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NEURORHETORIC, RACE, AND THE LAW: TOXIC NEURAL PATHWAYS AND HEALING ALTERNATIVES

LUCY JEWEL*

INTRODUCTION

Persuasion happens in both the brain and the body. Departing from a Cartesian view of rationality, neuroscience explains that the mind and the body are highly integrated. It is a fallacy to believe that we engage with arguments in an abstract, analytical, and unemotional fashion. Instead, neuroscience explains that when rhetoric influences us, it does so in an embodied way, triggering electrochemical reactions that traverse our neural pathways, beyond the purview of our conscious thought. Although it sounds like a science fiction concept, the biological and embodied nature of rhetoric is in line with the beliefs of the ancient Sophists, who understood rhetoric to have the same kind of effect on the brain as a drug. This ancient understanding, that rhetoric can infiltrate the human body, is another instance where ancient knowledge aligns with modern scientific theory.¹

Neurorhetoric is the study of how rhetoric shapes the human brain. At the forefront of science and communication studies, neurorhetoric challenges many preconceptions about how humans respond to persuasive stimuli. Neurorhetoric can be applied to a multiplicity of relevant legal issues, including the topic of this Symposium Issue: race and advocacy. After detailing the neuroscientific and cognitive theories that underlie neurorhetoric, this Essay theorizes ways in which neurorhetoric intersects with the law, advocacy, and race. This Essay explores how toxic racial stereotypes and categories become embedded in the human brain and what can be done about it.

This Essay, which examines the way that language creates thought patterns that can become collectively entrenched, is especially relevant in our extremely divisive political age. For instance, President Donald Trump's campaign drew upon negative stereotypes about minorities by crafting an *us*

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1. See Lucille A. Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 *LEGAL COMM. & RHETORIC* 39, 40–42 (2016) (positing that ancient wisdom concerning effective argumentation is supported by modern scientific understandings of human information processing).

vs. them dichotomy to foment political support.² As discussed below, these either/or thought patterns, adopted collectively, are what fueled the totalitarian and fascist regimes prior to World War II. And it is not just right-wing western political rhetoric that threatens. The Islamic State of Iraq and Syria (ISIS) also employs highly effective rhetorical tactics of inclusion and exclusion, defining a community of Muslims (the *Ummah*) who must join in *jihad* against the *kufir* camp, all those individuals existing outside the *Ummah*. ISIS's rhetoric, diffused online through multiple media platforms, effectively draws in disaffected youth from all over the world to join the movement, become part of the community, and massacre those outside of the community.³

The harmful rhetoric used to describe racial minorities and other subordinated groups produces toxic thought patterns that can become entrenched in the public mind. For instance, as this Essay explains in more detail below, when overt racism lost political credibility in the 1970s, conservative political operatives began using coded categories to link racial minorities with enduring negative stereotypes. For example, the term "Welfare Queen" automatically conjures up racialized images that reify existing power structures in a rapid and unconscious way. The term quickly captures complex ideas concerning the undeserving versus deserving poor, the racialized and feminized nature of poverty in the United States, and longstanding historical stereotypes about race, work, and family.⁴

Neuroscience explains why and how racially coded categories are so efficient: they create neural pathways that, upon continued use, become collectively entrenched. An entrenched neural pathway offers a smooth and rapid path for a conclusory message to reach an individual's consciousness. Coded categories are harmful because they encourage rapid unconscious thinking that has the effect of hardwiring stereotypes into the pathways of the brain. The rapid way in which a term raises these unspoken conclusions makes it difficult to imagine other narrative possibilities or engage in reasoned deliberation about the issue.

This Essay explores six thoughts related to neurorhetoric, the law, and race. First, this Essay generally explains the cognitive science and neuroscience theories that form the foundation of neurorhetoric, describing how

2. Ian Haney-López, *This Is How Trump Convinces His Supporters They're Not Racist*, NATION (Aug. 2, 2016), <https://www.thenation.com/article/this-is-how-trump-supporters-convince-themselves-theyre-not-racist/> (identifying "Trump's tales of racial doom" as "the four horsemen of Latino immigration, black crime, Islamic terrorism, and Chinese economic manipulation"); see *infra* notes 82–83 and accompanying text.

3. See Amaryllis Georges, *ISIS Rhetoric for the Creation of the Ummah* 4, 19–20 (TRENDS Research & Advisory Working Paper No. 6, 2015), <http://trendsinstitution.org/wp-content/uploads/2015/07/ISIS-rhetoric-for-the-creation-of-the-Ummah1.pdf>.

4. See *infra* notes 19–26.

rhetoric enters and interacts with the human brain and body. Second, from a historical perspective, this Essay explores how racialized rhetoric can be used to produce collective brain pathways that dehumanizes entire groups of people—a frightening process that sheds light on the widespread acquiescence to genocide and racial annihilation, such as what occurred in the Holocaust.

The third point fleshes out the intersection between neurorhetoric and race in the United States, with a specific focus on how U.S. racial stereotypes become embedded in the collective brainscape. The fourth point addresses neurorhetoric and the law, detailing law's unique power to reify concepts, which makes the law an especially potent type of embodied rhetoric. Building upon the previous discussion, the fifth point provides three concrete examples of how neurorhetoric connects with the law and race—in the courtroom, in recent tragedies involving police shootings of black men, and in the term “alien,” a toxic legal category that castigates and dehumanizes immigrant groups.

Finally, this Essay concludes with a theory of hope. To the extent that rhetoric produces collective neural pathways that reinforce racial oppression and subordination, the identification and deployment of alternative discourses have the potential to carve out healing pathways that can reshape brains, both individually and collectively. To that end, this Essay proposes a novel approach to legal rhetoric: a comparative approach that might uncover alternative discourses that can be infused into the law, carving out healing brain pathways and devitalizing pernicious pathways.

I. DEVELOPING THE DISCIPLINE OF NEURORHETORIC

A. The Foundation: Conceptions of Rhetoric

Neurorhetoric is a new discipline that applies neuroscience to understand how rhetoric stimulates activity that can actually change the shape and form of the brain. To set the foundation, it is useful to return to the original understanding of the term rhetoric. Ancient Greek rhetoricians defined rhetoric as the art of persuasion and/or a process for discovering truth by argumentation.⁵ This conception of rhetoric is fairly narrow, in contrast to the word's original etymology. Rhetoric derives from the Greek word “*eirō*,” or “I say.” Rhetoric could mean “[a]lmost anything related to the act of saying something to someone”⁶ The point here is that rhetoric relates to language, conversation, words, and even images. A broader conception of rhetoric complements the ideas in this Essay, which addresses

5. RICHARD E. YOUNG ET AL., *RHETORIC: DISCOVERY AND CHANGE* 1 (1970).

6. *Id.*

how words and phrases become cemented inside the brain in such a way as to influence thoughts and beliefs.

