

The Rhetoric of Race, Redemption, and Will Contests: Inheritance as Reparations in John Grisham’s *Sycamore Row*

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* Professor of Law, Mercer University Walter F. George School of Law. The author thanks God for his enduring grace and mercy, and her husband Mark Anthony Chubb for his unflagging support. This piece is dedicated to my ancestors for their survival and protection of African diasporic people and culture. For all of us who have come this way and continue your journey to preserve the core of our humanity, we owe you. I honor you with the words written here and in my fight for social justice.

I. INTRODUCTION

When Henry “Seth” Hubbard renounced his formally drawn wills and created a new holographic will on the day of his suicide, one that excluded his children, grandchildren, and ex-wives, and gave the bulk of his estate to his housekeeper and caretaker, a will contest was imminent. That Seth Hubbard was a white man living in rural Mississippi, and his housekeeper, a Black woman, made the will contest illustrative of our ongoing national discomfort with slavery, the Confederacy, and the respective obligations of and responsibilities to the descendants of both. This is John Grisham’s *Sycamore Row*, a novel in which the reader journeys to discover the mysteries behind Seth Hubbard’s will, his intentions, his burden as a witness to a lynching over his ancestor’s land, and the fate of the descendants of the formerly enslaved who worked and settled that land known as Sycamore Row only to see its destruction when they asserted their right to it. Seth’s act of bequeathing the bulk of his estate to a stranger made family through blood spilled over stolen land and stolen, broken Black bodies is an important start to an important discussion: Who bears responsibility to the survivors of domestic terrorism, white supremacy, and for the benefits that white privilege bestows? The will contest encapsulates the rhetoric of race and redemption; in *Sycamore Row*, Hubbard’s estate acts as reparations.

Key opponents of reparations for the descendants of African slaves in the Americas argue that they were not responsible for the ills of their ancestors just because they bear the same color skin, and therefore the law should not hold them accountable.¹ They further argue that they bear no legal responsibility for slavery and its aftermath because (1) slavery was legal until the passage of the Thirteenth Amendment to the U.S. Constitution; and (2) the same Amendment divested their ancestors of slave labor, which worked a hardship on their ancestors and the U.S. economy as a whole.² Proponents of reparations argue that the law should hold accountable those who are the descendants of slave holders and who otherwise benefitted from the slave economy by virtue of their white skin through monetary payment (1) to the descendants of African slaves directly; and (2) to

1. See generally ALFRED L. BROPHY, REPARATIONS: PRO AND CON 75–96 (2006).

2. *Id.*

those descendants through funding programs that address structural discrimination in government and private entities.³

Grisham's public will contest in *Sycamore Row* is the societal discussion about reparations in small scale. Each main character represents an argument in the debate and its nuances. **Jake Brigrance**, the protagonist in Grisham's first novel *A Time to Kill*, appears again as Seth Hubbard's attorney. His character symbolizes the very worst of what can happen when non-marginalized people help the marginalized. We find him three years later in a rented house, passing the empty lot to his house firebombed by the Klan in *A Time to Kill* on his way to work, and struggling to make ends meet as an attorney.⁴ It seems that Jake is beloved by Clanton, Mississippi's Black population, but hated by Whites who would rather have seen Carl Lee Hailey (Jake's client in *A Time to Kill*) sentenced to death for killing the White men who raped his adolescent daughter.⁵

Seth Hubbard asks Jake to make the sacrifice again, as the attorney who will represent his estate in the will contest.⁶ Hubbard's voice as gleaned through his holographic will is the rhetoric of white accountability for white supremacy and the ongoing harm of white privilege. He excludes his children, grandchildren, and ex-wives in his holographic will, leaving 90% of his estate to a Black woman, Letitia "Lettie" Tabor Lang, who has served as his housekeeper and caretaker for the past three years.⁷ Hubbard's children are incensed because his will constitutes their material loss. Their anger, though, is not solely over their father acting upon their neglect of him in old age and infirmity. Rather, it is because they see Lettie in particular, and Black people in general, as lesser than, meant to serve, not deserving of their (White) wealth at all, even to redress the lynching that their ancestors perpetrated on the Rinds family of which Lettie is a descendant.⁸ The children's characters are stand-ins for White Americans who oppose reparations, angered over the suggestion that white privilege is an ongoing harm that must be checked on a daily basis and redressed through concrete action exchanged for benign inaction.

3. *Id.* at 55–74.

4. JOHN GRISHAM, *SYCAMORE ROW* 9–13 (2013).

5. *Id.* at 11–12.

6. *Id.* at 18–24.

7. *Id.* at 20–23, 32.

8. *Id.* at 427–33.

Ancil Hubbard, Seth Hubbard's brother, is the scourge of white privilege, the beneficiaries of which witness the harms that Black people suffer but who run from those harms, fail to confront them, and through their inaction, prevent redress of witnessed wrongs. He is also emblematic of redemption, which he finds by finally confronting the past and reconciling with it. Lastly, **Lettie Lang** represents the descendants of African slaves and the Black survivors of Jim Crow in a racialized gendered form—a Black woman. She is a caretaker and servant, ever accommodating and respectful to White people, deferential and equivocal about receiving a portion of Hubbard's estate over his family. She is constantly devalued as both a Black person and as a woman, reduced to her value as a laborer and demonized as a sexual trickster. Lettie is the complexity of Black America writ large, a community occupying a conflicted space in America's promise of "We the People," aware that the danger of white supremacy is ever present and therefore willing to give up its inheritance as bastard children to a neglectful father for safety and peace.

This Article explores the rhetoric of race, redemption, and reparations in *Sycamore Row* and as it plays out in American jurisprudence in three parts. Part II explores how the will contest in *Sycamore Row* illustrates arguments for and against reparations. Specifically, it evaluates how Aristotle's Persuasive Appeals *logos* (using evidence and epistemology to persuade), *pathos* (using emotions to persuade), and *ethos* (using character to persuade) become racialized in the *nomos* (the normative universe where they function), both in Seth Hubbard's will and the will contest that follows, and as used as appeals in reparations litigation. Part III uses interdisciplinary narrative theory to interrogate the language of Seth Hubbard's will as his cultural narrative of race, racism, and redemption. It also considers how Seth's story is a story of American racism that ends differently from our current American story. Seth's story is a doorway to hope and a different way of viewing obligations and responsibilities to redress racial wrongs. In the final section, Part IV, the Article turns to the concept and practice of reconciliation, specifically how Seth Hubbard's actions through his will, the backlash from his family, and the reverberations throughout Clanton, Mississippi provide a glimpse of racial reconciliation in practice. Hubbard's will and the context for its creation demonstrate that racial reconciliation begins with

acknowledgment of harm done, presents a plan to address the harm, and contains an action or actions to implement the plan. While Hubbard's is one will, his will is a roadmap for the nation, as comprised of individual actors, to acknowledge and address racial harms and for racial reconciliation. The Article concludes with a call to disrupt the dangerous racial rhetoric that renders our country brittle and prone to shattering, threatening America with irreparable brokenness.

II. REPARATIONS AS RACIAL RHETORIC: RACIALIZING NOMOS, LOGOS, PATHOS, AND ETHOS

A. *The Racialized Universe of Reparations Discourse*

The discussion of whether reparations are owed to people of African descent in the United States is the expression of our country's most honest discussion about race. Reparations discourse is a racial conversation that highlights America's collective contested cultural memory in Black and White. At stake are our collective and cultural memories, creating a battle between shared histories and how we desire to remember those histories as a nation.

The Hubbard family in *Sycamore Row* is nation at its smallest component: nuclear family. They are unaware of the history that drives their father to his actions but share a collective, familial memory about what is owed to them and what others outside of their family, particularly those of African descent, deserve. Upon their first encounter with Lettie Lang in the aftermath of their father's death, they treat her as "the help."⁹ They are polite enough to her face but speculate about her character, worth, and good name behind her back.¹⁰ The Hubbard siblings' perception of her as occupying a station beneath them occurs even before the reading of their father's will.¹¹ Lettie is not family by blood or culture. As a woman of African descent, she has no claim on the Hubbard birthright or to the benefits that their racial birthright of whiteness bestows.¹²

9. *Id.* at 25–36, 75–76.

10. *Id.* at 33, 46–47.

11. *Id.* at 25–36.

12. *Id.* at 110. Grisham writes:

In large scale, this phenomenon is America's *nomos* or normative universe.¹³ *Nomos* generally refers to the context in which the law functions.¹⁴ America's *nomos* is a racialized one, a dynamic universe in which complex, nuanced racial interactions and negotiations are normalized, if not always explicit or acknowledged.¹⁵ This *nomos* provides the context for arguments for and against reparations; the context is the stories Americans tell and remember about race.¹⁶ To inhabit it means its actors understand how to "do race legally," or how to operate in the realm of legal discourse, where the discipline of law and practice of law have made various interpretive and analytic commitments for how to handle racial disputes.¹⁷ Within *nomos* function the Aristotelian persuasive (rhetorical) appeals, *logos*, *pathos*, and *ethos*.¹⁸ Disputes implicating race and racial harm, as situated in the legal and social debates about reparations, employ and deploy language that reflects the analytic and interpretive commitments of the racialized *nomos*.¹⁹

Critical rhetoricians have examined the deployment of language as simultaneously a representation of phenomena and a creator of the phenomena it seeks to describe.²⁰ As this concept relates to *nomos* in the context of reparations, communities of African descent and communities of European descent in the United States have used the

[the Hubbard siblings] and their families glared with hatred across the [courtroom] aisle at the group of blacks, who eagerly and somewhat smugly returned the looks. Their girl Lettie had been chosen to receive [Seth's money] and they were there to fight for her. But the money belonged to the Hubbards. Seth had been out of his mind.

13. Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

14. *Id.*

15. *Id.* at 6.

16. *Id.* at 4–5. Cover argues that legal institutions do not exist outside the narratives that give them meaning.

17. *Id.* at 7.

18. See generally SHARON CROWLEY & DEBRA HAWHEE, *ANCIENT RHETORICS FOR CONTEMPORARY STUDENTS* 12 (5th ed. 2012).

19. Patrick B.N. Solomon, *The Fallacious Rhetorica of Racism*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 3 (2013).

20. DEXTER B. GORDON, *BLACK IDENTITY: RHETORIC, IDEOLOGY, AND NINETEENTH CENTURY BLACK NATIONALISM* 10–11 (2003).

language of race to describe the phenomena of racism (ongoing and systemic racial harm) in the United States and formulate arguments for and against reparations based on those descriptions. These arguments reveal the knowledge bases for these communities, their epistemologies—how they know what they know and use it in service to defend their positions.²¹ Thus, the rhetoric of reparations also serves as an exercise in knowledge-building, which is not universal but subjective and essentialist.²² The rhetoric of reparations uses a group’s expressed collective and cultural memories (the epistemologies and ontologies of African and European descendants in the United States) insofar as it seeks to bring about a specific outcome.²³ Ultimately, understanding the rhetoric of reparations necessitates comprehension of collective and cultural memories in “Black” and “White,” particularly as they relate to slavery and its actual and perceived harms to people of African descent, to illustrate how each collides to form the *nomos* in which *logos*, *pathos*, and *ethos* operate in the reparations debate.

Collective memory is “the active past that forms our identities.”²⁴ Often used interchangeably with collective memory, social memory is that shared by a group, which also serves to distinguish outsiders from members.²⁵ In comparison, cultural memory has been defined as “memory that is shared outside of the avenues of formal historical discourse yet is entangled with cultural products and imbued with cultural meaning.”²⁶ Culture can be understood as the “beliefs, values, and thought patterns” of a group.²⁷

21. *Id.* at 18–19.

22. *Id.*

23. See Lolita Buckner Innis, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN’S J. LEGAL COMMENT. 649, 658 (2010) (arguing that rhetoric is epistemic and builds knowledge according to circumstance).

24. Jeffrey K. Olick & Joyce Robbins, *Social Memory Studies: From “Collective Memory” to the Historical Sociology of Practices*, 24 ANN. REV. SOC. 105, 111 (1998).

25. *Id.*

26. *Id.* (citing JAMES FENTRISS & CHRIS WICKHAM, *SOCIAL MEMORY* (1992)).

27. CONSTANT FOREIGNER, EDWARD T. HALL’S CULTURAL ICEBERG MODEL (2010) (citing EDWARD T. HALL, *BEYOND CULTURE* (1976)), https://www.spps.org/cms/lib/MN01910242/Centricity/Domain/125/iceberg_model_3.pdf.

Ethnologist Edward T. Hall's work in *Beyond Culture* has led subsequent scholars to visualize culture as an iceberg; a group's behaviors and beliefs are above the surface (the "tip of the iceberg") and its values and thought processes lurk unseen, below the surface.²⁸ The following aspects of culture are those visible and easily accessible: "food, dress, music, visual arts, drama, crafts, dance, literature, language, celebrations, [and] games."²⁹ Those barely visible or invisible are:

[notions] of courtesy; contextual conversational patterns; concept of time; personal space; rules of conduct; facial expressions; nonverbal communication; body language; touching, eye contact; patterns of handling emotions; notions of modesty; concept of beauty; courtship practices; relationships to animals; notions of leadership; tempo of work; concepts of food; ideals of childrearing; theory of disease; social interaction rate; nature of friendships; tone of voice; attitudes toward elders; concept of cleanliness; notions of adolescence; patterns of group decision-making; definition of insanity; preference for competition or cooperation; tolerance of physical pain; concept of "self"; concept of past and future; definition of obscenity; attitudes toward dependents; problem-solving roles in relation to age; class, occupation, kinship, [etc.].³⁰

At its core, culture has three general characteristics: "it is not innate, but learned; the various facets of culture are interrelated—you touch a culture in one place and everything else is affected; it is shared and in effect defines the boundaries of different groups."³¹ Scholarly

28. *Id.*

29. IND. DEP'T OF EDUC., OFFICE OF ENGLISH LANGUAGE LEARNING & MIGRANT EDUC., *The Iceberg Concept of Culture*, <http://www.echospace.org/assets/1843.html> (last visited May 15, 2018).

30. *Id.* For examples of African-centered cultural paradigms, see MOLEFI KETE ASANTE, *AFROCENTRICITY: THE THEORY OF SOCIAL CHANGE* (2003); LINDA J. MYERS, *UNDERSTANDING AND AFROCENTRIC WORLDVIEW* (1988) [hereinafter ASANTE, *AFROCENTRICITY*].

31. EDWARD T. HALL, *BEYOND CULTURE* 13–14 (1976).

inquiries about collective and cultural memory are part of a constellation of memory studies under the heading “social memory studies,” and described as “the varieties of forms through which we are shaped by the past, conscious and unconscious, public and private, material and communicative, consensual, and challenged.”³² Considering each, specifically how a group remembers itself and its cultural practices, as a part of social memory studies necessitates treating collective memory and cultural memory as products of their context. In this case, the context is the rhetoric of race and racial harm as they relate to the ways we discuss and remember slavery in Black and White communities.³³

A longstanding critique of rhetoric scholarship assails how it privileges Western epistemologies and ideologies, disguised as neutral, to the universal exclusion of marginalized ones.³⁴ Critical rhetoricians have dealt with this absence in a variety of ways—most relevant to this study are the rhetorical theories of racial alienation,³⁵ racial recovery,³⁶ and racial coherence,³⁷ and their role in creating collective and cultural memories about slavery and its attendant effects. Arguably, the history of Africans in the Americas is a history of alienation. The capture of Africans from various countries on the continent of Africa and their removal to the coasts as shipments for the

32. Olick & Robbins, *supra* note 24, at 112.

33. *Id.*

34. GORDON, *supra* note 20, at 11–13; *see also* HALL, *supra* note 31, at 7, (“Western man uses only a fraction of his mental capabilities, there are many different and legitimate ways of thinking; we in the West value one of these ways above all others—the one we call ‘logic,’ a linear system that has long been with us since Socrates. Western man sees his system of logic as synonymous with truth. For his it is the only road to reality.”). For more on Afrocentric views of African diasporic culture, *see* AFRICANISMS IN AMERICAN CULTURE (Joseph E. Holloway ed., 2d ed. 2005); ASANTE, AFROCENTRICITY, *supra* note 30; MOLEFI K. ASANTE, THE AFROCENTRIC IDEA (1998). *But see* WILSON JEREMIAH MOSES, AFROTOPIA: THE ROOTS OF AFRICAN AMERICAN POPULAR HISTORY (1998) (discussing an African Diasporic intellectual history of Afrocentric ideology, which seeks to separate history from cultural consciousness).

35. GORDON, *supra* note 20, at 21–23.

36. *See generally* AARON DAVID GRESSON III, RECOVERY OF RACE IN AMERICA (1995).

