: NEW LATINX KEYWORDS FOR THEORY AND PEDAGOGY, at xiv-xv (Iris D. Ruiz & Raúl Sánchez eds., 2016).

190. BACA, *supra* note 181, at 14 (quoting E. A. Mares).

Classroom Exercises Utilizing Latinx Rhetorics for Oppositional Discourse

- Compare and contrast colonial and Latinx rhetorics using statutory interpretation as a site for border disruption<sup>191</sup>
- Examine the role of epistemic delinking in proposed legislation<sup>192</sup> and cases<sup>193</sup> concerning transgender bathroom bans
- Read and analyze any set of cases to determine how language is gendered and acts to exclude parties and narrow rulings in judicial opinions
- Use Frida Kahlo's *Diego and I*<sup>194</sup> as a Latinx rhetorical framework to analyze the efficacy of the Senate Judiciary Committee's Nomination & Confirmation Process<sup>195</sup> as applied in the confirmation hearings for Justices Brett Kavanaugh and Clarence Thomas

III. TOWARD DECOLONIZING RHETORIC AND A WOKE LEGAL ACADEMY

*If You're Woke You Dig It; No mickey mouse can be expected to follow today's Negro idiom without a hip assist.*

—William Melvin Kelley, *The New York Times*<sup>196</sup>

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191. For a good starting point for this exercise see Josue David Cisneros, *Looking Illegal: Affect, Rhetoric, and Performativity in Arizona's Senate Bill 1070*, in *BORDER RHETORICS: CITIZENSHIP AND IDENTITY ON THE U.S.-MEXICO FRONTIER* (D. Robert DeChaine ed., 2012).

192. Joellen Kralik, "Bathroom Bill" Legislative Tracking, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/YM6A-ZWXU>].

193. See, e.g., *Carcaño v. Cooper*, 350 F. Supp. 3d 388 (M.D.N.C. 2018).

194. Frida Kahlo, *Diego and I*, 1949, oil on Masonite, 11 x 8¾", Mary-Anne Martin Fine Arts, New York, <https://www.fridakahlo.org/diego-and-i.jsp> [<https://perma.cc/YS3R-4XQ9>].

195. *Nomination & Confirmation Process, Supreme Court Nominations Research Guide*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=365722&p=2471070> [<https://perma.cc/23T9-YANP>] (Nov. 9, 2018, 12:40 PM).

196. William Melvin Kelley, *If You're Woke You Dig It; No Mickey Mouse Can Be Expected to Follow Today's Negro Idiom Without a Hip Assist. If You're Woke You Dig It*, N.Y. TIMES: ARCHIVES (May 20, 1962), <https://www.nytimes.com/1962/05/20/archives/if-youre-woke-you-dig-it-no-mickey-mouse-can-be-expected-to-follow.html> [<https://perma.cc/ND8P-Y4WN>]; William Melvin Kelley, *If You're Woke, You Dig It*, by William Melvin Kelley, FACEBOOK (May 23, 2017), <https://www.facebook.com/WilliamMelvinKelley/photos/a.1554462681255277/15544>

*Woke is definitely a black experience—woke is if someone put a burlap sack on your head, knocked you out, and put you in a new location and then you come to and understand where you are ain't home and the people around you ain't your neighbors. They're not acting in a neighborly fashion, they're the ones who conked you on your head. You got kidnapped here and then you got punked out of your own language, everything. That's woke—understanding what your ancestors went through. Just being in touch with the struggle that our people have gone through here and understanding we've been fighting since the very day we touched down here. There was no year where the fight wasn't going down.*

—Georgia Anne Muldrow, musician<sup>197</sup>

In 1962, writer William Melvin Kelley wrote an article for the New York Times titled *If You're Woke, You Dig It; No mickey mouse can be expected to follow today's Negro idiom without a hip assist*.<sup>198</sup> The purpose of the article was to ground the slang of his day in African Diasporic rhetorical practices and to poke fun at their enigmatic nature to those outside of the culture. To this end, Kelley's article makes mention of a "Member's Thesaurus," a fictional reference tool designed to help the confused decipher the slang. Again, Kelley's satire of non-African Diasporic peoples' quest to use African American idioms points to the fluid, contextual, and epistemic nature of language; just as it creates meaning, it shifts that meaning-making magic to something else.

The Western canons of rhetoric and their foundation in Western epistemology make meaning of legal reasoning, analytic, and communication processes. They do so even as they assert their neutrality while being dominant and exclusive. Being "woke" to these processes, means that we must actively work to decolonize Western rhetorical practices, the canon and notions of canonicity, throughout the law school

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62697921942/?type=3&theater; see also Elijah C. Watson, *The Origin of Woke: William Melvin Kelley Is the 'Woke' Godfather We Never Acknowledged*, OKAYPLAYER (2017), <https://www.okayplayer.com/culture/woke-william-melvin-kelley.html> [<https://perma.cc/G47N-WFRX>].

197. Elijah C. Watson, *The Origin of Woke: How Erykah Badu and Georgia Anne Muldrow Sparked the "Stay Woke" Era*, OKAYPLAYER (2018), <https://www.okayplayer.com/originals/georgia-muldrow-erykah-badu-stay-woke-master-teacher.html> [<https://perma.cc/WQ4A-SDPS>].