As a matter of orientation, neuroretoric sits within the discipline of modern rhetoric, the study of persuasion and communication in a variety of contexts—ancient narratives, poetry, literature, popular culture, film, television, and the news media. Modern rhetoric is also interdisciplinary, engaging with social and scientific theories to understand how people are persuaded. Legal rhetoric, described more fully below, studies persuasion in a legal advocacy setting. This Essay draws upon both modern rhetoric studies and legal rhetoric disciplines.

B. The Mind: Cognitive Rhetoric and Cognitive Science

Neuroretoric descends from cognitive rhetoric, the application of cognitive science, or the study of “how people conceptualize the world[,]”⁷ to rhetoric. Cognitive rhetoric might be understood as the generalized study of how the human mind responds to persuasive stimuli.⁸ Cognitive rhetoric is often focused on two fundamental concepts—metaphors and categories. Metaphors and categories are devices that help humans streamline thoughts when confronted with complex information.⁹

A metaphor allows the human mind to connect one concept to another in an automatic and embodied way.¹⁰ The metaphor of *more* correlating with *up* (positive) and *less* correlating with *down* (negative) exemplifies a concept that has become deeply connected to the mind, the body, and the physical environment.¹¹ When we remark that things are “looking up” to express a positive outlook, we are expressing an embodied metaphor, without realizing the connection between the positivity and the upwards direction. Moreover, the directional shifts, up or down, reflect the physical way

7. GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* 3 (2d ed. 2002).

8. For a general overview of cognitive rhetoric principles, see Jewel, *supra* note 1. Cognitive rhetoric also uncovers knowledge of how humans can be persuaded when information is presented in certain ways, such as introducing a request, subtly, up front, before asking the subject to act on the request. See Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 415 (citing DANIEL O’KEEFE, *PERSUASION: THEORY AND RESEARCH* 169 (1990)). For a succinct exploration of cognitive rhetoric in the context of political discourse, see GEORGE LAKOFF, *THE POLITICAL MIND: A COGNITIVE SCIENTIST’S GUIDE TO YOUR BRAIN AND ITS POLITICS* (2009).

9. See generally GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (2003 ed. 1980); GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987). Lakoff refers to metaphors and categories, or even narratives, as cognitive *frames*. LAKOFF, *supra* note 8, at 22, 133.

10. LAKOFF, *supra* note 7, at 4; STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 65 (2001).

11. See LAKOFF & JOHNSON, *supra* note 9, at 14–16; WINTER, *supra* note 10, at 31.

that the metaphor bridges connections between our minds and our physical bodies.

Categories are often comprised of one or more associative metaphors. We “pick out parts of our experience and treat them as discrete entities or substances of a uniform kind.”¹² For instance, when we categorize someone as motherly or maternal, we apply widely shared physical experiences to give a category a metaphorical meaning. The understanding that a maternal person is a warm and caring person stems from early childhood experiences that have become deeply embodied. As infants (for most but not all individuals), we associated our mother with warmth, food, and nurturance. This example illustrates how the connectedness of the two concepts—motherhood with warmth and caring—arose from our bodily experiences.¹³

Like metaphors, categories function unconsciously and rapidly.¹⁴ Lakoff and Johnson explain:

Understanding our experiences in terms of objects and substances allows us to pick out parts of our experience and treat them as discrete entities or substances of a uniform kind. Once we can identify our experiences as entities or substances, we can refer to them, categorize them, group them, and quantify them—and, by this means, reason about them.¹⁵

When we are confronted with a category, our mind quickly grasps the complexity of the concept. We simplify complex information when the various parts of the concept come together in one unified whole. Further, categories do not always reflect objective truths about the material world; rather, they may be based on subjective choices that reflect one’s culture or individual experience.¹⁶ Culture can produce unified categories that function as metaphorical “code” for more implicit concepts.¹⁷ For example, when we use the category “unwed mother” or “working mother,” our mind quickly latches onto the majoritarian cultural values associated with these categories.¹⁸ Both of these categories imply that the mother is less than ideal.

Social stereotypes cognitively function as coded categories, collectively understood to refer to negative generalizations about a social or racial

12. LAKOFF & JOHNSON, *supra* note 9, at 25.

13. GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT* 46–51 (1999).

14. *Id.* at 13, 18; *see also* LAKOFF & JOHNSON, *supra* note 9, at 25.

15. LAKOFF & JOHNSON, *supra* note 9, at 25.

16. *See* LAKOFF, *supra* note 9, at 8 (“[H]uman categorization is essentially a matter of both human experience and imagination—of perception, motor activity, and culture on the one hand, and of metaphor, metonymy, and mental imagery on the other.”).

17. *See* LAKOFF, *supra* note 8, at 83–84.

18. LAKOFF, *supra* note 9, at 80, 82.

group.¹⁹ Social and racial stereotypes rely on metonymy, the concept that some or a few attributes of a category stand for the whole.²⁰ In her masterful article, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, Professor Ann Cammett utilizes cognitive rhetoric to explain the “Welfare Queen” epithet, which conveyed a powerful, racially coded message generating political disfavor for social welfare legislation in the 1970s.²¹ The Welfare Queen trope developed out of a 1970s news story concerning an unmarried mother who fraudulently used aliases to obtain welfare benefits in the 1970s, abusing the benefits system to amass cash and wealth.²² Ronald Reagan repeatedly popularized the term in stump speeches, raising ire directed toward the Welfare Queen, her cash, and her Cadillac.²³ The fraudulent practices of one welfare recipient became, in metonymic fashion, the category that stood for all mothers on welfare. The Welfare Queen term relied on the metaphorical category of mother, but defined mother in the alterity, as an exemplar of a mother with loose morals and little virtue.²⁴ The reference to other attributes of category membership—the Cadillac for instance—functioned to cement an implicit and collective understanding that mothers on welfare were primarily black, even though the majority of those on public assistance at the time were white.²⁵ With one shot over the bow, the Welfare Queen rhetoric generated a syn-

19. *Id.* at 84–85; see also Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014).

20. LAKOFF, *supra* note 9, at 20, 84–85.

21. Cammett, *supra* note 19. In the spring of 2016, Professor Cammett re-examined the Welfare Queen trope in the context of recent efforts to criminalize black mothers. See generally Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers in the Age of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363 (2016). Professor Cammett’s latest piece on the Welfare Queen was part of an excellent symposium, organized by Professor Camille Gear Rich, where scholars examined the Welfare Queen construct through feminist and critical race theory lenses, with the goal of reframing the narrative. The papers presented at this symposium are collected in an issue of the *Southern California Interdisciplinary Law Journal*. See R.A. Lenhardt, *Black Citizenship Through Marriage? Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347 (2016); Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395 (2016); Lisa R. Pruitt, *Welfare Queens and White Trash*, 25 S. CAL. INTERDISC. L.J. 289 (2016); Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. L.J. 257 (2016); Laurel Parker West, *Soccer Moms, Welfare Queens, Waitress Moms, and Super Moms: Myths of Motherhood in State Media Coverage of Child Care During the “Welfare Reforms” of the 1990s*, 25 S. CAL. INTERDISC. L.J. 313 (2016).