37. *See generally* MARK LAWRENCE MCPHAIL, THE RHETORIC OF RACISM (1993); MARK LAWRENCE MCPHAIL, THE RHETORIC OF RACISM REVISITED: REPARATIONS OR SEPARATION (2001).

transatlantic slave trade marked an initial rupture of Africans from tribal and familial identities. The Middle Passage, during which they were packed into ships as objects of trade, marked yet another rupture, one from homeland and humanity. Still another rupture resulted in their placement on the auction block upon arrival in the Americas and sale as human chattel into the institution of slavery. The arrival of Africans to the Jamestown colony in 1619 was the beginning of the longest rupture, the alienation of Africans from their unique country, tribal, familial, and independent identities to a collectivist identity that lumped them all together under the term “Black.”³⁸ In his work on the rhetoric of Black identity, Dexter Gordon posits that:

[The phenomenon of Black people simultaneously occupying both American society and a separate Black society] is due in part to the search by blacks, in response to the experience of alienation, to articulate a way of life on their own. Black alienation is thus partly the effect of the nationalist ideology of a predominantly white society.

This white ideology defines the racial superiority that has been the hallmark of American practices since the initial encounter with blacks and whites.³⁹

“Black” as a descriptor of collective identity further alienates people of African descent as a group from concepts of Western individualism, the foundation of U.S Constitutional/liberal democracy.⁴⁰ Gordon continues,

38. For more on the African-American experience, see JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (9th ed. 2010); EDMUND S. MORGAN, *AMERICAN SLAVERY AMERICA FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* (1975).

39. GORDON, *supra* note 20, at 23 (citation omitted).

40. See, e.g., Benjamin R. Barber, *The Compromised Republic: Public Purposelessness in America*, in *THE MORAL FOUNDATIONS OF THE AMERICAN REPUBLIC* 60 (Robert H. Horwitz ed., 3d ed. 1986) (“Although conditions have changed, Americans still respond to the public world in terms of the attitudes they take to be suitable to those (now vanished) conditions of the Founding. Though they acknowledge the poverty of privatism, they think privatistically . . . though they have lost faith in the myths of self-sufficiency and the rhetoric of independence, they distrust cooperation and regard interdependence as a weakness. Attitudes lag behind changes in conditions, and institutions lag still further behind attitudes. . . . The new

[a]lienation, then, is a phenomenon that includes more than just oppressive material conditions or the loss of social cohesion as a material reality. In this regard, white language functions to marginalize blacks on the basis of race, and alienation manifests itself when blacks comply by acquiescing to the descriptors imposed upon them within such language.⁴¹

Alienation brings about loss, and with loss comes the need for recovery. Rhetorician Aaron David Gresson's theory of racial recovery offers a framework to understand how groups that have experienced loss use language to express the perceived loss and their subsequent recovery from it.⁴² In Gresson's view, "recovery rhetorics" [such as] "betrayal and consolation, 'failure' and 'self-healing'" are characterized by:

(1) a motive to recover something perceived as lost through violation, failure, or betrayal; (2) the use of narrative to describe a discovery with inferred relevance for both one's own and the Other's ability to deal with duplicity and uncertainty; and (3) an implicit invitation to identify with and accept the liberative powers of that discovery.⁴³

The narratives employed in Gresson's framework use "metaphor and myth to 'twist reality, a reality of self and Other.'"⁴⁴

Racial recovery theory, as it relates to Black community views of slavery, involves the tension between cultural loss and the recovery of Black social memories. It privileges ways of knowing about the past grounded in African cultural values and experiences (Afrocentric) in contrast to the centering of European ones (Eurocentric) as a means

pressures of ecology, transnationalism, and resource scarcity in combination with the apparent bankruptcy of privatism, materialism, and economic individualism—the pathologies and the ambivalent promises of our modernity—create conditions more inviting to the generation of public purposes and public spirit than any America has ever known. Abundance is the natural soil of competitive individualism; scarcity, the soil of mutualism.”)

41. GORDON, *supra* note 20, at 23.

42. *Id.* at 20.

43. *Id.* (citing GRESSON, *supra* note 36, at 5).

44. *Id.* at 21 (citing GRESSON, *supra* note 36, at 24–25).

to reconcile the two.⁴⁵ At its heart, “[a]frocentricity is a rhetorical recovery project for [people of African descent] and, by extension, for all.”⁴⁶ Accordingly, much of how Black artists, writers, scholars, and activists discuss/represent the post-slavery realities of Black people in the United States acts to reveal cultural losses to highlight social, political and legal harms, even in its respect for Black culture. In sum, Black social memory as presented by those fluent in Black culture is by nature oppositional because it exists in the context of American culture, which normalizes White supremacy as White social memory.⁴⁷ For example, note the work of visual artist Patrick Campbell, who, in his painting *The New Age of Slavery*, depicts the corpses of lynching victims in shadow placed in the foreground of the American flag’s red stripes.⁴⁸

Consider also poet, composer, novelist, diplomat, and activist James Weldon Johnson’s poem “Lift Every Voice and Sing.” Johnson wrote the poem on the occasion of a birthday celebration and remembrance for Abraham Lincoln in 1900.⁴⁹ At the time, Johnson was the principal at Stanton Institute in Jacksonville, Florida, named for Lincoln’s Secretary of War Edwin M. Stanton.⁵⁰ Founded three years after the end of the Civil War in 1868, the Institute was the first and sole opportunity for people of African descent to obtain a public secondary education in Florida.⁵¹ Under Johnson’s leadership the Institute added 9–12th grades and officially housed elementary, junior, and high schools.⁵² While at the Institute, a place of knowledge

45. *Id.* at 12.

46. *Id.*

47. *Id.* at 175–76.

48. dwilson1911, *The Inspiring Story Behind the “New Age of Slavery” Painting Capturing the Movement*, THEGRIO (Dec. 6, 2014), <https://thegrio.com/2014/12/06/new-age-of-slavery-painting-patrick-campbell/>.

49. NAACP *History: Lift Ev’ry Voice and Sing*, NAACP, <http://www.naacp.org/oldest-and-boldest/naacp-history-lift-evry-voice-and-sing/> (last visited May 15, 2018) [hereinafter *NAACP History*].

50. Kathryn, *The History of Stanton High School*, FLA. MEMORY: THE FLA. MEMORY BLOG (Feb. 10, 2017), <http://www.floridamemory.com/blog/2017/02/10/the-history-of-stanton-high-school/>.

51. *Id.*

52. *Stanton’s History*, STANTON COLL. PREPARATORY SCH., <https://dcps.duvalschools.org/Page/10562> (last visited May 15, 2018).

production for Black children and by Black educators,⁵³ Johnson, along with his brother, musician and composer J. Rosamond Johnson, set his poem to music as “Lift Every Voice and Sing.”⁵⁴ The National Association for the Advancement of Colored People (“NAACP”) adopted the song as its official song in 1915, declaring it the Negro National Anthem.⁵⁵ A year later, Johnson would join the NAACP as a field secretary and rise to the position of general secretary in 1920.⁵⁶ It is no coincidence that Johnson had attained leadership positions in the NAACP at the time when the organization sought to bring attention, through both research and activism, to the widespread practice of lynching.⁵⁷ In fact, Johnson was one of the organizers of the NAACP’s “Silent March” in 1917 held to protest lynching.⁵⁸ Early civil rights leaders routinely used “Lift Every Voice and Sing” as a means to unify and inspire Black communities during the NAACP’s anti-lynching campaign and in the fight for civil rights.⁵⁹ It reads:

Lift every voice and sing
Till earth and heaven ring,
Ring with the harmonies of Liberty;
Let our rejoicing rise
High as the listening skies,
Let it resound loud as the rolling sea.

53. Kathryn, *supra* note 50. White teachers were employed at the school until the county leased school property for use as a public school. At that time the school employed Black teachers primarily, if not exclusively, and the school remained a segregated school for Black children. *Id.*

54. *NAACP History*, *supra* note 49.

55. Femi Lewis, *James Weldon Johnson: Distinguished Writer and Civil Rights Activist*, THOUGHTCO., <https://www.thoughtco.com/james-weldon-johnson-distinguished-writer-45311> (last updated Mar. 8, 2018).

56. Jamie S. Hansen, *James Weldon Johnson, 1871–1938: Biography*, UNIV. OF S.C. (Feb.–Mar. 1999), <http://library.sc.edu/spcoll/amlit/johnson/johnson.html>.

57. *See, e.g.*, NAACP, THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889–1918 (1919), <https://archive.org/details/thirtyyearsoflyn00nati>.

58. Alexis Newman, *NAACP Silent Protest Parade, New York City (1917)*, BLACKPAST.ORG, <http://www.blackpast.org/aah/naacp-silent-protest-parade-new-york-city-1917> (last visited May 15, 2018).

59. *See, e.g.*, EBEN MILLER, BORN ALONG THE COLOR LINE: THE 1933 AMENIA CONFERENCE AND THE RISE OF A NATIONAL CIVIL RIGHTS MOVEMENT 205 (2012) (describing how a session for youth delegates at the NAACP annual convention in Detroit in 1937 ended with participants singing the hymn).

Sing a song full of the faith that the dark past has taught
us,
Sing a song full of the hope that the present has bought
us.
Facing the rising sun of our new day begun,
Let us march on till victory is won.

Stony the road we trod,
Bitter the chastening rod,
Felt in the day when hope unborn had died;
Yet with a steady beat,
Have not our weary feet
Come to the place for which our fathers sighed?
We have come over a way that with tears have been
watered,
We have come, treading the path through the blood of
the slaughtered,
Out from the gloomy past,
Till now we stand at last
When the white gleam of our bright star is cast.

God of our weary years,
God of our silent tears,
Thou who has brought us thus far on the way;
Thou who hast by Thy might
Led us into the light,
Keep us forever in the path, we pray.
Lest our feet stray from the places, our God, where we
met Thee,
Lest our hearts drunk with the wine of the world, we
forget Thee;
Shadowed beneath Thy hand,
May we forever stand.
True to our God,
True to our native land.⁶⁰

60. James Weldon Johnson, *Lift Every Voice and Sing*, POETRY FOUND. (citing JAMES WELDON JOHNSON, COMPLETE POEMS (Sondra Kathryn Wilson ed., 2000)),

Arguably, the first stanza of the song is a celebration of symbolic Lincoln, the defeat of the Confederacy, and the end of chattel slavery. The second stanza is an expression of alienation, chronicling slavery and the promise of freedom. The last stanza is a call to remember the past no matter what the future may bring. Reflecting on this work in 1926, Johnson stated that “the song not only epitomizes the history of the race, and its present condition, but voices their hope for the future.”⁶¹ In Gresson’s framework, “Lift Every Voice and Sing” is emblematic of the Black recovery rhetoric of perseverance, endurance, and hope.⁶² It tells a story of the African diasporic experience in juxtaposition to stories of that experience that seek to erase or distort it. Ultimately, the Black recovery rhetoric of perseverance, endurance, and hope is an invitation to dwell in the midst of an American social memory that centers the experiences of its African descendants. The new narratives it creates call for an acknowledgement of generational complicity in Black alienation (Whites) and generational strength despite the losses that resulted (Blacks).⁶³

<https://www.poetryfoundation.org/poems/46549/lift-every-voice-and-sing> (last visited May 15, 2018).

61. JESSIE CARNEY SMITH, *BLACK FIRSTS: 2,000 YEARS OF EXTRAORDINARY ACHIEVEMENT* (1994). See also IMANI PERRY, *MAY WE FOREVER STAND: A HISTORY OF THE BLACK NATIONAL ANTHEM* (2018). *The New York Times* quoted Perry as describing the hymn as “[a tale] of endurance, lament, and supplication.” Brent Staples, *Colin Kaepernick and the Legacy of the Negro National Anthem*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/opinion/kaepernick-negro-national-anthem.html>.

62. See generally GRESSON, *supra* note 36.

63. Gresson’s rhetorical study begins post-Civil Rights and examines African-American rhetorical strategies in modern social justice efforts. This is the site of Gresson’s “racial recovery discourse.” His work is a response to America’s cultural destabilization as a result of multiculturalism. In his *The Recovery of Race in America*, Gresson frames his study of this destabilization as “a rhetorical study of loss and recovery.” GRESSON, *supra* note 36, at ix. “[Gresson] contends that there are ‘two particular losses which are central to American life: white Americans’ loss of moral hegemony and black Americans’ loss of the myth of racial homogeneity.’” DEXTER B. GORDON, *BLACK IDENTITY* 20 (2003) (citing GRESSON, *supra* note 36, at ix). My analysis begins at a different, earlier point than Gresson’s, in which I use his idea of racial recovery rhetorics to explain the rhetorical phenomena of Black and White cultural destabilization as a result of slavery, the Civil War, Reconstruction, and Jim Crow.

As a counterpoint to slavery discourse as created in Black communities, White/Eurocentric slavery discourse creates and establishes White cultural hegemony. In his study, *Communicating Racism: Ethnic Prejudice in Thought and Talk*, Teun van Dijk examines how White cultural hegemony occurs rhetorically among Whites, and its role in reproducing racial discrimination and prejudice.⁶⁴ The major premise on which van Dijk's study rests is that how people of European descent talk about non-white ethnic minorities to each other is directly related to how Whites reproduce racism (racist attitudes and actions) and communicate it societally.⁶⁵ In the author's words:

Talk is embedded in more complex, higher-level systems of social information processing within groups, which also involve institutional discourses such as that of the media, politics, or education. Social members routinely invoke such other discourses, or the inferences based on them, to develop and sustain their own attitudes, and to warrant argumentatively such attitudes in talk, for instance, as public, if not as shared, social opinions.⁶⁶

van Dijk also argues that "talk [among Whites] about [non-White] ethnic groups involves complex strategies and moves aiming at positive self-presentation within the overall goal of negative other-description."⁶⁷

White/Eurocentric rhetoric concerning racial recovery views the legal end to slavery in 1865 as the rupture point for White culture insofar as it challenges perceptions of White hegemony and supremacy. Consider the introduction of Senate Bill S. 4119, titled "A Bill Authorizing the erection in the city of Washington of a monument in memory of the faithful colored mammies of the South."⁶⁸ Nine

64. TEUN A. VAN DIJK, *COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK* 7, 11 (1987).

65. *Id.* at 13, 23.

66. *Id.* at 12.

67. *Id.* at 22.

68. Lopez D. Matthews, *Celebrating the Faithful Colored Mammies of the South*, THE NAT'L ARCHIVES, REDISCOVERING BLACK HISTORY: RECORDS OF THE AFRICAN AM. EXPERIENCE (Apr. 4, 2013), <https://rediscovering-black->

months after the dedication of the Lincoln Memorial on the National Mall on March 30, 1922,⁶⁹ Mississippi Senator John Sharp Williams of the 67th Congress—a Congress comprised of an all-White and all-male senate—introduced the Mammy Monument Bill on December 2, 1922, amidst promises by the United Daughters of the Confederacy to fund the endeavor.⁷⁰ Williams’ introduction of the bill came just after the Senate of the 67th Congress defeated the Dyer Anti-Lynching Bill (“Dyer Bill”) in November 1922.⁷¹ This series of events highlights that discourse among Whites about slavery enshrined memories of an idealistic past, which stood in stark contrast to Black discussions about the ongoing harms of slavery and the current peril of lynching. As poet and Union soldier John Alexander Joyce expressed in the poem “Black Mammy”:

Let us raise a shining statue
To Black Mammy and Uncle Mose
Who taught us gay white children
How to put on our fine clothes,
And make mud pies and rabbit traps,
And how to sing and dance
When youth held every pleasure

history.blogs.archives.gov/2013/04/04/celebrating-the-faithful-mammies-of-the-south/.

69. See Matt Furman, *90th Anniversary of the Dedication of the Lincoln Memorial*, NAT’L PARK SERV. (May 30, 2012) <https://www.nps.gov/nama/blogs/90th-anniversary-of-the-dedication-of-the-lincoln-memorial.htm>; *The Lincoln Memorial*, NAT’L PARK SERV., <https://www.nps.gov/places/lincoln-memorial.htm> (last visited May 15, 2018).

70. MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 73 (2011); KATHLEEN J. FITZGERALD, *RECOGNIZING RACE AND ETHNICITY: POWER, PRIVILEGE, AND INEQUALITY* 376 (1st ed. 2014). Note that, after 1875, no African-American senators were elected to Congress until Edward Brooke in 1967. See *African American Senators*, UNITED STATES SENATE https://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm (last visited May 15, 2018).

71. ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950*, at 69 (1980); William Burnett Harvey, Comment, *Constitutional Law—Anti-Lynching Legislation*, 47 MICH. L. REV. 369, 369–70 n.2 (1949); *Anti-Lynching Legislation Renewed*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Anti-Lynching-Legislation/> (last visited Mar. 12, 2018).

And life was in a trance!

My heart beats back to childhood
And that Blue Grass sunny land
When beaming old Black Mammy
Held me by my trembling hand
And led me through the meadows
In search of birds and flowers
Or held me in her loving arms
Through sleepy, sunny hours!