198. Kathryn Schulz, *The Lost Giant of American Literature: A Major Black Novelist Made a Remarkable Debut. How Did He Disappear?*, NEW YORKER: AM. ARCHIVES (Jan. 22, 2018), <https://www.newyorker.com/magazine/2018/01/29/the-lost-giant-of-american-literature> [<https://perma.cc/8P4Z-7NQK>].

curriculum. As the site for knowledge production and the creation of disciplinary norms, legal writing process and practice are the battleground on which the war to decolonize the academy must be fought.

Legal writing instruction has not broadened to include a discussion of oppositional rhetorics as alternatives to dominant ones. The case study method of analysis, which hides the litigation process from students and as such the legal knowledge building process, truncates the opportunity for professors to aid students in developing oppositional discourse—“discourse that engages dominant culture’s language, idiom, and rhetoric”<sup>199</sup> while advancing the writer’s cultural concerns. Leventhal’s choices throughout the course of the *Mississippi: Conflict and Change* litigation are instructive here. The evolution of his pleadings to align with Western rhetorical canons is obscured in the study of the case by the federal district court’s frame and subsequent resolution of the issues before it. Teaching Leventhal’s litigation strategy, indeed the whole of social justice litigation strategies through an examination of the pleadings, briefs, and opinions in any given case, would expose the role of Western epistemology in the canons of rhetoric and position Leventhal’s attorney work product as oppositional discourse. The scholars referenced throughout Part II suggest similar pedagogical strategies ranging from an Afrocentric rhetorical analysis of Johnnie Cochran’s closing argument in the O. J. Simpson trial,<sup>200</sup> to an analysis of the rewritten opinions for *Cherokee Nation v. Georgia* and *Worcester v. Georgia* produced from the staged re-arguments of those cases hosted by the Tribal Law and Government Center at the University of Kansas.<sup>201</sup> How much different legal education might be if students were taught the comparative rhetorical traditions outlined above to see how parties engaged in oppositional discourse, even as they learned to use alternative rhetorics to challenge barriers to social justice? How much different legal education might be if they were “woke” to it?

But we all remain asleep, somnolent yet walking through the

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199. Cole, *supra* note 102.

200. Felicia R. Walker, *An Afrocentric Rhetorical Analysis of Johnnie Cochran’s Closing Argument in the O.J. Simpson Trial*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC: CLASSICAL ORIGINS TO CONTEMPORARY INNOVATIONS 245 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003).

201. Lyons, *supra* note 103, at 463.

imperialist legal academy<sup>202</sup> as if colonization were a natural occurrence. On that fall school day, not so long ago when my student boldly asserted the absence of African American history and culture, I had a choice to continue sleepwalking or to shake us all awake. I chose the latter, thus amassing our resources in a fight as old as time to decolonize our minds, our understanding of oppositional rhetorical practices, and to fashion those practices into the tools for our liberation. On that class day, I stopped class, went back to my office, and brought back as many books as I could carry on African American history and culture. My class and I spent the next hour resisting a canonicity that would exclude us. Their tools whet with knowledge, they thirsted for another fight. We reconvened in the decolonized space of my home where I held a teach-in. During that time, we continued learning about African Diasporic history and culture to a soundtrack of Black liberation as we broke bread and stereotypes together.

This decolonized pedagogy is the least of what is required for a “woke” legal academy. At present, law schools lack a comprehensive curriculum that engages rhetoric outside of its limited use in explaining legal reasoning, analysis, and communication for the purposes of creating genres commonly used in law practice and successful performance on law school exams. It would be untenable to implement the classroom exercises I suggest above, and many more like it, solely within the confines of the modern legal writing course. It is more untenable still to place the onus of this task on law professors of legal writing who, still writing at the master’s table, occupy chairs with missing legs, no legs, or who are forced to stand in inequity and job instability.<sup>203</sup> Teaching

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202. For a discussion of the law school as a site of imperialism see Roderick A. MacDonald & Thomas B. McMorrow, *Decolonizing Law School*, 51 ALTA. L. REV. 717 (2014); Larry Chartrand, *Indigenizing the Legal Academy from a Decolonizing Perspective* (Ottawa Faculty of Law Working Paper No. 2015-22), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2631163](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2631163) [<https://perma.cc/C9U3-HHZD>].

203. See Melissa H. Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. LEGAL EDUC. 538 (2017); Linda L. Berger, *Rhetoric and Reality in the ABA Standards*, 66 J. LEGAL EDUC. 553 (2017); Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEGAL EDUC. 558 (2017); Kristen Konrad Tiscione, “Best Practices”: *A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), a Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy*, 66 J. LEGAL EDUC. 566 (2017); 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); Ann C. McGinley, *Employment Law Considerations for Law Schools Hiring Legal Writing Professors*, 66 J. LEGAL EDUC. 585 (2017); Richard K. Neumann, Jr., *Academic Freedom, Job Security, and Costs*, 66 J. LEGAL EDUC. 595 (2017); Peter

discursive writing practices and acknowledging oppositional ones is a first strike against the colonial presence of the legal academy. Developing critical pedagogies for lawyering as an exercise in oppositional discourse building would effectively turn the tide of the culture wars. In the meantime, I plan to draft resistance strategies at another table, in a different room, just out of the master's hearing. Will you join me?

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A. Joy, *ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education*, 66 J. LEGAL EDUC. 606 (2017).