22. See Cammett, *supra* note 19, at 243–44; Josh Levin, *The Welfare Queen*, SLATE (Dec. 19, 2013, 12:41 AM), http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html.

23. See Levin, *supra* note 22 (“[I]n stump speech after stump speech, Reagan regaled his supporters with the story of an Illinois woman whose feats of deception were too amazing to be believed.”).

24. See Cammett, *supra* note 19, at 237, 248.

25. *Id.* at 236, 237, 244.

thesis of negative racial stereotypes about struggling mothers living in poverty.

In historical context, the Welfare Queen example illustrates the so-called “Southern Strategy,” a new type of racially coded rhetoric deployed by conservative politicians after the civil rights movement when it became impolite to display overt racism. In an infamous recorded interview, Lee Atwater, an architect of the Southern Strategy, explained that in lieu of using racial epithets to foment support (as had been the practice in the 1930s and 1940s), it was much more effective to utilize abstract categories like “forced busing, states’ rights, and all that stuff,” which functioned as code words indicating the superior interests of white citizens over those of black citizens.²⁶

C. *The Brain: Neuroscience*

Building upon cognitive rhetoric, neurorhetoric expands our understanding of how persuasion works, studying how informational stimuli interact within the neural pathways of the brain. Neuroscience explains that when we think, electrochemical reactions fire and are conducted from one place to another in our synapses, the connective spaces between two neuron cells in our brain.²⁷ This activity occurs through neural circuits or networks.²⁸ Whereas cognitive rhetoric might be conceived as the study of how persuasion works in the *mind*, neurorhetoric looks at how persuasion works in a biological sense, in the *brain*.²⁹

Thus, neurorhetoric seeks to connect neuroscientific understandings of cognition and thought to rhetoric, adding another layer of understanding for

26. Rick Perlstein, *Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy*, NATION (Nov. 13, 2012), <http://www.thenation.com/article/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/> (italicized in original).

27. JOSEPH LEDOUX, SYNAPTIC SELF: HOW OUR BRAINS BECOME WHO WE ARE 44 (2002). The cells in our brains, called neurons, have special appendages—axons that function as output channels and dendrites that function as input channels—that connect in the synapse. *Id.* at 40–41.

28. *Id.* at 49.

29. Neurorhetoric is a new discipline. Brett Ingram, an assistant professor of rhetoric at Boston College, has written a masterful doctoral dissertation that introduces the subject. Brett Ingram, *Critical Rhetoric in the Age of Neuroscience* (Feb. 2013) (unpublished Ph.D. dissertation, University of Massachusetts Amherst), http://scholarworks.umass.edu/open_access_dissertations/690/?utm_source=rss&utm_medium=rss&utm_campaign=critical-rhetoric-in-the-age-of-neuroscience. George Lakoff’s work, insofar that it addresses how neural synapses respond to discourse, could also be categorized as neurorhetoric. *See, e.g.*, LAKOFF, *supra* note 8, at 24–26, 83–85. In addition to Ingram and Lakoff, Jeff Pruchnic, who teaches rhetoric at Wayne State University, writes on the topic. *See* Jeff Pruchnic, *Neurorhetorics: Cybernetics, Psychotropics, and the Materiality of Persuasion*, 16 CONFIGURATIONS 167 (2009). William Connolly and Pasi Väliäho would also qualify as scholars of neurorhetoric. *See* WILLIAM E. CONNOLLY, NEUROPOLITICS: THINKING, CULTURE, SPEED (2002); PASI VÄLIAHO, BIOPOLITICAL SCREENS: IMAGE, POWER, AND THE NEOLIBERAL BRAIN (2014).

how meaning is created in the brain. Central to neuroretoric are the concepts of *neuroplasticity*, *mapping*, and *canalization/attenuation*. Neuroretoric's biggest takeaway is the idea that discursive stimuli (such as words or categories) can actually impact the structure of the brain, individually and on a mass scale.

Neuroplasticity is the concept that the structure of one's brain can be altered by one's experience. When we think a certain thought or perform a physical action, our brain's neuron cells fire in different areas, coming together to complete the task. As we repeat a mental operation, these neurons continue to fire in different areas and eventually become fused together in a network or circuit.³⁰ "Cells that fire together wire together" is a pithy quote that captures the idea of various neural electrical pathways forging together in a single circuit based on repeated triggering.³¹

This process of welding different neural paths into one connected path is also known as *mapping*.³² For an example, let us return to the discussion of the mother metaphor, discussed above. When parts of a baby's brain dealing with appetite, physical temperature, and affection are triggered in the presence of the mother, a network of connected neural pathways fuse together, linking concepts of warmth and sustenance with the concept of the child's mother.³³ As the infant is repeatedly exposed to the mother who feeds and provides comfort, these previously separate neural networks become more connected and entrenched. Eventually, the biological association of "mother" with warmth, nurturance, and caring gives rise to an abstract metaphor, seen in concepts like "he's a *warm* person," or "she's a *block of ice*."³⁴

The deepening of neural pathways in response to repeated exposure to a stimulus can be understood as a process of *canalization* occurring in the *plastic* brain. Our brains become "perpetually altered" by every encounter and every interaction.³⁵ Canalization of neural paths has been analogized to what happens when sledding on a snowy hill. The first time one sleds down a hill, new tracks are made. In subsequent trips down the slope, more likely

30. LEDOUX, *supra* note 27, at 79.

31. *Id.* This quote originated in the 1990s as scientists described neural network connection theory, a topic first developed by Canadian psychologist Donald Hebb. See Carla J. Shatz, *The Developing Brain*, 267 SCI. AM. 60, 64 (1992) ("In a sense, then, cells that fire together wire together."); Siegrid Löwel & Wolf Singer, *Selection of Intrinsic Horizontal Connections in the Visual Cortex by Correlated Neuronal Activity*, 255 SCIENCE 209, 211 (1992) ("[N]eurons wire together if they fire together."); see also D. O. HEBB, THE ORGANIZATION OF BEHAVIOR: A NEUROPSYCHOLOGICAL THEORY (5th prtg. 1959).

32. WINTER, *supra* note 10, at 30–31; see also LAKOFF, *supra* note 8, at 84–85.

33. LAKOFF & JOHNSON, *supra* note 13, at 46–55.

34. LAKOFF & JOHNSON, *supra* note 9, at 256.

35. NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF: STORIES OF PERSONAL TRIUMPH FROM THE FRONTIERS OF BRAIN SCIENCE 209 (2007).

than not, one selects a path that has already been forged. The more sledding that occurs, the deeper the existing tracks become.³⁶ Once we have created these tracks in the brain, they become “‘really speedy’ and very efficient at guiding the sled down the hill.”³⁷ Once a thought becomes cemented in the brain, that thought appears with great rapidity and arises unconsciously.³⁸

Once a concept has been synaptically cemented by continued activation of the same neural pathways by the same stimulus, it becomes highly difficult to undo.³⁹ Through a process of *attenuation*, alternative pathways in the brain can become cut off.⁴⁰ This happens because the development of neural pathways is “a competitive process, one in which the connections that are used are kept and those that go unused are eliminated.”⁴¹ Thus, “[o]nce a particular plastic change occurs in the brain and becomes well established, it can prevent other changes from occurring.”⁴²

Canalization and attenuation explain how ideas get stuck in our brains. When mental concepts become canalized, they become deep-seated habits of thought, which then cut off competing thought patterns.⁴³ The more a neural pathway becomes entrenched in the brain, the more certainty we have with respect to the associated thought.⁴⁴ And these ideas can be good or bad. We have all heard the term “toxic brain loop.” In neuroscience parlance, that concept refers to an entrenched neural pathway that has cut off more positive thought patterns. But there is also the possibility that healthy thought patterns can become canalized, which would implant positive pathways in the brain but weaken more negative patterns.