And through the fearful Civil War
That scarred over happy land
Black Mammy and dear Uncle Mose
Stood by us hand in hand
Not knowing whether Blue or Gray
Were really right or wrong
But doing every duty
With the sweetness of a song!

Then rear on high a monument
To truth and trust and love
And on it place Black Mammy
With her spirit far above
And by her side old Mose must stand
In laughing ebony hue
To glorify the picture
Of a pair so fond and true!⁷²

More recently, White racial rhetoric has framed the contentious debate in the United States about preserving or removing Confederate

72. Michelle Harper, *Remembering the "Mammy Memorial Movement": Race and Controversy in the Press*, THE READEX BLOG (Sept. 11, 2012, 2:01 PM), <https://www.readex.com/blog/remembering-%E2%80%9Cmammy-memorial-movement%E2%80%9D-race-and-controversy-press> (containing a digitized photocopy of *Black Mammy* from the June 4, 1910, edition of the *Washington (D.C.) Bee*). For information about Joyce, see *Mapping the City: DC Places, Part II*, BELTWAY POETRY QUARTERLY (2010), <http://washingtonart.com/beltway/joyce.html>.

monuments as an act of preserving Confederate heritage, rather than an exercise of hatred against Blacks. The webpages for the United Daughters of the Confederacy (1894)⁷³ and the Sons of Confederate Veterans (1896)⁷⁴ illuminate this debate. The United Daughters of the Confederacy (“UDC”) states as its objectives:

1. To honor the memory of those who served and those who fell in the service of the Confederate States[;]
2. To protect, preserve and mark the places made historic by Confederate valor[;]
3. To collect and preserve the material for a truthful history of the War Between the States[;]
4. To record the part taken by Southern women in patient endurance of hardship and patriotic devotion during the struggle and in untiring efforts after the War during the reconstruction of the South[;]
5. To fulfill the sacred duty of benevolence toward the survivors and toward those dependent on them[;]
6. To assist descendants of worthy Confederates in securing proper education [; and]
7. To cherish the ties of friendship among the members of the Organization.⁷⁵

Similarly, the Sons of Confederate Veterans (“SCV”) has as its charge this admonition by one of its early leaders:

To you, Sons of Confederate Veterans, we will commit the vindication of the cause for which we fought. To your strength will be given the defense of the Confederate soldier’s good name, the guardianship of his history, the emulation of his virtues, the perpetuation of those principles which he loved and which you love

73. UNITED DAUGHTERS OF THE CONFEDERACY, <https://www.hqudc.org> (last visited May 15, 2018).

74. SONS OF CONFEDERATE VETERANS, <http://www.scv.org/new/> (last visited May 15, 2018).

75. *History of the UDC*, UNITED DAUGHTERS OF THE CONFEDERACY, <https://www.hqudc.org/history-of-the-united-daughters-of-the-confederacy/> (last visited May 15, 2018).

also, and those ideals which made him glorious and which you also cherish.⁷⁶

Both organizations state that they honor America and respect the flag; the SCV goes so far as to cast the Civil War as “the Second American Revolution.”⁷⁷ In actuality, Southern secession from the Union was an act of treason in direct contravention of the United States and its flag, as evidenced by the existence of two oppositional constitutions—one ratified in 1789 for the United States of America and one ratified in 1861 for the Confederate States of America.⁷⁸ Like the discussion of the Mammy monument, however, the heritage vs. hate framework fixes memories of slavery as past, having no impact on the present.⁷⁹

76. *Charge to the Sons of Confederate Veterans*, SONS OF CONFEDERATE VETERANS, <http://www.scv.org/new/> (last visited May 15, 2018).

77. *Id.*

78. *See generally* *Texas v. White*, 74 U.S. 700 (1869) (holding secession to be of legal or constitutional effect); CYNTHIA NICOLETTI, *SECESSION ON TRIAL: THE TREASON PROSECUTION OF JEFFERSON DAVIS* (2017).

79. Several memorial organizations, known collectively as the “Grand Army of the Republic,” exist for Union soldiers, their descendants, and the descendants of women who served in the war effort. *See generally* AUXILIARY TO SONS OF UNION VETERANS OF THE CIVIL WAR, <http://www.asuvcw.org> (last visited Mar. 12, 2018); DAUGHTERS OF UNION VETERANS OF THE CIVIL WAR, <http://www.duvcw.org> (last visited Mar. 12, 2018); LADIES OF THE GRAND ARMY OF THE REPUBLIC, <http://suvcw.org/LGAR/Home.html> (last visited Mar. 12, 2018); SONS OF UNION VETERANS OF THE CIVIL WAR, <http://www.suvcw.org> (last visited Mar. 12, 2018); and WOMAN’S RELIEF CORPS, <http://womansreliefcorps.org> (last visited Mar. 12, 2018). It is interesting to note how none of these organizations mention slavery but talk about honor and remembrance of the Union soldiers and upholding the American flag. For example, the “Principles and Purpose” of the Auxiliary to the Sons of Union Veterans of the Civil War:

1. To assist the Sons of Union Veterans of the Civil War in all their principles and objects.
2. To perpetuate the memory of the services and sacrifices of the Union Veterans of the Civil War for the maintenance of the Union, particularly through patriotic and historical observances, especially the proper observance of Memorial Day, Lincoln’s Birthday and Appomattox Day.
3. To inculcate true patriotism and love of country, not only among our membership, but to all people of our land, and to spread and sustain the doctrine of equal rights, universal liberty and justice to all. To oppose to the limit of our power and influence, all movements, tendencies, and efforts that make for the destruction or impairment of our constitutional Union, and to demand of all citizens undivided

This recovery rhetoric of honor and remembrance signals the loss of an ideal, of autonomy over a preferred way of life and the ability to find freedom in self-government. It invites us to a recollection of the American past that honors its soldiers, and the tenets of liberty and freedom in the Constitution for which they ostensibly fought.

Inherent in both of these narratives is a struggle over ideology, or belief systems that inform how each narrative is constructed.⁸⁰ The rhetoric of coherence, which originates in the work of rhetorician Kevin McPhail, is a way to reconcile the two by examining how rhetoric itself builds the oppressed and the oppressor's knowledge of race.⁸¹ It opposes the notion that race is a pre-rhetorical concept that rhetoric can redress.⁸² The rhetoric of coherence provides the tools to explore how Western ideologies about rhetoric and the rhetoric of difference are reinforced in the rhetoric of race.⁸³ For McPhail, rhetoric as persuasion and argument about race exposes how language builds our knowledge of race in binary (Black and White) and essentialist (Black and White) terms, and its consequences for resolving racial disputes.⁸⁴ As such it enshrines "negative difference," those ideologies and knowledge systems that exacerbate the racial divide, which makes it difficult, if not impossible, to find points of commonality between the two.⁸⁵ The rhetoric of coherence intervenes; ultimately, it focuses the critique of oppression within the particularized racial context where it occurs.⁸⁶ McPhail introduces the following strategies to move us toward a rhetoric of coherence:

loyalty and the highest type of Americanism. 4. To oppose to the limit of our power and influence, all movements, tendencies and efforts that make for the destruction or impairment of our constitutional Union, and to demand of all citizens undivided loyalty and the highest type of Americanism.

AUXILIARY TO SONS OF UNION VETERANS OF THE CIVIL WAR, *supra*.

80. GORDON, *supra* note 20, at 21.

81. *Id.* at 16; MCPHAIL, *supra* note 37, at 4–5, 12, 15, 172.

82. GORDON, *supra* note 20, at 16; MCPHAIL, *supra* note 37, at 172, 185.

83. GORDON, *supra* note 20, at 15; MCPHAIL, *supra* note 37, at 13, 15.

84. GORDON, *supra* note 20, at 16, 17; MCPHAIL, *supra* note 37, at 12.

85. GORDON, *supra* note 20, at 16–17; MCPHAIL, *supra* note 37, at 11–13, 15, 16–17.

86. GORDON, *supra* note 20, at 18.

(1) the offering of an alternative epistemology to the foundationalism and externalism of Western thought, one that acknowledges the role of subjective conviction; (2) the affirmation of concrete personal experience or personal acceptance as the final arbiter justifying true belief; and (3) the call for the minimizing of inconsistencies as necessary to achieve an accurate connection between mind and material experience.⁸⁷

The *nomos* that contextualizes reparations litigation is the racialized *nomos* of domination and subordination.⁸⁸ As such it is rich ground to examine how the persuasive rhetorical devices of *logos*, *pathos*, and *ethos* operate to reinforce “negative difference” and exacerbate the racial divide in reparations discussions.

B. Logos, Ideographs, and Analytical Frameworks in Reparations Litigation

Seth Hubbard’s will contest occurs in Judge Reuben V. Atlee’s domain, set for trial before a jury.⁸⁹ As in *A Time To Kill*, Clanton will not be denied the spectacle of a trial. A trial is a written legal brief in Technicolor. Witnesses are sequenced to tell a story most favorable to their client and jury instructions are included in a jury’s legal toolkit to help them craft an outcome in the case. Jury instructions are not buried in dusty legal books accessible to only lawyers. On the contrary, the judge reads them aloud in the hearing of litigants and spectators; at the

87. *Id.* at 17–18 (citing MCPHAIL, *supra* note 37, at 129–30, 132). *But see* MCPHAIL, *supra* note 37, at 198–99 (questioning whether a rhetoric of coherence is possible without substantial movement in the epistemologies and rhetorics of White Americans).

88. For comparison see the Afrocentric *nommo*, introduced by Molefi Asante in his book *The Afrocentric Idea*, *supra* note 34. Asante asserts that *nommo* is the generative and productive power of the spoken word, in African discourse and in specific instances of resistance to the dominant ideology. . . . My goal in this book is to propose what an Afrocentric theory might examine and to perform an interpretation of discourse based on Afrocentric values in which *nommo* as word-force is a central concept.

Id. at 22.

89. GRISHAM, SYCAMORE ROW, *supra* note 4, at 308–15.

reading of the jury instructions, everyone has a tacit knowledge of what the law is. From Technicolor to monochromatic gray scale, reparations litigation is a battle of the motions. It is a battle of words, skillful drafting, and legal maneuvering. Jake's public presentation is about people, facts, and law, in that order. He must protect Seth's estate by showing Lettie as Seth saw her, present the facts surrounding the will in the light most favorable to Seth, and then leave it to the jurors to follow the law they are given. In Jake's litigation universe, *logos* is last. In reparations litigation, *logos* comes first.

Logos is a rhetorical device that persuades through logic—logical arguments linked with evidence.⁹⁰ In a litigation context, arguments are employed through the use of a myriad of analytical frameworks, developed to resolve particular and specific causes of action through the doctrine of *stare decisis* (precedent). How logical an argument is depends upon which framework a court will deem relevant and acceptable to resolve any given legal dispute. While lawyers frame issues in a manner most favorable to their clients to the extent the available frameworks allow, jurists arguably frame issues in a manner that maintains the integrity of precedent as they perceive it. The racialized *nomos* in which *logos* functions informs a lawyer's perception of frameworks favorable for their client and a jurist's perception of which frameworks maintain the integrity of any given precedent. Within that *nomos* ideographs, words or phrases that convey and reinforce ideologies, implicate which frameworks lawyers and jurists use.⁹¹ As they are context-dependent, *nomos* gives meaning to ideographs as lawyers use them in logical arguments.⁹² More specifically, ideographs derive meaning from the cause of action to

90. CROWLEY & HAWHEE, *supra* note 18, at 12, 118, 170.

91. Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q.J. SPEECH 1 (1980), *reprinted in* CONTEMPORARY RHETORICAL THEORY: A READER 427–29 (John Louis Lucaites et al. eds. 1999).

92. *Id.*; *see also* CELESTE MICHELLE CONDIT & JOHN LOIS LUCAITES, CRAFTING EQUALITY: AMERICA'S ANGLO-AFRICAN WORD xii (Donald N. McCloskey & John S. Nelson eds., 1993) (arguing that "[a]n ideograph is a culturally biased, abstract word or phrase . . . [that] represent[s] in condensed form the normative, collective commitments of the members of a public").

which they are attached, as well as from the parties to whom they are applied.⁹³

The use of the term “white-slavery” is instructive here. One of the first instances where the term appeared in litigation was the 1912 case *People v. Luechini*, in which the defendant-appellant was convicted of vagrancy under New York law.⁹⁴ The statute at issue provided that “[a] person (is a vagrant), who, having his face painted, discolored, covered or concealed, or being otherwise disguised, in a manner calculated to prevent his being identified, appears in a road or public highway, or in a field, lot, wood or inclosure [sic].”⁹⁵ The statute also described other types of vagrancy and vagrants, namely “[a]ll idle persons who, not having visible means to maintain themselves, live without employment; all persons wandering abroad and lodging in taverns . . . and not giving a good account of themselves; all persons wandering abroad and begging . . . shall be deemed vagrants.”⁹⁶ The detective who arrested the defendant stated that he [the detective]

found this young man in front of the Grand Theatre, 227 Main Street, his face all painted up and his garb on (pointing to women’s clothes which were conceded by the appellant to have been worn) and this wig on and slippers. . . . his face all painted up and he said he was representing the ‘White Slave.’ He [sic] was in the lobby of the theater, a depression same as any doorway, in view of the public.⁹⁷

In declining to uphold the conviction, the court reasoned that the conduct in question fell outside of the scope of the statute, but that a conviction of disorderly conduct or something similar might have been proper.⁹⁸ The court also said that the defendant’s reference to himself as a “White Slave” “[was] not an attractive expression in these latter

93. McGee, *supra* note 91, at 431–34. McGee includes the following among his examples of ideographs: “‘property,’ ‘religion,’ ‘right of privacy,’ ‘freedom of speech,’ ‘rule of law,’ and ‘liberty.’” *Id.* at 428.

94. *People v. Luechini*, 136 N.Y.S. 319, 319 (N.Y. Cty. Ct. 1912).

95. *Id.*

96. *Id.* at 320.

97. *Id.*

98. *Id.*

days” and only applicable if the defendant were convicted of abduction, solicitation (immoral), or aiding or abetting either crime.⁹⁹ The court concluded that there was no white slavery crime committed.¹⁰⁰

At the time the New York Superior Court decided *Luechini*, Congress had already passed the Mann Act (1910), which prohibited international and interstate trafficking in women for “prostitution or other immoral purposes.”¹⁰¹ The phrase “white slavery” was used in popular parlance as a contrast to “black slavery,” and meant to refer only to the sexual exploitation of white women.¹⁰² To be sure, Black women suffered exploitation as trafficked individuals during the slave trade and as reproductive property for slave-owners.¹⁰³ The same sexual exploitation of Black women persisted post-slavery.¹⁰⁴ However, the trope of the Jezebel, the sexually lascivious trickster, placed Black women outside the protections of the law and societal care.¹⁰⁵ As Kathleen Barry argues in her work on female sex-trafficking in the early 20th century

in addition to being sweet, innocent, and young, victims
were also coming to be seen only as white, despite

99. *Id.*

100. *Id.* at 321.

101. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 33 (1979).

102. *Id.* at 32.

103. *See generally* JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT* (2010); PATRICIA MORTON, *DISFIGURED IMAGES: THE HISTORICAL ASSAULT ON AFRO-AMERICAN WOMEN* (1991).

104. *See generally* TALITHA L. LEFLOURIA, *CHAINED IN SILENCE: BLACK WOMEN AND CONVICT LABOR IN THE NEW SOUTH* (Heather Ann Thompson & Rhonda Y. Williams eds., 2015); MORTON, *supra* note 103.

105. Carolyn M. West, *Mammy, Jezebel, Sapphire, and Their Homegirls: Developing an “Oppositional Gaze” Toward the Image of Black Women*, in *LECTURES ON THE PSYCHOLOGY OF WOMEN* 287 (Joan C. Chrisler, Carla Golden & Patricia D. Rozee eds., 2010); *see generally* Zanita E. Fenton, *Domestic Violence in Black and White: Radicalized Gender Stereotypes in Gender Violence*, 8 *COLUM. J. GENDER & L.* 1, 23–24, 24 n.87 (1998); Angela Mae Kupenda, Letitia Johnson & Ramona Seabron-Williams, *Political Invisibility of Black Women: Still Suspect but No Suspect Class*, 50 *WASHBURN L.J.* 109, 115 (2010); Molly A. Schiffer, *Women of Color and Crime: A Critical Race Theory Perspective to Address Disparate Prosecution*, 56 *ARIZ. L. REV.* 1203, 1213–17 (2014).

evidence that the traffic included black, brown, and yellow women. The term eventually embodied all the sexist, classist, and racist bigotry that was ultimately incorporated within the movement dominated by religious morality.¹⁰⁶

Thus, within the racialized and gendered *nomos* where Luechini was prosecuted, there existed no analytical framework for his behavior as a vagrant “white slave” because he was not female, not a victim of trafficking, or otherwise involved in the sexual exploitation of White women.