II. GETTING HIGH: RHETORIC INSIDE OUR BRAINS AND BODIES

As a stimulus that triggers thought, rhetoric can change the brain’s structure, both individually and collectively.⁴⁵ When we are asked to consider a thought pattern over and over again (a common rhetorical strategy), we are left with a mark in our brains.⁴⁶ Contrary to the deeply held Western

36. *Id.*

37. *Id.*

38. *Id.*; WINTER, *supra* note 10, at 32; *see also* LAKOFF & JOHNSON, *supra* note 9, at 256–57 (explaining how entrenched metaphors “arise spontaneously and automatically without our being aware of them”).

39. WINTER, *supra* note 10, at 32.

40. Ingram, *supra* note 29, at 10–11.

41. LEDOUX, *supra* note 27, at 76.

42. DOIDGE, *supra* note 35, at xx.

43. *Id.* at 209.

44. Ingram, *supra* note 29, at 10–11.

45. *See* DOIDGE, *supra* note 35, at 213 (“Each thought alters the physical state of your brain synapses at a microscopic level.”).

46. Ingram, *supra* note 29, at 60.

belief that there is a separation between the mind and the body, rhetoric can get inside our brains and bodies and make us think and feel things without the intervention of conscious rationality. In a nutshell, neurorhetoric challenges traditional conceptions of reason and choice.⁴⁷

The embodied nature of thought helps explain how deeply rhetoric influences us. Thought is embodied; our thoughts are deeply interconnected to our physical bodies.⁴⁸ For instance, when we read something that asks us to imagine a scene or when we view a film, we use the same neural structure of our brain that we use when living out that scene.⁴⁹ As George Lakoff and Mark Johnson describe, “When we imagine seeing a scene, our visual cortex is active. When we imagine moving our bodies, the pre-motor cortex and motor cortex are active.”⁵⁰

The concept of having a “gut feeling” about a particular outcome reflects the embodied nature of thought. Neuroscientist Antonio Damasio devised the term “somatic marker” to highlight this relationship—*soma* coming from the Greek word for body and *marker* reflecting the impact that previous thought experiences have had on our brains.⁵¹ Somatic markers represent canalized thought patterns that guide the direction, rapidly and unconsciously, of our thought processes. Rather than functioning as a form of “high reason,” somatic markers highlight some options, rapidly eliminating the negative and favoring the positive.⁵² They operate at a preconscious and unconscious level.⁵³ Somatic markers “do not deliberate for us[;]” rather, they function as a “biasing device.”⁵⁴

Somatic markers are generated when we engage with a certain thought over and over again. The common rhetorical strategy of repetition seems designed to help entrench a thought or conclusion in the brain. Moreover, collective cultural experiences can produce somatic markers.⁵⁵ Political scientist William Connolly has applied Damasio’s somatic marker thesis and argued that with respect to culture, the rhetoric we are exposed to in television, film, and journalism can produce somatic markers that affect our thinking and judgment in an unconscious way.⁵⁶ Through mass culture,

47. For an explanation of traditional conceptions of reasoning, see ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 171 (1994).

48. See LAKOFF, *supra* note 8, at 40; LAKOFF & JOHNSON, *supra* note 9, at 257.

49. See DOIDGE, *supra* note 35, at 204 (“[I]n action and imagination many of the same parts of the brain are activated.”); LAKOFF, *supra* note 8, at 40.

50. LAKOFF & JOHNSON, *supra* note 9, at 257.

51. DAMASIO, *supra* note 47, at 173–75.

52. *Id.* at 174.

53. *Id.* at 173–74.

54. *Id.* at 174.

55. See generally CONNOLLY, *supra* note 29, at 34–37.

56. *Id.* at 35–36.

somatic markers become carved out in our brains as early as childhood, becoming “filtered into [our] mode of being” before we even develop language skills.⁵⁷

Further, rhetoric’s emotional aspects tend to deemphasize our critical thinking faculties. When we are presented with a stimulus that promotes emotion, it becomes difficult to think with our higher order faculties. Instead, our circuits become focused on the threatening situation and the flight or fight response.⁵⁸ Emotional rhetoric releases chemical reactions in our brain that subdue and dampen the part of our brain (the prefrontal cortex) that controls higher order thinking.⁵⁹ The end result is a state of mindlessness, which is analogous to a drug-induced state.⁶⁰ Emotional rhetoric is also more memorable and powerful than non-emotional rhetoric, because emotional rhetoric activates more systems in the brain, the arousal is greater, and larger neural networks become forged.⁶¹ In other words, we engage more deeply with emotional rhetoric and it feels great.

Rhetoric-induced mindlessness often happens in a collective ritualistic setting, such as when we attend a rally for our preferred political candidate or a sports game for our favorite professional or college team.⁶² In this situation, our brain dampens our critical thinking and ratchets up its emotional side.⁶³ These situations

all involve a sublimation of individuality caused by the dampening of general neuronal communication, coupled with the intensification of the activity of a few specific neural networks. The flood of neurotransmitters that produces pleasure puts brain cells on alert, making them more receptive to signals from other neurons. Consequently, our receptivity to sensual interactions with the environment and other people is increased, but our cognitive capacity is reduced.⁶⁴

In this way, rhetoric fosters communal bonds by fueling intragroup intimacy in a pleasurable way.⁶⁵

A study from Emory neuroscientist Drew Westen further supports the rhetoric/drug analogy. In this brain imaging study, subjects viewed a favored political candidate making a clearly inconsistent statement. During

57. *Id.* at 47.

58. LEDOUX, *supra* note 27, at 217.

59. Ingram, *supra* note 29, at 65.

60. *Id.* at 50, 65, 69.

61. *Id.* at 65 (quoting LEDOUX, *supra* note 27, at 322).

62. *Id.* at 64.

63. *Id.*

64. *Id.* at 63.

65. *Id.*

this scenario, areas of the subjects' brains related to unpleasant distress lit up.⁶⁶ The subjects then attempted to rehabilitate their candidate by applying faulty and illogical reasoning to rationalize the inconsistency; their brains were looking for "ways to turn off [this] spigot of unpleasant emotion."⁶⁷ When the subjects engaged in this flawed reasoning, the brain scans indicated that the subjects were able to turn off the neural areas associated with unpleasantness and instead trigger areas of pleasure.⁶⁸ The faulty and illogical reasoning triggered a state of pleasure in the brain, "activating reward circuits that [gave] partisans a jolt of positive reinforcement for their biased reasoning."⁶⁹ The illogical reasoning provided a neural "fix" similar to what drug addicts experience.⁷⁰

Viewed through the lens of neuroscience, rhetoric is like a drug—it functions beyond consciousness, heightens emotional reactions, and can produce a state of mindlessness. The Greek Sophist Gorgias believed that "persuasive discourse has effects on the human soul that, like drugs or physical force, overwhelm and cancel out the possibility of individual agency."⁷¹ Thus, the Greeks categorized the rhetorician in the same class as a medical doctor or mystic.⁷² Ancient Greek sages feared the embodied power of rhetoric, and, as a precursor to Descartes, exhorted individuals to try to separate the mind from the body, so as to not succumb to rhetoric's powerful spell.⁷³ Here, the ancient idea that rhetoric intrudes into and interacts with the body aligns with modern neuroscientific and cognitive theories that support an embodied approach to rhetoric.

III. THE DARK SIDE OF NEURORHETORIC—TOXIC NEURAL PATHWAYS

The collective canalization produced by toxic rhetoric can lead to collective oppression, even violence. Negative stereotypes can become collectively embedded with unspeakable consequences, helping us to understand, for instance, how regular German citizens collectively acquiesced to the Holocaust or why ISIS's online messaging is so magnetic. Repeated exposure to certain forms of narrative rhetoric causes the neural synapse circuits associated with these stories to become so strong that they form a perma-

66. DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* xi (2007).

67. *Id.* at xiii.

68. *Id.* at xiv.

69. *Id.*

70. *Id.*

71. Ingram, *supra* note 29, at 4.

72. *Id.* at 5.

73. *Id.* at 6.

ment part of the brain's structure.⁷⁴ In this way, deep narratives become implanted.

In studying the connection between rhetoric and violence in Nazi Germany, rhetoric professor Jeffrey Murray theorizes that the collective acceptance of Hitler's Final Solution was dependent on the repeated use of discourses in three forms: (1) anti-Semitic narratives in speeches, newspapers, and other media, (2) anti-Semitic laws, and, eventually, (3) enacted violence, the public performance of violent acts of physical aggression against Jewish Germans, such as the anti-Jewish pogrom carried out in 1938, known as *Kristallnacht*.⁷⁵ The anti-Semitic narratives linked the concept of a Jewish person with fear and disgust.⁷⁶ Jewish people were consistently and repeatedly "described as the murderers of everything the German masses identified as good, true, and beautiful."⁷⁷ A severe dichotomy developed in Nazi rhetoric, with Jewish persons construed as the enemy, inhuman, and incapable of being rehabilitated. The Jewish villain was then contraposed with the good and heroic people of Teutonic/Nordic descent.⁷⁸ The Final Solution was so successful because its victims were so effectively dehumanized; killing was not murder but rather a public policy decision.

These hyperbolic narratives, dependent on vile stereotypes, were repeated over and over again, in journals, films, and in Hitler's dramatic speeches.⁷⁹ Hitler himself seemed to understand the canalization process, because he knew that persuasion required the speaker to repeat the argument over and over again.⁸⁰ Rhetoric's ability to thrust people toward a nefarious state of mindlessness underscores Kenneth Burke's conclusion that Hitler functioned as a potent medicine man with the ability to foment support for war and mass extermination of an entire people.⁸¹

74. See CONNOLLY, *supra* note 29, at 17, 35. Here, Connolly suggest that mass media such as television and film, in so far as they combine the visual with sound and emotion, invoke embodied cognitive traces that function on both a collective and individual level. When we apply neuroplasticity theory to Connolly's observations on mass media, we can infer that repeated exposure to these stimuli will cause these cognitive traces to become further embedded and integrated in the mind's structure. See Doidge, *supra* note 35, at 213 ("Each thought alters the physical state of your brain synapses at a microscopic level.").

75. Jeffrey W. Murray, *Constructing the Ordinary: The Dialectical Development of Nazi Ideology*, 46 COMM. Q. 41, 42 (1998).

76. See *id.* at 46–47. For example, a repeated disgust narrative about Jewish People was that they drink the blood of Christian children.

77. Michael Blain, *Fighting Words: What We Can Learn from Hitler's Hyperbole*, 11 SYMBOLIC INTERACTION 257, 258 (1988).

78. *Id.* at 263–64.

79. Murray, *supra* note 75, at 45–47.

80. Blain, *supra* note 77, at 262.

81. *Id.* at 257 (citing KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM* 191 (1941)).

Viewed from a neuroscience perspective, Nazi rhetoric successfully carved out deep neural pathways that became collectively entrenched. In the collective mind, alternative narratives portraying Jewish people as fellow humans withered away from lack of use. Emotional circuitry became activated, in a rapid and unconscious way, in the brains of German citizens attending rallies or viewing mass media, as they felt a sense of commonality in the face of threat. The rhetoric also engendered collective mindlessness, entirely anesthetizing the German citizenry to the reality of human death and suffering happening in their midst. Contemporary neuroscience research tells us that this rhetorically induced mindlessness not only dampened critical thought, but also, in all likelihood, triggered feelings of pleasure.

Moving to the contemporary U.S. political landscape, one sees disturbing parallels in President Trump's campaign rhetoric that vilified immigrants and Muslims, pitching them as a threat posed to traditional "American" citizens.⁸² While the consensus seems to be that President Trump is not a fascist in the same political form as it existed in Germany and Italy before World War II, he takes many items from the fascist recipe book.⁸³ In a very frightening way, the dichotomous *us vs. them* rhetoric, which frames the other as inhuman, mirrors the strategies successfully deployed by Hitler and his peers to generate support for state-sanctioned mass murder. President Trump's rhetoric becomes more ominous than boorish when viewed through the lenses of history and neuroscience, which explain how rhetoric can induce a sense of mindlessness in the public and then cause them to buy into murderous solutions.

Although President Trump is an easy target, the dark side of neuro-rhetoric is not a right wing versus left wing issue. Enabled by Internet technology, ISIS offers the most terrifying contemporary example of rhetoric's murderous power. Using the Internet and various social media networks, ISIS has dispersed its repetitive, dichotomous, and violent *us vs.*

82. For instance, recently many media outlets have analyzed whether or not Donald Trump is a fascist. See, e.g., Isaac Chotiner, *Is Donald Trump a Fascist?*, SLATE (Feb. 10, 2016, 3:50 PM), http://www.slate.com/articles/news_and_politics/interrogation/2016/02/is_donald_trump_a_fascist_an_expert_on_fascism_weighs_in.html; *Father of Fascism Studies: Donald Trump Shows Alarming Willingness to Use Fascist Terms & Styles*, DEMOCRACY NOW! (Mar. 15, 2016), http://www.democracynow.org/2016/3/15/father_of_fascism_studies_donald_trump; *Noam Chomsky on Whether the Rise of Trump Resembles the Rise of Fascism in 1930s Germany*, OPEN CULTURE (May 30, 2016), <http://www.openculture.com/2016/05/noam-chomsky-on-whether-the-rise-of-trump-resembles-the-rise-of-fascism-in-1930s-germany.html>; J.P.P., *Donald Trump Is Not a Fascist**, ECONOMIST (May 30, 2016, 8:00 PM), <http://www.economist.com/blogs/democracyinamerica/2016/05/trump-and-1930s>; Gianni Riotta, *I Know Fascists; Donald Trump Is No Fascist*, ATLANTIC (Jan. 16, 2016), <http://www.theatlantic.com/international/archive/2016/01/donald-trump-fascist/424449/>.