The cases *United States v. Beach*¹⁰⁷ and *Wright v. United States*¹⁰⁸ confirm how the ideograph “white slavery” implicates this framework. The Court in *Beach* considered the issue of whether the Mann Act applied to trafficking that occurred in Washington, D.C.¹⁰⁹ The *Wright* case raised the issue of whether a woman could be convicted of conspiracy for violating the Mann Act when assisting her husband in prostituting women.¹¹⁰ In both cases the courts used the phrase “white slave” or “white slavery” in tandem with citations to the Mann Act to describe the prohibited acts.¹¹¹ In *Beach*, the term “white-slavery” was distinguished from the mere prostitution for which the defendant was prosecuted, while in *Wright*, the defendants’ conduct fell squarely within the Act’s purview.¹¹² Even though the Court in *Beach* declined to apply the Mann Act, it defined white slavery as “the business of securing white women and girls and of selling them outright, or of exploiting them for immoral purposes.”¹¹³ “White

106. BARRY, *supra* note 101, at 32.

107. 324 U.S. 193 (1945).

108. 243 F.2d 569 (5th 1957).

109. *Beach*, 324 U.S. at 193–94.

110. *Wright*, 243 F.2d at 570.

111. *Beach*, 324 U.S. at 198–200; *Wright*, 243 F.2d at 569–70.

112. *Beach*, 324 U.S. at 198–200; *Wright*, 243 F.2d at 569–70.

113. *Beach*, 324 U.S. at 197. Quoting the Congressional Record of the proceedings that created the Mann Act, the Court stated that:

The term ‘white slave’ includes only those women and girls who are literally slaves—those women who are owned and held as property and chattels—whose lives are lives of involuntary servitude; those who practice prostitution as a result of the activities of the procurer, and who, for a considerable period at least, continue to lead their

slavery” functions as an ideograph in these cases because the race of the actors and victims is not explicit but understood because of the ideological commitments of the phrase. “White slavery,” when the State used it in the specific context of the racialized gendered *nomos*, implicated an analysis under the Mann Act when the victims were white and female; race, while invisible, was integral to the Court’s decision of whether the Mann Act applied.

Examining how ideographs and their attendant analytical frameworks function in the racialized *nomos* is integral to comprehending the failure of reparations claimants to succeed. Five reparations cases in modern American jurisprudence exemplify how ideographs operate in reparations litigation: *Johnson v. McAdoo*;¹¹⁴ *Cato v. United States*;¹¹⁵ *Pigford v. Glickman*;¹¹⁶ *Obadele v. United States*;¹¹⁷ and *In re African-American Slave Descendants Litigation*.¹¹⁸ Exploring each case—how the lawyers and judges framed the case, the ideographs used in the advocates’ briefs and their accompanying frameworks, and the courts’ opinions—demonstrates the limits of logical argument in the reparations debate.

1. *Johnson v. McAdoo*

Johnson v. McAdoo involved a dispute over a property interest in cotton seized during the Civil War.¹¹⁹ The plaintiff-appellants, H.N. Johnson, C.B. Williams, Rebecca Bowers, and Minnie Thompson, were enslaved during the years 1859–1868 on cotton plantations in unspecified Southern states.¹²⁰ They alleged that their labor during the period of their enslavement contributed to the cultivation and harvest of cotton that the Secretary of the United States Department of Treasury seized and taxed as an “Internal Revenue Tax on Raw

degraded lives because of the power exercised over them by their owners.

Id.

- 114. 45 App. D.C. 440 (1916).
- 115. 70 F.3d 1103 (9th Cir. 1995).
- 116. 185 F.R.D. 82 (D.D.C. 1999).
- 117. 52 Fed. Cl. 432 (Fed. Cl. 2002).
- 118. 375 F. Supp. 2d 721 (N.D. Ill. 2005).
- 119. *Johnson*, 45 App. D.C. at 440–41.
- 120. *Id.* at 441.

Cotton.”¹²¹ The amount of money collected as a result of the tax was \$68,072,388.99, upon which the plaintiff-appellants asserted an equitable lien.¹²²

The case originated in the Supreme Court of the District of Columbia, which dismissed it on the U.S. Attorney’s Motion to Dismiss.¹²³ The plaintiffs appealed to the Court of Appeals for the District of Columbia, which upheld the ruling of the lower court on grounds that the money at issue was not the Secretary of the Treasury’s property; his office required him to act as a caretaker and steward of the money.¹²⁴ In truth, the money was the property of the United States government, which the plaintiffs should have named as the actual defendant in their lawsuit.¹²⁵ Citing *United States ex rel. Goldberg v. Daniels*,¹²⁶ *International Postal Supply v. Bruce*,¹²⁷ and *Belknap v. Schild*¹²⁸ for the proposition that the plaintiffs could not sue the United States without its consent, the D.C. Court of Appeals dismissed the case.¹²⁹ The Supreme Court of the United States upheld the dismissal.¹³⁰

The Johnson plaintiff-appellants framed themselves and their ancestors as “subject to a system of involuntary servitude.”¹³¹ In doing so, they implicated “slavery” as an ideograph, a system that allowed both individuals and institutions like the United States through the Department of Treasury to profit from their labor, rather than themselves as “slaves,” an ideograph that evokes a cascade of beliefs that normalizes people of African descent as laborers and justifies their victimization.¹³² In its function as an ideograph, “slavery,” with its

121. *Id.*

122. *Id.* at 440.

123. *Id.*

124. *Id.* at 441.

125. *Id.*

126. 231 U.S. 218, 221–22 (1913).

127. 194 U.S. 601, 605 (1904).

128. 161 U.S. 10, 16–17 (1896).

129. *Johnson*, 45 App. D.C. at 440–41.

130. *Johnson v. McAdoo*, 244 U.S. 643 (1917).

131. *Johnson v. McAdoo*, 45 App. D.C. at 441.

132. *See e.g.*, MORGAN, *supra* note 38, at 314. The author states that: “[i]t was not necessary to extend the rights of Englishmen to Africans, because Africans were a ‘brutish sort of people.’ And because they were ‘brutish’ it was necessary ‘or at

focus on systems over people, precipitated the State and Court's use of an analytical framework applicable to a system (the United States Government) and not an individual (the Secretary of Treasury). That analytical framework allowed the State to avoid the lawsuit by alleging that the plaintiff-appellants were wrong in naming Secretary McAdoo as a party to the lawsuit instead of the United States, who could evoke sovereign immunity.

2. *Cato v. United States*

Plaintiff-appellants Jewel Cato, Joyce Cato, Howard Cato, and Edward Cato (Group 1 plaintiffs); and Leerma Patterson, Charles Patterson, and Bobbie Trice Johnson (Group 2 plaintiffs) filed separate but almost identical complaints against the United States.¹³³ The plaintiff-appellants, collectively known as “Cato,” proceeded *pro se* and *in forma pauperis* in a suit for damages in the amount of \$100,000,000 against the United States.¹³⁴ The *Cato* complaint alleged that damages were appropriate for: “[1] forced, ancestral indoctrination into a foreign society; [2] kidnapping of ancestors from Africa; [3] forced labor; [4] breakup of families; [5] removal of traditional values; [6] deprivations of freedom; and [7] imposition of oppression, intimidation, miseducation [sic] and lack of information about various aspects of their indigenous character.”¹³⁵ Accordingly, the *Cato* plaintiffs asked the court to “order an acknowledgement of the injustice of slavery in the United States and in the 13 American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present,” and for “an apology from the United States.”¹³⁶

The *Cato* plaintiffs invoked the ideographs “slavery” (system of enslavement; horrors of slavery) and “discrimination” (in reference

least convenient’ to kill or maim them in order to make them work.” *Id.* See also Solomon, *supra* note 19, at 1–2 (“The Negro is to man what donkey is to horse.” (quoting BENJAMIN ISAAC, *THE INVENTION OF RACISM IN CLASSICAL ANTIQUITY* 1–3 (2004))).

133. *Cato v. United States*, 70 F.3d 1103, 1105 (1995).

134. *Id.* at 1105–06.

135. *Id.* at 1106.

136. *Id.*

to the ongoing racial harms wrought by the system of enslavement). Again, the court applied the framework for sovereign immunity claims in response to the *Cato* plaintiffs' suit against the United States as a party.¹³⁷ At the district court level, the doctrine of sovereign immunity acted as a means to dismiss the lawsuit prior to service on the defendants.¹³⁸ The appellate court also used sovereign immunity as a means to affirm the dismissal of the *Cato* claim. Additionally, it extended its analysis by reading into the Plaintiffs' pleadings the Civil Rights Act, 42 U.S.C. section 1981(a),¹³⁹ which further buttressed the dismissal on sovereign immunity grounds, and the Federal Torts Claim Act¹⁴⁰ (hereinafter "FTCA"), which acted as a time-bar for suits arising on or before January 1, 1945.¹⁴¹ Because the plaintiffs did not allege any constitutional or statutory violations at the district court level, the Court selected the Civil Rights Act and FTCA as relevant and applied them as a bar to recovery.¹⁴²

On appeal, the *Cato* plaintiffs' brief included arguments concerning sovereign immunity and the statute of limitations, specifically as they arose under the FTCA.¹⁴³ Additionally, the brief framed Plaintiffs' allegations of discrimination as violations of the Thirteenth Amendment to the United States Constitution.¹⁴⁴ Specifically, Plaintiffs alleged that their claims should not be time-barred and dismissed because they arose under statutory (FTCA) and constitutional (Thirteenth Amendment) provisions.¹⁴⁵ The Plaintiffs' reasoning to support their assertion rested in their analogy of their claims to that of Native Americans arising out of the Indian Trade and Intercourse Act ("ITIA"), which prevented Native Americans from selling land not authorized for sale through a treaty with the United States.¹⁴⁶ The ITIA governed when the United States could bring a

137. *Id.* at 1105–06.

138. *Id.* at 1105.

139. 42 U.S.C. § 1981(a) (2012).

140. 28 U.S.C. § 1346 (2013); 28 U.S.C. § 2674 (2006).

141. *Cato v. United States*, 70 F.3d 1103, 1106–07 (1995).

142. *Id.*

143. *Id.* at 1107–08.

144. *Id.*; Brief of Petitioner-Appellant at 1–2, *Cato v. United States*, No. 94-17102 (9th Cir. Feb. 24, 1995).

145. *Cato*, 70 F.3d at 1107–08.

146. *Id.* at 1108.

lawsuit, as opposed to when a Native American tribe could sue the United States.¹⁴⁷ In this instance, the ideograph “slavery” again locked the Plaintiffs into a sovereign-immunity analysis that protected the United States from suit. Furthermore, the court found no viable analogous reasoning in the operation of the Indian Trade and Intercourse Act to allow century-old Native American land disputes to slavery under the Thirteenth Amendment, just 130 years old at the time the Plaintiffs brought suit.¹⁴⁸ The court found that slavery as a system was not analogous to the trust relationship between the United States and Native American tribes in which both operated as sovereigns.¹⁴⁹ Moreover, the court opined that even if the government had waived its sovereign immunity under the Thirteenth Amendment, that issue was separate from whether a cause of action existed under which the Plaintiffs could recover.¹⁵⁰

Cato’s claims concerning the horrors of slavery and its ongoing harms to people of African descent were encompassed in the ideograph “discrimination,” for which there existed no corresponding legal framework to address the plaintiffs’ claim. In the district court judge’s words:

Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this country is inexcusable. This court, however, is unable to identify any legally cognizable basis upon which plaintiff’s claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiffs’ grievances.¹⁵¹

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 1109–11. But see Plaintiffs’ arguments asserting what they perceive as an important Constitutional right—the right to sue the government directly. *Id.* at 1110–11.

151. *Id.* at 1105.

The district court dismissed these claims in accordance with 28 U.S.C. section 1915(d),¹⁵² which allows a judge to dismiss a complaint “that merely repeats pending or previously litigated claims.”¹⁵³ The *Cato* plaintiffs had previously filed complaints, and the judges who adjudicated those complaints had dismissed them.¹⁵⁴ As such, the district court construed those claims as previously litigated or pending, which is a viable independent basis for dismissal on 1915(d) grounds.¹⁵⁵ In evaluating the Plaintiffs’ allegation that the district court abused its discretion by dismissing their claims, the Ninth Circuit Court of Appeals cited 1915(d) in affirmation of the district court’s opinion.¹⁵⁶ It also cited additional authority for the proposition that “a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits.”¹⁵⁷

The *Cato* plaintiffs asserted as grounds for appeal: “[1] that the dismissal of [the] action was premature in that [they] were given no opportunity to be heard on the adequacy of [their] complaint or to amend” and that “[2] the complaint should not have been dismissed merely because the court [had] doubts that the plaintiff[s] will prevail.”¹⁵⁸ In addressing the first allegation, the Ninth Circuit Court of Appeals reiterated that the appropriateness of the legislature to address the discrimination claim was a proper basis for the district court to dismiss the complaint.¹⁵⁹ The court of appeals underscored the district court judge’s opinion of Plaintiffs’ discrimination claims in its statement that “[Plaintiffs’] claims were not legally cognizable because they raise ‘a “policy question,”’ which the judiciary ‘has neither the authority nor wisdom to address.’”¹⁶⁰ While the court entertained the Plaintiffs’ arguments that their claims could not be time-barred because the Thirteenth Amendment created “a national right for African Americans to be free from the badges and indicia of

152. *Id.*

153. *Id.* at 1105 n.2.

154. *Id.*

155. *Id.* (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988)).

156. *Id.* at 1105 n.2, 1106.

157. *Id.* (citing *Denton v. Hernandez*, 504 U.S. 25, 31 (1992)).

158. *Id.* at 1106.

159. *Id.*

160. *Id.*

slavery,” as well as theories available under the FTCA for government liability for failure to meet this obligation to African Americans, it ultimately found these arguments without merit.¹⁶¹ The court’s reasoning was twofold; it reasoned that the Plaintiffs’ arguments were too general and “class-based” (collective), and that the Plaintiffs “neither [allege] nor [suggest] . . . any conduct on the part of any specific official or as a result of any specific program that has run afoul of a constitutional or statutory right and caused her a discrete injury.”¹⁶²

The ideograph “discrimination” next invoked the analytical framework for standing. The Ninth Circuit Court of Appeals reasoned that plaintiffs needed to draw a straight line between the alleged harms (ongoing) and a bad actor or actors to recover on their claims. Finding none, the court averred that:

No plaintiff has standing “to complain simply that their Government is violating the law.” Neither does *Cato* have standing to litigate claims based on the stigmatizing injury to all African Americans caused by racial discrimination. In any case, [plaintiffs do not] trace the presence of discrimination and its harm to the United States rather than to other persons or institutions. Accordingly, [the *Cato* plaintiffs] lack[] standing to bring a suit setting forth the claims [they] suggest[.].¹⁶³

In the final pages of the *Cato* opinion, the court put to rest any strategies for racial redress that looked to the courts as a viable forum. It cast discrimination as something involving “judgment calls of legislators in their legislative capacity,” even as it reminded the claimants that senators and congresspersons enjoyed complete immunity for their actions as legislators.¹⁶⁴

The court’s opinion in *Cato* demonstrates that racial alienation rhetoric and the recovery rhetoric of perseverance, endurance, and

161. *Id.* at 1109.

162. *Id.*

163. *Id.* at 1109–10 (internal citations omitted).

164. *Id.* at 1110 (“Congress wished to prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.” (quoting *Baker v. United States*, 817 F.2d 560, 564 (9th Cir. 1987))).

hope have no attendant legal frameworks to address ongoing racial harm. Throughout the opinion, the White racial recovery rhetoric of honor and remembrance implicitly fixes harm for slavery in the past, and more broadly harm for redress of any racial harms to a particular space and time. Note for example the Ninth Circuit's assertion that the *Cato* plaintiffs modeled their complaint on the Japanese internment cases arising from World War II, which courts resolved through reparations authorized by a legislative act.¹⁶⁵ The court's reference to Japanese reparations is congruent with its invocation of the Civil Liberties Act of 1988, which sets the justiciability of claims on or after January 1, 1945—the end of WWII.¹⁶⁶ This lends credence to the court's reasoning that claims brought to address racial discrimination are political questions, not legal ones.

3. *Pigford v. Glickman*

The *Pigford* opinion departs in rhetorical structure from *Johnson* and *Cato*, if not in purpose, in that it begins with the story of forty acres and a mule as a broken promise by the Union after the Civil War to give the formerly enslaved a new beginning and financial independence.¹⁶⁷ Although *Pigford* is not a reparations case *per se*, its opening pages place it squarely within the reparations-litigation canon, which perpetuates the White racial recovery rhetoric of honor and remembrance and exacts penalties for the Black racial recovery rhetoric of perseverance, endurance, and hope. Both recovery rhetorics are evident in these opening pages. The court describes the Government's broken promise in these terms:

During Reconstruction . . . President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen's Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers was taken away and returned to Confederate loyalists.¹⁶⁸

165. *Id.* at 1106.