83. See Chotiner, *supra* note 82 (reporting on a conversation with Columbia University political history professor Robert Paxton, a scholar of the history of fascism).

them messaging across nations, composing intense “communities” of murder-minded jihadists situated in all parts of the world.⁸⁴ Although the rhetorical approach is the same, the process of galvanizing mass support for murder has changed; technology has enabled ISIS to corral support for its terror network outside of a traditional nation state and without the assistance of a single charismatic speaker sermonizing in brick-and-mortar stadiums.

A. Neuro rhetoric and Race—The Welfare Queen Example

In turning to the subject of this Symposium Issue, neuroscience helps us understand how coded racial categories can become ingrained in the collective mindset. As mentioned above, Professor Cammett masterfully explained how the coded category “Welfare Queen” became part of the U.S. cultural landscape by virtue of its potency as a metonymic metaphor in which the story of one person became associated with an entire group of persons (impoverished black mothers).⁸⁵ In a more specific sense, a neuro rhetoric perspective helps us understand how the metaphor became imprinted in the brains of so many. The metaphor relied on a complex set of dichotomous metaphors having to do with good mothers (nurturant, responsible) and bad mothers (immoral, irresponsible), emphasizing the bad in contrast with the good. The metaphor operated on an explicit gender axis—Welfare Queen, as “queen” is explicitly gendered—and an implicit racial axis, as it was understood that she is black.

This implicit racial understanding likely triggered implicit biases that have infected almost all of U.S. culture.⁸⁶ Implicit biases are discriminatory beliefs, based on negative stereotypes and cultural generalization, which are held unconsciously.⁸⁷ Moreover, implicit bias can cause persons to act in ways that diverge from their conscious or avowed belief systems.⁸⁸ Research on implicit bias indicates that unconscious or subconscious attitudes that favor whites over blacks lurks underneath the surface of our consciousness.⁸⁹ For instance, one study found that when whites viewed photographs of black people, their amygdala (the part of the brain responsible for processing fear) was activated in a greater proportion to blacks viewing the same photographs, even though consciously, the white study subjects regis-

84. See Georges, *supra* note 3.

85. See *supra* notes 19–25 and accompanying text.

86. See generally Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729 (2000); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

87. Greenwald & Krieger, *supra* note 86, at 951.

88. *Id.*

89. See generally *id.*

tered no fear.⁹⁰ Thus, a racially coded category like Welfare Queen likely activated negative responses in target audiences, but below the level of consciousness.

Moreover, certain elements of the Welfare Queen narrative raised visual specters in the brain—such as the Welfare Queen’s Cadillac and her other luxury accoutrements—rendering the metaphor highly memorable. Visual information becomes more memorable because it is *vivid*, “(a) emotionally interesting, (b) concrete and imagery-provoking, and (c) proximate in a sensory, temporal, or spatial way.”⁹¹ When we visualize imagery with our imagination, as rhetoric often asks us to do, we use the same part of our brain (the visual cortex) as we would if we were seeing the object firsthand.⁹²

With reliance on the implicit dichotomies of good mothers versus bad mothers and hardworking citizens versus freeloaders, the Welfare Queen metaphor likely generated an emotional response in audiences. The emotionality of the metaphor dampened the audience’s critical thinking faculties⁹³ but also rendered it more memorable.⁹⁴ Because it relied on *us vs. them* social stereotypes, the metaphor also likely fostered feelings of intragroup cohesion in the face of the “other.” The combination of emotionality with communal feelings likely generated a sense of mindlessness in the receiving audiences, a mindlessness that generated pleasure, despite the fact that the metaphor greatly departed from logocentric reasoning and fact-based reality.⁹⁵

Thus, in collective neural pathways, the Welfare Queen triggered concomitant firings in various neural pathways related to concepts as disparate as women, good and bad mothers, the implicit bias against African Americans, visualized luxury automobiles, and moral verdicts. The consistent reiteration of the rhetoric, by politicians⁹⁶ and journalists,⁹⁷ welded a deeply entrenched neural network ensconced in the brains of the many individuals exposed to it. The emotion and pleasure triggered by the code word generated even more potency for the neural pathway. Alternative pathways that

90. See Phelps et al., *supra* note 86, at 732.

91. Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659, 659 (1985).

92. DOIDGE, *supra* note 35, at 203–04.

93. See *supra* notes 58–59 and accompanying text.

94. See *supra* note 61 and accompanying text.

95. See *supra* notes 64–70 and accompanying text.

96. See ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* 50–51 (2004) (contextualizing the Welfare Queen trope as a persistent political frame that attacks the moral character of black mothers in need of assistance).

97. See *id.* at 65–87 (locating and analyzing hundreds of examples of the Welfare Queen stereotype appearing in news and journalism sources).

might have framed welfare as a helpful safety net necessary to protect the most vulnerable of American citizens, especially children, became attenuated from lack of use. As it became part of the collective brain structure, however, the Welfare Queen metaphor helped persuade a large swath of Americans to view welfare as a racialized locus of fraud and immorality. For the most part, the advocacy occurred underneath the surface, operating unconsciously and rapidly in the brain, outside of logocentric cognition.

B. Neurorhetoric and the Law

Applied to law, neurorhetoric has the potential to generate fascinating new theoretical and research inquiries. In order to support future projects considering neurorhetoric and the law, three premises should be brought to the surface. First, we have to understand that legal rhetoric situates *the law as rhetoric*. In a common law system, the law is comprised of language—the language of judicial opinions; the words of legal actors in the system (lawyers, lawmakers); the language of statutes, orders, and other sources of law; and even the language of contractual agreements, which produce private legal worlds. Legal rhetoric could have both a narrow or broad definition. In its narrowest conception, legal rhetoric might be construed as the art of legal argumentation. But, for purposes of this Essay, which seeks to outline an approach for comparative legal rhetoric, a broader definition is more appropriate.⁹⁸

A broad conception of legal rhetoric “looks at how the law works by exploring a meaning-making process, one in which the law is ‘constituted’ as human beings located within particular historical and cultural communities write, read, argue about, and decide legal issues.”⁹⁹ In theorizing a definition for legal rhetoric, Linda Berger was influenced by James Boyd White’s empowering conception of law.¹⁰⁰ White’s conception of rhetoric flows from his liberating, anti-formalist view of what law is. For White,

[L]aw is a [sic] not an abstract system or scheme of rules, as we often speak of it, but an inherently unstable structure of thought and expression. It is built upon a distinct set of dynamic and dialogic tensions, which include: tensions between ordinary language and legal language; between legal language and the spe-

98. In U.S. legal education, legal rhetoric has not long existed as a standalone inquiry of study. Rather, most law schools offer legal communication instruction in the form of legal writing classes, where students are taught how to write formal legal analysis, in both an objective and persuasive format. Linda L. Berger was one of the first professors in the United States to teach legal rhetoric as a separate field of study. See Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING 3 (2010).