166. *Id.*

167. *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999).

168. *Id.*

This elucidation of events sparks a remembrance of what existed before the War, a recovery in the form of a land grab to honor the Confederate fallen. The court talks in grand terms of perseverance, endurance, and hope, stating: “[d]espite the government’s failure to live up to its promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.”¹⁶⁹ By 1992 less than 18,000 farms remained.¹⁷⁰

The case subsequently jumps in time to what is before the court, a case alleging racial discrimination by the United States Department of Agriculture (USDA) in its financial lending practices to African-American farmers.¹⁷¹ Because the ideograph “discrimination” operates in a reparations context to lock courts into analyses concerning political questions and standing, its use in an anti-discrimination context is instructive here. In *Pigford*, “discrimination” proceeds under an anti-discrimination analysis,¹⁷² where a specific agency regulation has been violated¹⁷³ and a cause of action exists under a specific congressional act.¹⁷⁴ Although the court’s language in the beginning of *Pigford* set it up to connect the current controversy to a past harm—the straight line required to overcome the obstacle of standing in reparations cases—the court used White racial recovery rhetoric to place a period on the past, only allowing itself to address the present harm in a legally isolated context. In its own words:

It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of African American farmers in the United States. The Court has before it a proposed settlement of a class action lawsuit that will not undo all that has been done. Despite that

169. *Id.*

170. *Id.* at 87.

171. *Id.* at 85.

172. *Id.* at 85–86.

173. *Id.* at 85 (citing Nondiscrimination in Federally-Assisted Programs of the Department of Agriculture—Effectuation of Title VI of the Civil Rights Act of 1964, 7 C.F.R. § 15.1 (2003)).

174. *Id.* at 86 (citing The Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2014)).

fact, however, the Court finds that the settlement is a fair resolution of the claims brought in this case and a good first step towards assuring that the kind of discrimination that has been visited on African American farmers since Reconstruction will not continue into the next century.¹⁷⁵

Thus, the court addressed the actual claim of discrimination before it, as the lawyers pleaded and briefed the issue, in lieu of connecting the actual ongoing harms to Black farmers since Reconstruction. Regardless of the court's good intentions in wanting to rectify a racial wrong, the fact remains that more than 907,000 farms disappeared from 1920–1992, and the putative class in the original cause of action represented only 641 Black farmers.¹⁷⁶

4. *Obadele v. United States*

The premise of the Plaintiff's lawsuit in *Obadele* was that the Government's failure to award reparations to African Americans as it had to Japanese-Americans after World War II violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.¹⁷⁷ The Plaintiffs' claims arose under the Civil Liberties Act of 1988 ("the Act"), which "provide[d] a formal apology and benefits, including redress payments of \$20,000, to certain individuals affected by the Federal Government's evacuation, relocation, or internment of United States citizens and permanent resident aliens of

175. *Id.* at 85–86.

176. *Id.* at 87, 89. Under the terms of the *Pigford I* settlements, 22,721 Black farmers were certified as class members and eligible to file claims. TADLOCK COWAN & JODY FEDER, CONG. RES. SERV., RS20430, THE *PIGFORD* CASES: USDA SETTLEMENT OF DISCRIMINATION SUITS BY BLACK FARMERS i (2013), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>. As of December 31, 2011, 15,645 claimants had filed (69% of total claimants eligible) and only 104 (62%) of those claimants who filed were successful. *Id.* *Pigford II* included those Black farmers who did not receive a judgment on the merits of their discrimination claims under *Pigford I*. *Id.* Black farmers filed nearly 40,000 claims under *Pigford II*, of which "approximately 34,000 were deemed complete and timely." *Id.* It is estimated that 17,000–19,000 claims would be successful under *Pigford II*. *Id.*

177. *Obadele v. United States*, 52 Fed. Cl. 432, 435–36 (2002).

Japanese ancestry during Wor[ld War II.”¹⁷⁸ Any person seeking benefits under the Act had to file a claim with the Office of Redress Administration (“ORA”), an office within the Justice Department’s Civil Rights Division tasked with handling the claims.¹⁷⁹ Under the provisions of the Act, a successful claimant had to show that:

- (1) They [were] of Japanese ancestry; and
- (2) They were living on the date of the Act’s enactment, August 10, 1988; and
- (3) During the evacuation, relocation, and internment period (December 7, 1941 through June 30, 1946) they were:
 - United States citizens; or
 - Permanent resident aliens who were lawfully admitted into the United States; and
- (4) They were confined, held in custody, relocated, or otherwise deprived of liberty and property as a result of Executive Order 9066 or other related [] government action respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry.¹⁸⁰

The court characterized this legislation as addressing discrimination, but only quantifiable discrimination supported by history—not the generalized discrimination of the Plaintiffs’ lawsuit.¹⁸¹

178. *Id.* at 433 (citing 50 U.S.C. app. § 1989 (1998) (current version at 50 U.S.C. § 4201 (Supp. III 2016))).

179. *Id.* at 433.

180. *Id.* at 434.

181. *Id.* at 442. The court reasoned: “There are, unfortunately, a number of other groups which can make a case for redress of wrongs done them on the basis of political, religious, ethnic, or racial discrimination.” *Id.* at 443. Citing the D.C. Court of Appeals’ decision upholding reparations for Japanese Americans, the court opined:

Congress’s finding that Japanese-Americans were the victims of prejudice . . . is amply supported by historical evidence that the internment policy extended to Japanese American but not to German-American children. Congress, therefore, had clear and sufficient reason to compensate interns of Japanese but not German descent; and the compensation is . . . narrowly tailored to Congress’

The Act required that all potential plaintiffs file claims by 1998.¹⁸² It also placed sole jurisdiction for appeal of redress claims in the United States Court of Federal Claims.¹⁸³ The Court of Federal Claims had jurisdiction to hear appeals of claims arising under the Act only when the claimants had exhausted their administrative remedies available at the ORA.¹⁸⁴ In such instances, the Court of Federal Claims could only set aside an ORA decision upon a finding that its decision was “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁸⁵

Plaintiffs Imari Abubakari Obadele, Kuratibisha X Ali Rashid, and Kalonji Tor Olusegun, all persons of African descent, filed claims with the ORA under the Act.¹⁸⁶ Their complaints alleged that they were “[d]escendants of persons kidnapped from Afrika [sic] who have been born in the United States are U.S. citizens without a right to self-determination.”¹⁸⁷ Aside from loosely fitting within provision (4) of the Act, the plaintiffs satisfied none of the other statutory requirements for eligibility.¹⁸⁸ Subsequently, ORA denied their claims, and the plaintiffs timely filed an appeal.¹⁸⁹ The Government filed a Motion to Dismiss¹⁹⁰ and a Motion for Judgment on the Administrative Record¹⁹¹ pursuant to the Rules of the United States Court of Federal Claims. The Government’s Motion to Dismiss alleged that the Plaintiffs lacked

compelling interest in redressing a shameful example of national discrimination.

Id. at 443 (quoting *Jacobs v. Barr*, 959 F.2d 313, 321–22 (1992). “As the court noted, the Act was aimed at specific governmental actions as opposed to discrimination in general.” *Id.*

182. *Id.* at 435.

183. *Id.* at 434.

184. *Id.*

185. *Id.*

186. Plaintiffs Obadele and Rashid filed their claims together. Plaintiff Olusegun filed a separate claim. The claims were considered together. *Id.* at 434–35.

187. *Id.* at 434.

188. *Id.* at 434–35.

189. *Id.* at 435.

190. *Id.* at 437 (citing RCFC 12(b)(1)).

191. *Id.* at 440 (citing RCFC 56(c)).

standing,¹⁹² the Court of Federal Claims had no subject matter jurisdiction, and that the *Obadele* plaintiffs could not state a claim deserving of relief.¹⁹³ Ultimately, the court denied the Government's Motion to Dismiss, as the Civil Liberties Act compelled it to address the Plaintiffs' constitutional claims.¹⁹⁴

The basis for the Plaintiffs' appeal was that the eligibility requirement that a claimant be of Japanese ancestry was a racial classification that violated the Equal Protection Clause of the Fourteenth Amendment.¹⁹⁵ The court framed the issue in a slightly different manner, describing its inquiry as whether the Constitution compelled Congress to offer parallel legislation for descendants of enslaved Africans.¹⁹⁶ In keeping with its statement that "[t]he treatment of African Americans who were enslaved, oppressed, and disenfranchised is a long and deplorable chapter in this nation's history [a plight which may] well be the subject of future legislation providing for reparations for slavery," the court declined to find that the Japanese ancestry eligibility requirement was an unconstitutional racial classification.¹⁹⁷ In its comparison of African reparations to Japanese reparations, the court placed the responsibility to persuade Congress and the American people of the need for reparations for people of African descent on the shoulders of people of African descent. Once

192. Note that I do not consider "standing" an ideograph in the reparations litigation context because it does not invoke an analytical framework to dismiss a claim for reparations made on general grounds of discrimination. Plaintiffs' claim for reparations arose under a specific Act. *But see* Innis, *supra* note 23, at 649, 670 (arguing that standing is an ideograph in *In re African-American Slave Descendants Litigation*).

193. *Obadele*, 52 Fed. Cl. at 437.

194. *Id.* at 437–38. The Court asserted that:

[t]he Government's logic is circular. The Government confuses eligibility for relief with eligibility *to seek* relief. Our function is to review *denials* of relief. Judicial review would take little of our time if we had jurisdiction only over *successful* applicants. Eligibility for relief under the statute is a question on the merits, more appropriately resolved via a motion for judgment on the administrative record pursuant to Rule 56.1.

Id.

195. *Id.* at 436.

196. *Id.*

197. *Id.* at 442.

again, the Black rhetoric of alienation and recovery placed the plaintiffs outside of the proper frameworks for relief. The court perceived the enactment of the Civil Liberties Act as a successful act of political persuasion by those of Japanese ancestry, reinforcing that the question of reparations was a political question.¹⁹⁸

5. *In re African-American Slave Descendants Litigation*

The court's decision in *In re African-American Slave Descendants Litigation* is a grand illustration of how *logos* operates in the racialized *nomos* to crystalize the White racial-recovery rhetoric of honor and remembrance and perpetuate White supremacy. The court began its opinion by recounting the history of slavery in the following parts: "A. A Definition of Slavery; B. A Brief History of the Slavery in the New World; C. Slavery and American Law; D. Slavery and Morality; E. Slavery as the Cause of the Civil War; F. The Civil War; and G. The Abolishment of Slavery."¹⁹⁹ In doing so, it engaged in an exercise of White social memory by placing primacy on the history of slavery, the Civil War, and Reconstruction as told by all but one White historian.²⁰⁰ While it would be disingenuous to make claims about a historian's work based on his or her race, it remains that a person's experience in the world shapes his or her view of the past. History is not just about facts, but rather an argument about which facts, narratives, people, places, and events matter. History is as much about the story as it is about who is allowed to tell the story and how the story is told. Thus, it is careless for any court to treat historical accounts as uncontested facts.²⁰¹ As sociologist, historian, novelist, essayist,

198. *Id.* at 443.

199. *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 726–31 (N.D. Ill. 2005).

200. Edward Reynolds is an African American. See *Stand in the Storm: A History of the Atlantic Slave Trade*, AMAZON.COM, <https://www.amazon.co.uk/Stand-in-the-Storm-History-Atlantic-Slave/dp/1566630207> (last visited June 6, 2018) (click "See all 3 images" to view the author's picture and description in the book's jacket); Linda Carter Brinson, *Courage to Change a Campus: Two Interviews with Edward Reynolds ('64), 42 Years Apart*, WAKE FOREST U. ALUMNI MAG. (Jan. 31, 2013), <http://magazine.wfu.edu/2013/01/31/courage-to-change-a-campus>.

201. See, e.g., PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (Cambridge Univ. Press 1999 ed.) (arguing that the "noble dream" of objectivity in history remains elusive).

intellectual, and activist W. E. B. Du Bois wrote in his book *Black Reconstruction in America 1860–1880*, “[the history of Reconstruction consists of the] unsupported evidence of men who hated and despised [people of African descent] and regarded it as loyalty to blood, patriotism to country, and filial tribute to the fathers to lie, steal or kill in order to discredit these black folks.”²⁰² Du Bois biographer and historian David Levering Lewis also wrote of African-American historians of Reconstruction and beyond “[a] small number of [Black] authors and scholars, equally ignored or dismissed by white academics and the mainstream public, had begun to join Du Bois in the seemingly futile venture of rehabilitating the post-Civil War history of their people.”²⁰³

The court’s opinion in the case crafts a history of slavery, the Civil War, and Emancipation from the work of 8 historians: Ira Berlin;²⁰⁴ Roger William Fogel;²⁰⁵ Edward Reynolds;²⁰⁶ Herbert S. Klein;²⁰⁷ Walter Berns;²⁰⁸ Thomas D. Morris;²⁰⁹ Shelby Foote;²¹⁰ and James M. McPherson.²¹¹ Only one of these historians, Edward Reynolds, is a person of color; Reynolds is of Ghanaian descent.²¹² It is curious to note that Reynolds’ work comprises the bulk of section

202. David Levering Lewis, *Introduction* to W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA*, at xxv (Henry Louis Gates, Jr. ed., 2007).

203. *Id.*

204. IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES* (Harvard Univ. Press 2003).

205. ROGER WILLIAM FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* (Norton 1989).

206. EDWARD REYNOLDS, *STAND THE STORM: A HISTORY OF THE ATLANTIC SLAVE TRADE* (Alison & Busby 1985).

207. HERBERT S. KLEIN, *THE ATLANTIC SLAVE TRADE* (Cambridge Univ. Press 1999).

208. WALTER BERNS, *The Constitution and the Migration of Slaves*, in *IN DEFENSE OF LIBERAL DEMOCRACY* 199 (Gateway Books 1985).

209. THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH 1780–1861* (Johns Hopkins Univ. Press 1974).

210. SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE, FORT SUMTER TO PERRYVILLE* (First Vintage Books 1986) (1958); SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE, RED RIVER TO APPOMATTOX* (First Vintage Books 1986) (1974).

211. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (First Ballantine Books 1989).

212. See Brinson, *supra* note 200.

“B. A Brief History of Slavery in the New World” and is used to discuss the African involvement in the slave trade—a strategy used to implicitly suggest that because Africans were participants, enslaved people of African descent are partly to blame for slavery.²¹³ There are no accompanying footnotes or additional sources in the opinion to alert the reader that interpretations of African involvement in the slave trade, namely the role of European imperialism and African consent, is a widely debated subject in the historiography of the slave trade.²¹⁴

213. *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 727 (N.D. Ill. 2005). *But see, e.g.*, Vincene Verdun, *If the Shoe Fits Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 626 n.91 (1993). Verdun states that:

In Europe (and western societies, including America) individuals who were enslaved were the “property” of the enslaver, whose ownership extended to the right of life or death of the enslaved person. People were not enslaved—they were slaves. By contrast, in African societies, a person was enslaved—never to extend to that person’s offspring and many times not for that person’s whole life. Enslaved persons still retained basic human rights and were often integrated into the slaveholding family.

Id. (citations omitted).

214. *See, e.g.*, PATRICK MANNING, *SLAVERY AND AFRICAN LIFE: OCCIDENTAL, ORIENTAL, AND AFRICAN SLAVE TRADES 2* (Cambridge Univ. Press 1991) (1990). Manning argues that:

The mistake of our African protagonists was their willingness to participate in slavery and in the slave trade, even if they did so only to dispose of enemies in revenge, or in hopes of securing a fortune which might enable their family or their kingdom to grow and profit. The tragic results of these attempts to advance themselves at the expense of others emerge out of the logic of the plot itself, though over a period of more than a century rather than in a single episode. Developments in the story included the decline in the African population, the disruption of countless families, and the individual falls of the mighty.

The tragic climax came in the mid-nineteenth century, with the decline in the external demand for slaves. Africans faced an array of choices, each one of which led necessarily to a tragic end. Those who sought to sustain African slavery achieved short-term prosperity, but then underwent conquest by Europeans. Those who sought to renounce slavery had either to accept conquest by their neighbors or ally with conquering Europeans and negate their own heritage.

Id.

At the very least, the court could have considered Du Bois' *The Suppression of the African Slave Trade*, first published in 1896 as his doctoral dissertation in history and widely available for sale at the time this opinion was authored.²¹⁵ Also available to the court was a vast canon of African-American historians writing the histories of slavery, the Civil War, and Reconstruction including: John Hope Franklin;²¹⁶ Mary Frances Berry;²¹⁷ John Wesley Blassingame;²¹⁸ and Darlene Clark Hine.²¹⁹ All of these works, and more like them, were in print at the time the court authored the opinion.²²⁰

The court's historical account of the African-American experience describes one in which slave is dichotomous to free;²²¹ the Trans-Atlantic Slave Trade becomes "African slave trafficking in the New World";²²² Africans actively participated in supplying African bodies to the slave trade;²²³ the American legal system endorsed and perpetuated slavery, but perhaps it was not the main cause of the Civil War;²²⁴ where the Civil War battles at Appomattox and Fort Sumter

215. W. E. B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638–1870* (Cosimo Classics 2017) (1896).

216. JOHN H. FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (9th ed. 2010); JOHN HOPE FRANKLIN, *THE MILITANT SOUTH, 1800–1860* (Univ. of Ill. Press 2002) (1956); JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* (Daniel J. Boorstin ed., 1961).

217. MARY FRANCES BERRY, *MILITARY NECESSITY AND CIVIL RIGHTS POLICY: BLACK CITIZENSHIP AND THE CONSTITUTION, 1861–1868* (1977).

218. JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* (1979).

219. *MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS* (David Barry Gaspar & Darlene Clark Hine eds., 1996); *THE AFRICAN AMERICAN ODYSSEY, THE COMBINED VOLUME* (David Barry Gaspar & Darlene Clark Hine eds., 6th ed. 2013).

220. See also *Obadele v. United States*, 52 Fed. Cl. 432, 442 (2002), for an overview of the Court's treatment of history. The Court treats different arguments and viewpoints of historical events as alternative to dominant narratives of those events, and dismisses discrimination as an "unhappy aspect[] of American history." *Id.*

221. *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 727 (N.D. Ill. 2005).

222. *Id.*

223. *Id.*

224. *Id.* at 729.

are detailed in spectacular fashion;²²⁵ and Reconstruction remains a question mark.²²⁶ In the telling, the court obscures the Black rhetorics of alienation and recovery and does not contest the White racial recovery rhetoric of honor and remembrance. Consequently, it remains complicit in allowing White racial recovery rhetoric to stand as the “truth” in its reasoning for denying the Descendants’ claims. Like the *Cato* court, the United States District Court for the Northern District of Illinois invoked the ideographs “slavery” (system of enslavement; horrors of slavery) and “discrimination” (in reference to the ongoing racial harms wrought by the system of enslavement) to deny the Plaintiffs’ claims for reparations against private corporations.²²⁷ Also like in *Cato*, this court reasoned that the Plaintiffs lacked standing to bring their claims of discrimination within the court’s jurisdiction. It stated that: “[t]he fact of having an enslaved ancestor, even one transported, insured, or put to work by the defendants, does not seem sufficient injury,” and that “[p]laintiffs are alleging that injuries to their long-dead ancestors are causing them concrete harm today,” but that “Plaintiffs face insurmountable problems in establishing ‘to a virtual certainty’ that they have suffered concrete, individualized harms at the hands of the Defendants.”²²⁸ The message is clear: slavery is the past and has no effect on the present.

In evaluating the discriminatory, ongoing effects of slavery, the court turned to the political question doctrine as an additional basis to dismiss the Descendants’ claims.²²⁹ It used the elements the Court developed in *Baker v. Carr* (“*Baker* factors”) as its analytical framework for determining whether the political question doctrine applied.²³⁰ It ultimately settled on two factors as the basis for its

225. *Id.* at 729–30.

226. *Id.* at 731.

227. Among the private corporations named defendants were: FleetBoston Financial Corporation; CSX Corporation; Aetna Inc.; Brown Brothers Harriman & Company; New York Life Insurance Company; Norfolk Southern Corporation; Lehman Brothers Corporation; Lloyd’s of London; Union Pacific Railroad; JP Morgan Chase; R.J. Reynolds Tobacco Company; Brown and Williamson; Liggett Group Inc.; Canadian National Railway; Southern Mutual Insurance Company; American International Group (AIG); and Loews Corporation. *Id.* at 738.

228. *Id.* at 747.

229. *Id.* at 754–58.

230. *Id.* at 755; *see Baker v. Carr*, 369 U.S. 186, 217 (1962).

determination that the question of reparations was a political question: “[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [and] [2] a lack of judicially discoverable and manageable standards for resolving it.”²³¹ Finding that Congress intended the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution—to cure the Constitutional defects of the formerly enslaved in lieu of reparations, the court ruled that the Descendants’ claims were beyond the scope of judicial authority.²³² Further, it cited Congress’s rejection of Bill H.R. 29, the Bill to which *Pigford* referred, which would have given newly freed slaves forty acres and a mule and other monetary compensation, to show that Congress had the opportunity to give actual reparations to slaves but declined to do so.²³³

The reparations cases demonstrate that the operation of reparations rhetoric in the racialized *nomos* enshrines negative difference.²³⁴ The actual, legal effect is to prohibit or limit litigation to specific racialized analyses upon an advocate or court’s use of certain ideographs in argumentation. The field of reparations litigation is littered with ideographical landmines for the unsuspecting lawyer. Knowing which ideographs to avoid, along with the deployment of their attendant analytical frameworks, is essential to the extent lawyers see litigation as a viable means to address reparations.

231. *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721, 755 (N.D. Ill. 2005). The complete list of *Baker* factors are as follows:

(1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial [sic] discretion; or (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

232. *Id.* at 759–60, 762.

233. *Id.* at 760–62.

234. MCPHAIL, *supra* note 37, at 11–13, 15, 16–17.

Ultimately, for lawyers to continue to use the legal arena as a vehicle for change would require them to draft briefs which challenge the court's fiction of political question when Black alienation rhetoric is used in arguments. Courts have routinely ruled on the merits of discrimination claims that have dealt with slavery and its ongoing harms.²³⁵ Its reluctance to do so in the reparations arena is a product

235. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (ruling by U.S. Supreme Court finding that the Equal Protection Clause protections afforded to Black people in an education context extended to White people alleging discrimination as a result of educational policies designed to assist Black people); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (ruling by U.S. Supreme Court that the testing scheme Duke Power used to decide promotions was preferential to White employees); *Loving v. Virginia*, 388 U.S. 1 (1967) (ruling by U.S. Supreme Court prohibiting bans on interracial marriage); *NAACP v. Button*, 371 U.S. 415 (1963) (ruling by the U.S. Supreme Court allowing the NAACP to provide legal assistance to civil rights claimants); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (ruling by U.S. Supreme Court finding a 15th Amendment violation by the Alabama legislature in its redistricting efforts to dilute Black voting strength); *Gayle v. Browder*, 352 U.S. 903 (1956) (ruling by U.S. Supreme Court prohibiting segregated buses in Montgomery, Alabama); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ruling by U.S. Supreme Court striking down segregated public schools); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ruling by U.S. Supreme Court upholding separate but equal doctrine, but requiring that the facilities available to Black graduate students actually be equal—TX); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (ruling by the U.S. Supreme Court to strike down racial segregation in and outside of public school classrooms); *Henderson v. United States*, 339 U.S. 816 (1950) (ruling by the U.S. Supreme Court striking down segregated dining cars on railroads); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (ruling by U.S. Supreme Court striking down restrictive housing covenants); *Sipuel v. Okla. State Bd. of Regents*, 332 U.S. 631 (1948) (ruling by U.S. Supreme Court upholding separate but equal doctrine, but requiring that the facilities available to Black graduate students actually be equal—OK); *Morgan v. Commonwealth of Virginia*, 328 U.S. 373 (1946) (ruling by U.S. Supreme Court prohibiting segregation on buses traveling interstate); *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938) (ruling by U.S. Supreme Court upholding the separate but equal doctrine in education); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (ruling by the U.S. Supreme Court allowing the state of Mississippi to require a person of Chinese descent to attend Black segregated schools); *Buchanan v. Warley*, 245 U.S. 60 (1917) (ruling by U.S. Supreme Court prohibiting municipalities from requiring residential segregation); *Guinn v. United States*, 238 U.S. 347 (1915) (ruling by U.S. Supreme Court finding the Grandfather clause unconstitutional); *Williams v. Mississippi*, 170 U.S. 213 (1898) (ruling by U.S. Supreme Court that poll taxes and literacy tests used to block Black people from voting were constitutional); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (ruling by the U.S. Supreme Court upholding the

of the White racial recovery rhetoric of honor and remembrance as it operates invisibly to drive and manipulate legal outcomes.

Table of Ideographs and Analytical Frameworks Used in Reparations Litigation by Case

Case Name/Year	Ideograph	Analytical Framework Utilized	Outcome
Johnson v. McAdoo (1916)	Slavery	Sovereign Immunity The United States can only be sued by consent; consent acts as a waiver to sovereign immunity	The Court of Appeals for the District of Columbia affirmed the District Court’s grant of the State’s Motion to Dismiss
Cato v. United States (1995)	Slavery	Sovereign Immunity The United States can only be sued by consent or if the complaint filed against it is non-monetary in nature; consent acts as a waiver to sovereign immunity, as do requests for non-monetary damages	The United States Court of Appeals for the Ninth Circuit affirmed the District Court’s grant of the State’s Motion to Dismiss

separate but equal doctrine); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (ruling by the U.S. Supreme Court permitting Black people to serve on juries); *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974) (deciding to desegregate Boston public schools by bussing Black students to White schools); *Pearson v. Murray*, 182 A. 590 (Md. 1936) (ending segregation at the University of Maryland Law School); *Ferguson v. Gies*, 46 N.W. 718 (Mich. 1890) (ruling that a Black diner could not be restricted to the “colored” section of an eatery).

		<p>Statute of Limitations Applies as read into Plaintiff's complaints, as breach of no particular law or statute was alleged in the complaint</p>	
Cato v. United States (1995)	Discrimination	<p>Political question No legal framework for analysis exists, as the wrongs alleged are beyond the scope of the judiciary</p> <p>Standing To show standing, an individual must demonstrate a direct, traceable, specific harm between themselves and alleged bad actor(s)</p>	The United States Court of Appeals for the Ninth Circuit affirmed the District Court's grant of the State's Motion to Dismiss
Pigford v. Glickman (1999)	Discrimination (as used in an anti-discrimination context under a specific act)	<p>Anti-Discrimination analysis under the Equal Credit Opportunity Act</p>	United States District Court for the District of Columbia approved the settlement and approved the revised consent decree
Obadele v. United States (2002)	Discrimination	<p>Political question No legal framework for analysis exists, as the wrongs alleged are</p>	The Court of Federal Claims denied the State's Motion to Dismiss

		<p>beyond the scope of the judiciary</p> <p>Standing To show standing an individual must demonstrate a direct, traceable, specific harm between themselves and alleged bad actor(s) – procedural /not to be confused with eligibility for relief – merits-based²³⁶</p> <p>Fourteenth Amendment Equal Protection analysis as it relates to a racial classification in the Civil Liberties Act</p>	<p>The Court of Federal Claims affirmed the ORA’s grant of the State’s Motion for Judgment on the Administrative Record</p>
In re African-American Descendants (2005)	Slavery	<p>Statute of Limitations Applies to the specific claims alleged in the Descendants’ Second Amended Complaint ²³⁷</p>	<p>The United States District Court for the Northern District of Illinois granted Defendants’ Joint Motion to Dismiss Plaintiffs’ Second Amended</p>

236. *Obadele v. United States*, 52 Fed. Cl. 432, 437 (2002).

237. *See generally In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005). For a list of the applicable statute of limitations see *id.* at 773.

			Complaint
In re African Descendants ²³⁸ (2005)	Discrimination	<p>Standing To show standing an individual must demonstrate a direct, traceable, specific harm between themselves and alleged bad actor(s)</p> <p>Political Question (<i>Baker</i> Factors) No legal framework for analysis exists, as the wrongs alleged are beyond the scope of the judiciary</p>	The United States District Court for the Northern District of Illinois granted Defendants' Joint Motion to Dismiss Plaintiffs' Second Amended Complaint

C. *Pathos, Ethos, and Constitutive Rhetoric*

Aristotle's persuasive appeals of *pathos* and *ethos* refer to the rhetor's emotion and character in making effective arguments.²³⁹ *Pathos* refers to a rhetor's ability to persuade based on an emotional appeal, whereas *ethos* concerns how the rhetor's gravitas and credibility aid or undermine her or his ability to be persuasive.²⁴⁰ If the rhetor is not credible to her or his targeted audience, a decision-maker in the legal realm, then it is unlikely that she or he will be able

238. The *In re African-American Descendants* case discussed in this Article was appealed to the Seventh Circuit Court of Appeals. *In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006). The outcome was the same, although whether a complaint was dismissed with or without prejudice changed. *Id.* at 763.

239. CROWLEY & HAWHEE, *supra* note 18, at 12, 170.

240. *Id.* at 170.

to effectively invoke an emotional appeal.²⁴¹ In sum, *pathos* and *ethos* are connected as persuasive devices.²⁴² While scholars of discourse and rhetoric across disciplines have explored the relationship between *pathos* and *ethos* objectively, the rhetor's credibility and ability to make an emotional appeal are neither objective nor exclusive.²⁴³ As *pathos* and *ethos* operate in a racialized *nomos*, who the rhetor is and/or represents determines how and whether the intended audience can hear her or his arguments at all.

As a skilled orator and criminal defense attorney, Jake Brigance demonstrates an understanding of how *pathos* and *ethos* operate in the racialized *nomos*. By the time the reader meets Jake in *Sycamore Row*, we have a relationship with him. We first made his acquaintance in the novel *A Time to Kill* during his defense of Carl Lee Hailey, an

241. See *id.* at 170–71.

242. *Id.* at 171.

243. See, e.g., Melissa H. Weresh, *Morality, Trust, and Illusion: Ethos As Relationship*, 9 LEGAL COM. & RHETORIC: JALWD 229, 233 (2012) (writing about *pathos* and *ethos* in written rather than oral persuasion). Weresh writes:

A writer can demonstrate intelligence and competence by showing that she is informed, adept at legal research, organized, analytical, deliberate, empathetic, practical, articulate, eloquent, precise, innovative. A writer's character is revealed when she demonstrates truthfulness, candor, zeal, respect, and professionalism. Finally, good will refers to the apparent motivation of the advocate. "According to classical rhetoricians, a decision-maker will doubt the veracity of what an advocate has to say if the advocate does not appear to be well-disposed toward the decision-maker or toward another party that may be affected by the decision." Good will can be established or reinforced when the writer demonstrates authority; consistency; fairness; and concern for, or similarity with, the audience.

Id. (citing MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2d ed., Aspen Publishers 2008)). While her explanation of the subject matter is thorough and innovative, Weresh does not explore these concepts as they are modified by the rhetor's race beyond a surface investigation. *But see* ARIN N. REEVES, *WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS, NEXATIONS YELLOW PAPER SERIES* (2014), <http://nextions.com/wp-content/uploads/2017/05/written-in-black-and-white-yellow-paper-series.pdf> (detailing a study showing that partners at a law firm scored papers with writing errors lower when told they were written by a Black associate).

African-American man accused of murders he did indeed commit.²⁴⁴ Because Carl Lee Hailey gunned down two White men at a courthouse in the presence of a myriad of eyewitnesses, Jake turns to the defense of justification as his sole viable legal argument.²⁴⁵

When the reader once again meets Jake in *Sycamore Row*, three years after the events in *A Time to Kill*, his reputation as a credible defender of Black people abounds in Clanton's Black community, even as his reputation as a race-traitor persists in its White community.²⁴⁶ As a result, Jake's law practice is faltering and he is forced to expand beyond his comfort zone of criminal defense into a general civil practice.²⁴⁷ The Jake the reader encounters in *Sycamore Row* is a destabilized and somewhat downtrodden Jake, called upon yet again to defend one of Clanton's Black citizens—in this case, indirectly as a beneficiary of the estate Seth Hubbard asks him to defend.²⁴⁸ How he comes to represent Ms. Lang is directly attributable to the gravitas he gained from the Hailey representation.²⁴⁹ It is important to note that Seth Hubbard, a White man, hires Brigrance to defend his bequest to a Black woman based on his performance in the Hailey case.²⁵⁰ The reader expects Jake to make another *pathos*, as he did with Mr. Hailey's justification defense. However, Lettie Lang is not as sympathetic a client as was Carl Lee Hailey. Hailey, although a Black man indicted for the murders of two White men in a town where the White community would have sanctioned a lynching over a trial, murdered to avenge the rape of his ten-year-old daughter Tonya.²⁵¹ In defending Hailey, Jake connected with the decision-makers at trial, the jury, by appealing to the jury as parents, primarily as fathers whose White daughters suffered Tonya's same fate.²⁵² Jake's *pathos* was

244. JOHN GRISHAM, *A TIME TO KILL* 64–69, 91–92 (1989).

245. *Id.* at 63, 389–90.