99. *Id.* at 5.

100. See *id.* at 5 n.9 (citing James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 695 (1985)).

cialized discourses of other fields; between language itself and the mute world that lies beneath it; between opposing lawyers; between conflicting but justifiable ways of giving meaning to the rules and principles of law; between substantive and procedural lines of thought; between law and justice; between the past, the present, and the future.¹⁰¹

White's conception of law is liberating because it gives legal actors agency over the process of making legal meanings. The law is not just a static system of rules to be studied; rather, students and practitioners engage in a dynamic intellectual enterprise of remixing and reconstituting precedential legal texts, with the goal of forging new and transformative legal meanings.¹⁰²

The law as rhetoric concept flows into a second premise, which is the law's unique ability to reify norms by clothing them with the concrete power of the state, which in turn produces a collective reality.¹⁰³ We saw an example of this above, as one rhetoric scholar theorized that the German people adopted Nazism's Final Solution en masse in part because the rhetoric was codified in formal German laws that sanctioned the anti-Jewish boycott of 1933 and the Nuremberg Laws of 1935.¹⁰⁴ This point has been most lucidly expressed by French sociologist/anthropologist Pierre Bourdieu, a proponent of speech act theory, which encapsulates the idea that, in some circumstances, speech can influence/remake social reality.¹⁰⁵ For Bourdieu, because of its compelling symbolic power—a power that people buy into and acquiesce in, law carries the unique power to create the social world, social groups in particular.¹⁰⁶ There are some limits to law's power to construct reality, however, the law's power only goes so far as it is able to mirror and represent what people believe, understand, or are willing to believe and understand.¹⁰⁷ As a result, the law usually functions as a kind of confirmation agent, ratifying and sanctifying majoritarian views of how the social world should be categorized.¹⁰⁸ Nonetheless, for purposes of this Essay, legal rhetoric is an available vehicle for transforming the world and for

101. James Boyd White, *An Old-Fashioned View of the Nature of Law*, 12 THEORETICAL INQUIRIES IN L. 381, 381 (2011).

102. *Id.* at 386–87.

103. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 838 (1987) (Richard Terdiman, trans.) (“Law consecrates the established order by consecrating the vision of that order which is held by the State.”).

104. *See supra* note 75 and accompanying text.

105. *See* Audrey P. Olmsted, *Words are Acts: Critical Race Theory as a Rhetorical Construct*, 9 HOW. J. COMM. 323, 325 (1998).

106. Bourdieu, *supra* note 103, at 838.

107. *Id.* at 839.

108. *Id.* at 839, 840.

possibly healing the world, but only if there is collective buy-in. And, collective buy-in occurs from matching the rhetoric to compelling narratives, metaphors, and other ways of understanding the world.¹⁰⁹

The third relevant premise helps explain the unique power of law to shape collective reality from a neuroscience perspective. In law, it is necessary to repeat the same thought patterns (represented by rules, statutes, and other language forms). While all legal systems require some recitation of the governing legal texts, the American common law system, with its emphasis on *stare decisis* and precedent, is particularly iterative and recursive, and requires a ritualistic recitation of rules, case precedents, even boilerplate language. These iterative and recursive elements of the American common law system make the law a uniquely effective agent for cementing neural pathways. Neuroscientific theory tells us that the more a particular thought pattern is repeated, the deeper it gets into our brains. Thus, the repeated use of specific language forms creates collective neural pathways that become collectively entrenched. The dark side of the law's function as a mechanism for blazing collective neural pathways is that if laws consistently produce negative outcomes, then bad law becomes part of our collective brain structure.

C. Neurorhetoric, Race, and the Law

This part of the Essay identifies a few examples of where the law might be functioning to carve out or deepen neural paths that, when triggered, reinforce toxic racial stereotypes. The next Sections provide three brief examples that trace the connections between neurorhetoric, race, and the law: (1) in the courtroom; (2) the toxic legal category of "alien"; and (3) police violence and the right to bear arms.

1. Race & Neurorhetoric in Courtroom Settings

An understanding of neurorhetoric is relevant for all types of legal advocacy. Advocates should recognize that the use of certain tropes and images may be triggering deeply ingrained neural networks, requiring much effort to redirect the flow of energy in the brain. For instance, emphasizing that a black mother receives public assistance might trigger all of the different pathways that rapidly give rise to the embodied, negative reaction that the term Welfare Queen generated.

In any criminal proceeding, a simple reference that a legal actor is a black male with a firearm is likely to trigger deep-seated neural pathways related to fear. As set forth above, pathways in the amygdala are triggered

109. *Id.* at 839.

just upon viewing a photograph of a black face.¹¹⁰ Moreover, longstanding cultural narratives that frame black men as fearsome have dug deep trenches in our collective brain structures.¹¹¹ Black men, in particular, have been constructed as metaphorical bogeymen, dark monsters who attack during the night.¹¹² Stereotypes of black men “perpetuate black danger, which is always in the dark.”¹¹³

Thus, in a legal proceeding, if a lawyer sees her/his opponent using language that triggers potentially toxic neural pathways, the response must be to reframe and reiterate facts in a way that will trigger alternative pathways. To cut off the negative racialized stereotypes associated with a client receiving public assistance benefits, advocates might emphasize factual details that frame the client as nurturing and caring. George Lakoff lucidly explains that the animosity toward government social safety net programs derives from collectively held neural networks triggered by a discourse that utilizes a “strict father” metaphor.¹¹⁴ An example of such a discourse is the argument that recipients of welfare are in need of discipline, should not be coddled, and should not be allowed to enter into a culture of dependency. The metaphor is so powerful because it connects with longstanding childhood bodily experiences of being raised by a strict parent (usually the father). In order to turn off that neural network, Lakoff suggests that advocates trigger the neural network associated with a nurturant model of parenting, emphasizing the language of caring, warmth, and support for the vulnerable.¹¹⁵ Language that draws upon the nurturant mother creates a powerful form of neuro rhetoric, because, like the strict father metaphor, it triggers neural pathways originating in body-brain connections forged long ago between the infant and the mother.¹¹⁶ The goal is to locate rhetoric that will trigger an equally strong neural network.