246. GRISHAM, *SYCAMORE ROW*, *supra* note 4, at 9–10.

247. *Id.* at 7, 14–15.

248. *Id.* at 19.

249. *Id.* Seth Hubbard writes of Jake: “I chose you because you have a reputation of being honest and I admired your courage during the trial of Carl Lee Hailey. I strongly suspect you are a man of tolerance, something sadly missing in this part of the world.” *Id.*

250. *Id.*

251. GRISHAM, *A TIME TO KILL*, *supra* note 244, at 63, 68–69.

252. *Id.* at 340–41, 389–90.

effective because he had an understanding of the racialized *nomos* where he employed it; White girlhood, like White womanhood, is an expression of innocence and sexual virtue worthy of protection even unto death.²⁵³ Rather than transcending race, Jake invoked it by tapping into White racial rhetoric about patriarchy and the role of fathers in protecting their daughters' sexual purity.²⁵⁴

Jake could not invoke the same *pathos* in his defense of Lettie Lang. Lang, an African-American woman, was not worthy of Seth Hubbard's patriarchal protection because she was neither family nor a cultural member of Clanton's White community.²⁵⁵ Consequently, Jake was left with the White racial rhetoric of the loyal mammy, a caretaker who meant Mr. Hubbard no harm and only sought his best interests.²⁵⁶ In emphasizing that Lettie meant Seth no harm, however, Jake had to mediate Lettie's perception as the Jezebel, the sexual trickster who swindled Seth out of his fortune.²⁵⁷ Jake is at a crossroads in his defense of Seth Hubbard's will, where he must find a point of connection with the judge and jury. With the pressure of a looming trial, and Jake's fear that his case is unwinnable before a jury, he faces a dilemma.²⁵⁸ Jake's *ethos* cannot rehabilitate his ability to effectively engage *pathos* because of the racial rhetoric about who and what he represents.

Like Jake's dilemma in representing Lettie, at issue in the reparations litigation is not the *ethos* of the advocates, but rather the claimants, and how it undermines their advocates' ability to effectively employ *pathos*. As descendants of African slaves, the claimants' primary purpose is to connect slavery with ongoing racial harm. The

253. For contrast and comparison see, for example, RUTH NICOLE BROWN, *BLACK GIRLHOOD CELEBRATION: TOWARD A HIP HOP FEMINIST PEDAGOGY* (2009); ALL ABOUT THE GIRL: CULTURE, POWER, AND IDENTITY (Anita Harris ed., 2004); BELL HOOKS, *BONE BLACK: MEMORIES OF GIRLHOOD* (1997).

254. BARRY, *supra* note 101, at 32.

255. See, e.g., Teri A. McMurtry-Chubb, *#SayHerName #BlackWomensLivesMatter: State Violence in Policing the Black Female Body*, 67 *MERCER L. REV.* 651, 659 (2016) (arguing that post-Civil War Mammy was characterized as a failure of Black patriarchal authority; Mammy in the plantation household could raise the master's children under the guidance of his patriarchal hand but was unable to raise her own in freedom without it).

256. *Id.*

257. *Id.* at 660–61, 668–70.

258. See, e.g., GRISHAM, SYCAMORE ROW, *supra* note 4, at 293–96, 310–16.

racialized *nomos* is problematic to their endeavor because White racial rhetoric that fixes slavery as a past harm with no present relevance limits their use of *pathos*. In this context, the advocates' *ethos* in the reparations cases cannot overcome the ideographic-bound analytical structures in *logos* to make an emotional appeal based on the ongoing harms of slavery. The constitutive narrative,²⁵⁹ the retelling of the story of slavery as past, becomes a constitutive rhetoric of racial harm.²⁶⁰ Through its retelling as precedent, it continually reconstitutes White racial rhetoric as a credible source of knowledge about the past, while excluding Black racial rhetoric from the knowledge terrain. This practice renders the Black collective recovery rhetoric of perseverance, endurance, and hope as something outside of knowledge, less than fact, a non-credible source, an unpersuasive *ethos*.²⁶¹

This tension between the recovery rhetoric of perseverance, endurance, and hope vs. honor and remembrance demonstrates how the process of persuasion exacerbates the racial divide and thwarts a rhetoric of coherence that could lead to racial reconciliation. Advocates' attempts to draw on the rhetoric of alienation and the recovery rhetoric of perseverance, endurance, and hope in the briefs for *In re African Descendants* and *Cato v. United States* illuminate how *ethos* informs *pathos* to the reparations claimants' detriment in the racialized *nomos* of reparations litigation. For example, consider the Descendants' arguments in resistance to the defendants' claims that the political question doctrine applies to their case:

Equality under the law and freedom from discrimination are *not* reparations. They are separate issues *from* reparations. Their implementation does not provide repair for the damage done nor restitution for the property stolen. A decision by the Representative

259. Olick & Robbins, *supra* note 24, at 122–123.

260. See generally Maurice Charland, *Constitutive Rhetoric: The Case of the People Québécois*, 73 Q.J. SPEECH 133 (1987), reprinted in GORDON, *supra* note 20, at 30–31; JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC & POETICS OF THE LAW (1989).

261. See generally Charland, *supra* note 260, at 133; WHITE, *supra* note 260.

branches of government does not *ipso facto* relegate the issue of reparations to their exclusive purview.²⁶²

Likewise, the *Cato* plaintiffs' characterization of slavery in their opening brief:

This lawsuit is of great historical significance and is long overdue. There is sufficient precedent for the United States government to pay reparations to racial or ethnic groups that it has injured. Descendants of Native American nations have rightfully been paid millions of dollars for U.S. treaty violations. Japanese-Americans interned during World War II were rightfully paid \$20,000 each and given a formal apology by the government. Certainly the plight of enslaved Africans and their descendants—the thousands of dead African bodies tossed into the Atlantic ocean during the Middle Passage, the billions of dollars worth of free labor forcibly extracted at the crack of a whip, the innumerable rapes and beatings of women and men who toiled for lifetimes in the sweltering heat, the countless crying infants torn from the arms of their grieving mothers, the federal government's abandonment of the survivors of this holocaust to the mercy of lynch mobs and Klansman and humiliating treatment based on a theory of racial inferiority and all the subsequent cases of racially motivated discrimination, abuse and murder—surely this too deserves an apology and compensation.

The newly-freed Africans, having worked under grueling conditions from dawn to dusk for generations with no pay, certainly thought so. So did the federal government. The government promised these former slaves “forty acres and a mule” to compensate them for the economic disparity created by slavery, but delivered nothing. Today, 130 years later, poverty, racial antipathy, discrimination and other badges and indicia of

262. Plaintiff's Memorandum in Opposition to Defendants' Joint Motion to Dismiss the Second Amended and Consolidated Complaint at 6, *In re African-American Descendants*, No. 02-7764 (N.D. Ill. 2005).

slavery still blight the lives of African-Americans throughout the United States. The executive and legislative branches have both failed to remove those badges, as required by the judicial interpretation of the Thirteenth Amendment. Thus, Plaintiffs seek relief in federal court.²⁶³

The plaintiffs in *Cato* and *In re African-American Descendants* received none. A more promising forum for reparations recovery may be in the private domain of wills and the laws governing inheritance.

III. THE WILL AS CULTURAL NARRATIVE: TELLING STORIES OF RACE AND REDEMPTION

A will is a legal genre bound by legal conventions in its expression of the personal will of its creator.²⁶⁴ Its purpose is to convey a person's property at her or his death to those whom the testator designates.²⁶⁵ In her work on wills and narrative, legal scholar Karen J. Sneddon conceptualizes the will as a personal narrative.²⁶⁶ She describes the will as "central to the process in which an individual confronts his or her mortality, assesses his or her life's accomplishments and disappointments, and contemplates his or her legacy," and the estate planning process as "a journey in self-discovery."²⁶⁷ When viewed from this perspective, a will is a story, a narrative that the testator tells about her or his life through the language of the will and by those things the testator gives at death, how the testator chooses to give them, and the people to whom the testator gives them.²⁶⁸

The narrative about to whom the testator gives her or his property becomes a contested one when that person is not family. In instances where a will disinherits the testator's heirs by failure to give

263. Appellants' Opening Brief at 1–2, *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (No. 94-17102).

264. Karen J. Sneddon, *The Will as Personal Narrative*, 20 ELDER L.J. 356, 359 (2013).

265. *Id.*

266. *Id.* at 360.

267. *Id.* at 359.

268. *Id.* at 368–73, 405–09.

them any portion of the testator's estate, the disinherited resort to litigation to contest the will, primarily under the legal theory of undue influence. Undue influence "is an outside force that so dominates a testator's mind that it destroys his free agency and causes him to make a disposition he would not otherwise have made."²⁶⁹ A person finds her or himself under undue influence when she or he is "subject to such psychological domination by another that he cannot help but carry out the other person's wishes."²⁷⁰ The theory of undue influence encompasses any influence that overrides a testator's free will to dispense of his or her property, including influence that is benevolent.²⁷¹ When evaluating claims of undue influence, courts consider whether ruling in favor of those bringing the claim will subvert the testator's free will and intent in dispensing his or her property²⁷²—a key consideration, as free will is a manifestation of the Western ideals of individualism, property, and the importance of intent in creating and executing a will.²⁷³ This possibility threatens when the testator's bequest is perceived as outside of the normative universe of estate planning.²⁷⁴

Fundamentally, the will is a family inheritance paradigm. It tells the story of a family—arguably at least one of its members in relation to the others.²⁷⁵ Family, as understood in the Western world, is the normative universe of testamentary dispositions.²⁷⁶ Courts have

269. Julia Cowan Spear, *Undue Influence in Louisiana: What It Was, What It Is, What It Might Be*, 43 LOY. L. REV. 443, 444 (1997); see also Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997) (describing undue influence as "the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, resulting in an instrument that would otherwise have not been made").

270. Madoff, *supra* note 269, at 578.

271. *Id.* at 580.

272. *Id.* at 581.

273. Sneddon, *supra* note 264, at 371.

274. Madoff, *supra* note 269, at 581–82. See generally *In re Will of Kaufmann*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), *aff'd* 205 N.E.2d 864 (N.Y. 1965).

275. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 203 (2001).

276. *Id.* at 201–02 (arguing that "[e]stablished scholars and new voices in the field have presented a compelling picture of a system out of step with modern American society. They have shown that inheritance rules fail to recognize the full range of today's families; the growing pattern of family abuse, neglect, and non-

underscored that natural bequests are those the testator makes to family, while “unnatural” dispositions raise the possibility of undue influence; anyone not a blood relative of the testator is an unnatural beneficiary of his or her estate, even if that person was a caregiver to the testator before his or her demise.²⁷⁷ In casting non-familial bequests in this manner, courts have revealed their presumptions that:

(1) people can depend on spouses and blood relatives to look out for their best interests; (2) non-family members can generally not be depended on because they will act selfishly; (3) people want to leave the bulk of their property to spouses and blood relatives (regardless of the level of services provided by the members of the family); and (4) people want to benefit non-family members based on a contract model (with bequests relative to the value of the services provided by the non-family member).²⁷⁸

In sum, courts have viewed non-familial caregiving relationships as “governed by an ethic of selfish individualism and hence ‘naturally’ recognized by contract rather than gratuitous bequest.”²⁷⁹ As such, courts necessarily impose their understanding of a testator’s intent, based on legal and societal meanings attached to inheritance law, as a vehicle to preserve and transmit generational wealth.²⁸⁰ To the extent a testator’s narrative of family as expressed in his or her will deviates from the courts’ understanding, confusion abounds. A court considering a non-familial caregiver bequest must analyze the disposition in accordance with the family paradigm or seek another framework by which to make meaning of the testator’s intent.

support; and the evolving status of women in society”); Madoff, *supra* note 269, at 590 (arguing that “[t]he status of the beneficiary, rather than the quality of the beneficiary’s relationship to the testator, determines what is a natural disposition for purposes of the undue influence analysis”).

277. Madoff, *supra* note 269, at 590.

278. *Id.* at 603.

279. Foster, *supra* note 275, at 235 (citing Madoff, *supra* note 269, at 608).

280. *Id.* at 204–05.

At its core, narrative is a way of making meaning, of making sense of our selves and our experiences.²⁸¹ It is also a window into identity building; the stories we tell about ourselves are an exercise in constructing and expressing who we are.²⁸² In his foundational work *The Narrative Construction of Reality*, James Bruner argues that “[n]arratives . . . are a version of reality whose acceptability is governed by convention and ‘narrative necessity’ rather than by empirical verification and logical requiredness, although ironically we have no compunction about calling stories true or false.”²⁸³ In this vein, cultural narratives are conveyances of cultural realities governed by where they are expressed (convention) and the narrator’s purpose in using them (narrative necessity). A will, then, can be a cultural narrative insofar as what it bequeaths conveys a cultural reality. Its conventions order how the testator tells the narrative to serve its legal purpose of property distribution and its narrative function of advancing or disrupting cultural realities.

To examine Seth Hubbard’s will as a personal and cultural narrative, it is necessary to examine its rhetorical effect, both in convention and content. The will as a legal genre contains parts describing the identity of the testator, the people or entities named in the will, and the property they are given.²⁸⁴ These parts establish a will as a personal narrative.²⁸⁵ Each of these main parts has sub-parts as follows:

1. Identity—Who is the testator?²⁸⁶
 - a. Tense—How the testator refers to him or herself;²⁸⁷
 - b. Title—How the will is titled;²⁸⁸

281. See generally DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES (1988); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (1991).

282. STORIED LIVES: THE CULTURAL POLITICS OF SELF UNDERSTANDING 1 (George C. Rosenwald & Richard L. Ochberg eds., 1992).

283. Bruner, *supra* note 281, at 4–5.

284. See generally Sneddon, *supra* note 264, at 381–402.

285. *Id.* at 382.

286. *Id.*

287. *Id.*

288. *Id.* at 387.

- c. Overture—A declaration of the testator’s state of mind;²⁸⁹ and
 - d. Sequencing—What the order of the bequests tells us about how the testator chooses to tell his or her story.²⁹⁰
2. People—Who are the people or entities named in the will?²⁹¹
 - a. Named Beneficiary—Reveal the nature of the testator’s relationships;²⁹² and
 - b. Identification of family—Reveals what family members meant to the testator by how they are called.²⁹³
 3. Property—What does the will bequeath to the people and entities named and how is it described?²⁹⁴

A consideration of each follows the text of Mr. Hubbard’s will:

[Title] Last Will and Testament of Henry Seth Hubbard
[Identity, Tense, Overture]

I, Seth Hubbard, being 71 years old and of good mind but decaying body, do hereby make this my last will and testament:

1. I am a resident of the state of Mississippi. My legal address is 4498 Simpson Road, Palmyra, Ford County, Mississippi.
2. I renounce all previous wills signed by me, specifically one dated September 7, 1987, and prepared by Mr. Louis McGwyre of the Rush law firm in Tupelo, Mississippi. And that will specifically renounced one I signed in March of 1985.

289. *Id.* at 389.

290. *Id.* at 395.

291. *Id.* at 396–400.

292. *Id.* at 396.

293. *Id.* at 397.

294. *Id.* at 400–05.

3. This is intended to be a holographic will, with every word written by me, in my handwriting, with no help from anyone. It is signed and dated by me. I prepared it alone, in my office, on this day, October 1, 1988.
4. I am of clear mind and have full testamentary capacity. No one is exerting or attempting to exert influence over me.
[People]
5. I appoint as executor of my estate Russell Amburgh of 762 Ember Street, Temple, Mississippi. Mr. Amburgh was vice president of my holding company and has a working knowledge of my assets and liabilities. I direct Mr. Amburgh to retain the services of Mr. Jake Brigance, Attorney at Law, in Clanton, Mississippi, to provide all necessary representation. It is my directive that no other lawyer in Ford County touch my estate or earn a penny from its probate.
[People, Identification of family]
6. I have two children—Hershel Hubbard and Ramona Hubbard Dafoe—and they have children, though I don't know how many because I haven't seen them in sometime. I specifically exclude both of my children and all of my grandchildren from any inheritance under my estate. They get nothing. I do not know the precise legal language necessary to “cut out” a person from an inheritance, but my intention here is to completely prohibit them—my children and grandchildren—from getting anything from me. If they contest this will and lose, it is my desire that they pay all attorneys' fees and court costs incurred as a result of their greed.
[People, Identification of family]
7. I have two ex-wives who I will not name. Since they got virtually everything in the divorces, they

get nothing more here. I specifically exclude them. May they perish in pain, like me.

[Property]

8. I give, devise, transfer, leave behind (whatever the hell it takes) 90% of my estate to my friend, Lettie Lang, as thanks for her dedicated service and friendship to me during these last few years. Her full name is Letetia Delores Taber Lang, and her address on 1488 Montrose Road, Box Hill, Mississippi.

[Property, Identification of family]

9. I give, devise, etc., 5% of my estate to my brother, Ancil F. Hubbard, if he's still alive. I have not heard from Ancil in many years, though I have thought of him often. He was a lost boy who deserved better. As children, he and I witnessed something no human should ever see, and Ancil was forever traumatized. If he's dead by now, his 5% share remains in my estate.

[Property]

10. I give, devise, etc., 5% of my estate to the Irish Road Christian Church.

[Property]

11. I direct my executor to sell my house, land, real property, personal property, and lumber yard near Palmyra, for market value, as soon as practicable, and place the proceeds into my estate.

[Identity]

/s Seth Hubbard

October 1, 1988²⁹⁵

How Seth's story is sequenced gives the reader of the will a glimpse into his will as a personal narrative. Seth established himself as son of the South, a resident of Mississippi where he was born and where he died. His use of the term "I" and his writing the will in his own hand demonstrate that he is in control himself and his fate.²⁹⁶ In the letter to Jake Brigrance that accompanied the will, Seth tells Jake

295. GRISHAM, SYCAMORE ROW, *supra* note 4, at 20–21.

296. Sneddon, *supra* note 264, at 382–88.

that he is dying of lung cancer, and that he has taken his own life because his death from cancer is “imminent” and he is weary “of the pain.”²⁹⁷

Next in time is Seth’s identification of his family. His descriptions of them reveal his ire for his children and ex-wives. His children get nothing because of greed, and his wives because they already received their share. Seth’s disposition to Ancil alludes to his reasons for favoring Lettie over his descendants. Ancil, as a witness to a traumatic event (the lynching of Lettie’s great-grandfather Sylvester Rinds) “was a lost boy who deserved better.”²⁹⁸ Although Ancil did not have the courage or fortitude to stay in Mississippi or keep in touch with his brother, he saw what happened. His broken ties with his family do not place him beyond his ties to Seth, but Seth does not make the bequest to him just because they are blood relatives. On the contrary, Seth’s bequest to Ancil is also a challenge to the family inheritance paradigm; it focuses on the quality of Seth’s relationship with Ancil, forged and unbreakable through the shared trauma of the lynching, and not familial connection.

Lastly, Seth’s identification of his property is rather terse, evidence that his money is not as much of the focus as to whom he chooses and chooses not to give it to. He simply states that he wishes to give the bulk of his estate by “whatever the hell it takes” to his “friend and caregiver Lettie Lang.”²⁹⁹ Likewise, he refers to his dispositions to Ancil and his church simply as percentages of the estate.

As predicted, Seth’s children contest the will under a theory of undue influence.³⁰⁰ Their efforts attempt to reconcile the will with their understanding of the family as the normative universe of testamentary behavior. Central to their allegations of undue influence are their perceptions of Lettie as a trickster; the only way they can reconcile their father’s actions is to prove that he was tricked or under the Lettie’s sexual spell.³⁰¹ Thus, they draw from the stock story of the non-familial character as trickster, a master narrative to explain the

297. GRISHAM, SYCAMORE ROW, *supra* note 4, at 19.

298. *Id.* at 21.

299. *Id.*

300. *Id.* at 260, 279–80, 364–67.

301. *Id.*

legal theory of undue influence.³⁰² This particular stock story carries a racial dimension because Lettie is a Black woman. Where Seth describes her as a dedicated friend and caregiver, his children interpret his description as evidence that Lettie fits the trope of either Mammy or Jezebel.³⁰³ As a Mammy, Lettie is an asexual and benevolent caretaker who took care of Seth with no expectation of payment.³⁰⁴ They express their views about Lettie through their discussions of her with each other when they first encounter her after their father's death, and they critique how much she received in wages.³⁰⁵ The Hubbard siblings subsequently fire her.³⁰⁶ With their discussion, they create a White racial rhetoric in which they "know" how people like Lettie, Black women, operate. Once Seth's descendants find that the will names Lettie, but not them, Lettie becomes a Jezebel who enticed their father with sex for the purpose of duping him out of his estate.³⁰⁷ From their perspective, her influence so dominated Seth's mind that it destroyed his free agency and caused him to make a bequest that he otherwise would not have made.³⁰⁸

Seth's will as a cultural narrative is equally compelling. By refusing to give any money to his descendants, Seth deviates from the family inheritance paradigm, an act which he is certain will result in a will contest. His will is an act of disruption in that it takes what is legally considered a market relationship—his relationship with his caregiver Lettie Lang—and places it firmly into his family's paradigm. His act contravenes an expression of his free will as an act of Western

302. Susan M. Chesler & Karen J. Sneddon, *Tales From A Form Book: Stock Stories and Transactional Documents*, 78 MONT. L. REV. 237, 246, 268 (2017). The authors state: "[p]art of the power of stock stories is that the pattern does in fact fit so many narratives. For example the non-family caregiver may in fact be the trickster who is attempting to deceive the testator for the caregiver's own benefit." *Id.* at 268. The authors go on to argue: "the non-family trickster who receives a gift under the will may be interpreted as the stock character of the trickster, even without facts that would suggest the non-family caregiver is a trickster." *Id.* at 272–73.

303. The authors state: "[t]he readily recognizable stock story in a form document may thus make an attempt to project an alternate story difficult, especially if the alternate story runs counter to the expected stock story." *Id.* at 271.

304. GRISHAM, SYCAMORE ROW, *supra* note 4, at 25–36.

305. *Id.*

306. *Id.* at 75–76.

307. *Id.* at 260, 279–80, 364–67.

308. *See id.*; *see also* Spear, *supra* note 269, at 444.

individualism. Rather, it is an expression of the non-Western concept of collective responsibility, recognition of Black alienation, and the Black recovery rhetoric of perseverance, endurance, and hope.³⁰⁹ Lettie becomes a beneficiary of the rightful inheritance denied to her when her family member was lynched and her land was stolen. Simultaneously, Seth's descendants disinherit the estate, which they did nothing to earn or deserve in their father's eyes. To rectify the wrong done to Lettie's family Seth's children must pay the price for their unearned privilege, the substantial proceeds of the estate. Ancil pays no price for his inaction, because he has not claimed his privilege in the space Seth and his children occupy (Mississippi in particular, family in general), even as his inaction (when contacted) almost completely undermines Seth's testamentary intent.³¹⁰

Seth's treatment of his descendants and his brother offers powerful commentary about ongoing racial harms and who bears the responsibility for correcting them. That Seth's will is the convention used to rectify a racial wrong is significant in its own right. Again, the will subverts the family inheritance paradigm as it applies to slavery and places the market relationship of human trafficking within the realm of the plantation (a familial structure), arguably the patriarchal archetype for the State and its relationships with the enslaved and their descendants.³¹¹ The benefits of "whiteness" as an unearned personal benefit and unearned inherited birthright are inaccessible to those not born white or who have not assimilated into whiteness.³¹² To those not in the "family" or "cultural/social memory," the cultural inheritance that Seth bequeaths is access as a function of collective responsibility for ongoing racial harm. In its rhetorical function it collides with White racial rhetoric to push us toward a rhetoric of coherence as it reshapes our knowledge of collective identity and individualism. It challenges notions that the racial benefits of whiteness as they manifest

309. See Sneddon, *supra* note 264, at 371 (describing the will as an expression of the "Western concept of individualism of property").

310. GRISHAM, SYCAMORE ROW, *supra* note 4, at 100, 186–87, 431.

311. See, e.g., McMurtry-Chubb, *supra* note 255, at 653–55 (2016) (arguing that the plantation acts as the precursor to the State in its control of and violence against Black bodies).

312. See generally DAVID R. ROEDIGER, THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS (1991) (noting the phenomena of immigrant whites to assimilate into whiteness).

materially are the result of one's individual efforts, just as it challenges the notion that racial penalties are inherited and normal.

IV. FROM SYSTEMIC CHANGE TO INDIVIDUAL ACTION: WHAT
SYCAMORE ROW CAN TEACH US ABOUT RACIAL RECONCILIATION

Conventional wisdom dictates that a collective response is necessary to address a collective harm. In the reparations context, reparations proponents have looked to the nation's courts and legislatures to acknowledge the scope of slavery and its role in wealth distribution in the United States, as well as the role of Jim Crow in reinforcing the boundaries of that wealth distribution.³¹³ That Congress has not yet discussed any reparations bill³¹⁴ and successful reparations litigation remains elusive in the courts suggest that a collective response may be a wrong-headed one. Seth Hubbard's will models how individual acts not only change those to whom they are directed, but also reverberate and impact communities on a larger scale.

Beginning with his suicide and suicide note, Seth Hubbard set in motion a series of events that would lead to at least one reconciliation between the Hubbard family and the descendants of the Rinds family. The note alluded to the harm that precipitated Seth's change of will and left specific instructions for Jake Brigance on how

313. See *supra* note 308; see generally ALFRED L. BROPHY, REPARATIONS PRO AND CON 55–74 (2006); Ta-nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

314. Beginning in 1989, Congressman John Conyers has introduced a bill each year to establish a committee to study the possibility of African-American reparations. *In re African-American Slave Descendants Litigation*, 375 F. Supp. 2d 721 (N.D. Ill. 2005). However, none of the bills have made it to the floor. *Id.* The preamble to the Conyers Bill explains the purpose of the legislation is:

to acknowledge the fundamental injustice, cruelty, brutality, and inhumanity of slavery in the United States and the 13 American colonies between 1619 and 1865 and to establish a commission to examine the institution of slavery, subsequent de jure and de facto racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, [and] to make recommendations to the Congress on appropriate remedies, and for other purposes.

Id.

he wished to proceed with protecting his estate.³¹⁵ As an instrument, his will and its bequest of the majority of the Hubbard estate to Ms. Lang was an implementation of the plan set out in his suicide note.

Hubbard's will demonstrates that racial reconciliation begins with an acknowledgment of harm done. Although the will itself does not name the harm, Seth's disposition of property to Lettie Lang is a concrete action to acknowledge that her ancestor was lynched, his father among the mob that drove her family from their land. Hubbard's monetary gift acts as an apology, an understanding that the loss of Rinds land was not only a symbolic loss for Lettie's family ("racism" or "discrimination" in the abstract) but also a loss that resulted in wealth for the Hubbard family at the expense of the Rinds descendants. It is not until Ancil Hubbard's radical confrontation with his past, his final reckoning with the events that shaped his life and estranged him from his family and their homestead, that the harm is named, described, and most importantly experienced in the retelling.³¹⁶ In a courtroom, the parties to the will contest learn the events that shaped Seth's life and precipitated his gift to Lettie.³¹⁷ Ancil's words change what they know and how they know. His recounting of the story moved them from logic to experience. Seth and Ancil were not responsible for what happened to Lettie's family, and Lettie was not born when the events that would change her life occurred. Yet Seth's way of knowing was altered by this critical disruption in his development, which caused him to see and interpret injustice—even though he was not an actor he would not remain complicit in perpetuating the harm or blindly accept the benefits from it.

Hubbard's will and the ensuing will contest illuminate the tension between logic and experience in effectuating racial justice. Logic depends on epistemology and ontology; logical arguments are logical only so far as the boundaries of knowledge in which they operate allow.³¹⁸ If the jury sitting for Seth's will contest are any indication, it is not beyond the intellectual abilities of most people currently residing in the United States to understand that slavery and its manifest harms are wrong, and that people of African descent are

315. GRISHAM, *SYCAMORE ROW*, *supra* note 4, at 20.

316. *Id.* at 425–31.

317. *Id.* at 427–37.

318. VAN DIJK, *supra* note 64, at 12, 22.

treated as they are as the result.³¹⁹ The problem is not one of logic but of translation and interpretation.³²⁰

The Black rhetorics of alienation, perseverance, endurance, and hope have created a universe of knowledge in which people of African descent understand the African diasporic experience and their place in it in a particular manner. In this universe, experiential knowing takes primacy over logical knowing. Within the boundaries of the Black rhetorical universe, reparations are logical because the collective, lived, and remembered experiences of people of African descent are themselves evidence of harm that requires redress. This is a truth that Seth's jury came to know. In contrast, the White racial recovery rhetoric of honor and remembrance creates a universe of knowledge where the definition of harm is itself episodic, intentional, and direct. There can be no harm without a direct actor or benefits without the intentional acts of the individual who creates them; there is no bright line of harm or benefit linking the past to the present. In this knowledge universe, linear thought that operates as "logic" takes primacy over experience. In this knowledge-universe, logic is truth.³²¹

Examples of Black and White rhetorics and their knowledge building power exist as recently as the "acts of domestic terrorism" in Charlottesville over the removal of a Confederate monument honoring Robert E. Lee, even as there was violence "on both sides."³²² Black and White recovery rhetorics polarize us by our differences and dictate how we talk about them and understand them. In a normalized universe in which there are facts and alternate facts, a right and alternate right, a left and an alternate left, the reality is that there can be no collective understanding of the past and present across racial lines. Until we can move into a rhetoric of coherence, America remains stalled at the first step in racial reconciliation—acknowledgment. As a country, we cannot even acknowledge who has been and continues to be harmed, what is the scope of harm, and who was and continues to be responsible. Without this critical first step,

319. GRISHAM, *SYCAMORE ROW*, *supra* note 4, at 439–40.

320. VAN DIJK, *supra* note 64, at 12, 22.

321. HALL, *supra* note 31, at 7.

322. *See, e.g.*, Dan Merica, *Trump Says Both Sides to Blame Amid Charlotte Backlash*, CNN (Aug. 16, 2017), <http://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html>.

our country cannot move forward with developing and implementing a plan to address those harms.

Litigation is not a viable tool to move us toward a rhetoric of coherence as it concerns reparations. *Logos* as it operates in the racialized *nomos* in which reparations litigation takes place locks lawyers and jurors into analytical frames that further cement negative difference. Claimants who seek constitutional remedies for racial harms need look no further than the reparations cases to see they are on a fool's errand. Despite the promise of social engineering³²³ to change the nature of the *nomos* so that existing frameworks function differently within it, the racialized *nomos* is fixed in White racial rhetoric and defaults to it. As the reparations cases underscore, advocates and jurists can employ ideographs that trigger the application of analytical frameworks that work against Black racial rhetorics more easily than they can overcome them. In short, it is easier to socially engineer racial outcomes that perpetuate White racial rhetoric and aid in the continuance of White supremacy. The "reverse discrimination" cases are instructive here.³²⁴

The long game, the key to a rhetoric of coherence, is disruption. Those who seek racial reconciliation must literally change how we talk about race to change how we know race. Ancil's testimony disrupted what the jurors thought they knew, the stock story of the trickster caregiver who swindled her charge out of his fortune. It also disrupted the racialized *nomos* by constructing a new collective memory of race that did not enshrine "negative difference" but led to an understanding among the jurors of how those differences operated in the context of

323. Social engineering was a key legal strategy conceived by Charles Hamilton Houston and employed by Houston, Thurgood Marshall and other civil rights attorneys, especially those at the NAACP Legal Defense Fund. At its core it attempts to use the law to create precedent that will ultimately change the law to support social justice.

324. See, e.g., Sherrilyn Ifill, Opinion, *Racial Justice Demands Affirmative Action*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/opinion/college-discrimination-whites-donald-trump-.html> (detailing the systematic overturning of civil rights advancements under the guise of reverse discrimination). Sherrilyn Ifill is the head of the NAACP Legal Defense Fund. See also Sean Higgins, *Former Senate Democrat: Trump Can Fix "Reverse Discrimination,"* WASH. EXAMINER (Jan. 20, 2017), <http://www.washingtonexaminer.com/former-senate-democrat-trump-can-fix-reverse-discrimination/article/2612435>.

1930 rural Mississippi to work an injustice on the Rinds family. Ancil's narrative was about trauma and the misuse of power, universal themes whose actors are interchangeable. He told a story about curious boys who became scarred men, one who left (Ancil), one who stayed (Seth), and ultimately both who made things right. Ancil's tale is also about a family (the Rinds family and their descendants) who because of their race and industry were targeted for what they had and who they were. Yet they survived, the trauma they suffered a reflection of the collective memories of their family and their people.

Fiction is a disruptive force that can change attitudes and perceptions.³²⁵ *Sycamore Row*, as a work of fiction, changes the conversation about race and reparations as it changes our sources of knowledge from logic to experience. In the hands of a writer like John Grisham, fiction may be just the intervention we need for racial reconciliation.

325. See, e.g., Melanie C. Green, Jennifer Garst & Timothy C. Brock, *The Power of Fiction: Determinants and Boundaries*, in *THE PSYCHOLOGY OF ENTERTAINMENT MEDIA: BLURRING THE LINES BETWEEN ENTERTAINMENT AND PERSUASION* 161–76 (L.J. Shrum ed., 2004) (discussing how fiction and narrative have the ability to change attitudes).