2. Race, Neuro rhetoric, and the Term “Alien”

This Essay’s second example raises issues of how legal language might contribute to toxic neural pathways. In our iterative common law system, an often-repeated term can canalize negative stereotypes. The legal term “alien,” currently in use to categorize immigrants seeking legal status in the United States, illustrates how categorical language within U.S. legal

110. See *supra* note 90 and accompanying text.

111. See Nick J. Sciuillo, *Richard Sherman, Rhetoric, and Racial Animus in the Rebirth of the Bogeyman Myth*, 37 HASTINGS COMM. & ENT. L.J. 201 (2015) (explaining that black men have long been portrayed as dark, angry, maniacal and threatening monsters).

112. *Id.* at 226.

113. *Id.* at 207.

114. LAKOFF & JOHNSON, *supra* note 13, at 312, 318; LAKOFF, *supra* note 8, at 76, 78, 81.

115. LAKOFF, *supra* note 8, at 114.

116. See *id.* at 83–84.

infrastructure contributes to toxic neural pathways that dehumanize. The dictionary meaning of the noun form of alien includes four meanings:

1. An unnaturalized foreign resident of a country[;]
2. A member of another family, people, religion, or country[;]
3. An outsider[;]
4. A creature from outer space.¹¹⁷

The adjective form includes five additional meanings:

5. Owing political allegiance to another country or government; foreign[;]
6. Belonging to, characteristic of, or derived from another country, place, society, or person; strange[;]
7. Being inconsistent or opposed; repugnant.¹¹⁸

The first meaning of the term, as a noun and adjective, seems to be fairly neutral with little to no negative connotation. However, the other connotations of the word imply a negative value judgment. Aliens are “inconsistent,” “repugnant,” and “strange.” For individuals emigrating to the United States from Mexico, alien has long been rhetorically paired with conceptions of criminality and non-humanness.¹¹⁹ Beginning in the 1930s, the word alien has been commonly paired with the word illegal and used together with visual language depicting Mexicans as threatening, unsanitary, immoral, and criminal.¹²⁰ Mexican immigrants were represented as a threatening horde that had to be contained.¹²¹ As another example of the synergistic relationship between law and collective cultural narratives, illegal alien rhetoric materialized in newspapers and media concurrent with emerging federal laws that made it a felony to enter the United States from Mexico without authorization.¹²²

In current law practice, the term alien continues to be used in legal proceedings, in pleadings before Immigration Judges, the Board of Immigration Court of Appeals, and other legal fora. A search for the term “alien” in Westlaw’s immigration database produces 9,998 cases using the term. Title 8 of the United States Code is entitled “Aliens and Nationality” and the term repeatedly appears in various statutory sections.¹²³ Westlaw Key Number 24 is entitled “Aliens, Immigration, and Citizenship” and the term appears another nine times in the Key Number’s sub-categories. The

117. *Alien*, THE AMERICAN HERITAGE DICTIONARY (2d ed. 1985).

118. *Id.* (italics in original).

119. See Lisa A. Flores, *Constructing Rhetorical Borders: Peons, Illegal Aliens, and Competing Narratives of Immigration*, 20 CRITICAL STUD. MEDIA COMM. 362, 363, 372–81 (2003).

120. See *id.* at 372–79.

121. See *id.* at 375–76.

122. See *id.* at 372–78.

123. See, e.g., 8 U.S.C. §§ 1555, 1557 (2012).

appearance of the term in case opinions, statutes, and the data structure of the law illustrates how imbricated the term is. Lawyers cannot avoid the term if their advocacy requires them to quote language from a case, cite to the title of a statute, or use the Westlaw Key Number system to perform legal research. Performing these lawyering tasks deepens the collective neural pathways that flow toward fear and exclusion, igniting a collective brain loop that becomes difficult to halt.

Neurorhetoric tells us that alien is not simply a “politically incorrect” term that has gone out of fashion. A freighted word that is frequently reiterated, the term likely triggers neural networks connected to deep-seated fears of unknown persons, crime, and more generalized fears of the “other.” As a descriptor for people existing outside the bounds of what is familiar and safe, the term removes the humanity from an entire population of people because “they” are not like “us.”¹²⁴ In this way, the term rapidly and unconsciously generates collective support for policies of removal, detention, and deportation of Mexican immigrants.¹²⁵ Objections to the continued use of terms like alien are not grounded in nanny-state word politics; rather, they reflect efforts to change cultural narratives, to attenuate toxic pathways in the brain that have been identified. Although there are difficult practical considerations (as lawyers, we often must use the terms preferred by our audience), lawyers should nonetheless think twice before using the word.

3. *Race, Neurorhetoric, the Right to Bear Arms, and Police Violence Against Black Men*

In a law enforcement context, racialized neural pathways of fear can ignite a rapid and unconscious bodily response, explaining why black men and black boys continue to be shot and killed by the police, such as in the cases of Trayvon Martin, Tamir Rice, Freddie Gray, and Mike Brown.¹²⁶ The possession of a firearm deepens these pathways of fear. Both Alton Sterling, shot by police in Baton Rouge, and Philando Castile, shot the next day by police in Minneapolis, were reportedly armed with a gun.¹²⁷ The twelve-year-old Tamir Rice, shot by police in the summer of 2015, was

124. See CONNOLLY, *supra* note 29, at 150 (“‘Aliens’ . . . are also coded as strange beings whose presence is threatening to ‘natives’ or, in this case, real citizens.”).

125. See Flores, *supra* note 119, at 377–79, 381.

126. See Chris Mooney, *The Science of Why Cops Shoot Young Black Men*, MOTHER JONES (Dec. 1, 2014, 7:00 AM), <http://www.motherjones.com/politics/2014/11/science-of-racism-prejudice>.

127. Jesse J. Holland, *Black Gun Owners Worried About Treatment After Shooting*, A.P. (July 8, 2016, 8:34 PM), <http://bigstory.ap.org/article/8e2c1e4bdb0f4de6bed23748b84d5c0f/black-gun-owners-worried-about-treatment-after-shooting>.

playing with a realistic-looking replica gun.¹²⁸ In 1999, when New York City police officers fired forty-one fatal shots at unarmed Haitian immigrant Amadou Diallo, the initial shots were fired when one officer yelled “He’s got a gun!”¹²⁹ There was no gun—what the officer thought was a gun was the edge of Diallo’s wallet.¹³⁰ In the brains of these police officers, deep-seated neural pathways light up when confronted with an image of an armed black man, or a child, in the case of Tamir Rice.¹³¹ These neural networks then unconsciously propel rapid action that often ends in tragedy.¹³²

Circling back to the concept that the law can become imprinted in the collective brain, statutory¹³³ and common law narratives¹³⁴ may have played a role in cementing the deadly stereotype of fear that has attached to black men in possession of firearms. Prior to the Civil War, the right to bear arms was heavily restricted for black persons, including explicit bans on gun ownership, but these limitations did not apply to whites.¹³⁵ After the Civil War and the passage of the Fourteenth Amendment, new gun laws were promulgated that were neutral in their wording, but unequally applied to heavily regulate the right of blacks to bear arms.¹³⁶ These laws were driven

128. Kellan Howell, *Tamir Rice’s Toy Gun ‘Functionally Identical’ to Real Weapon: Prosecutor*, WASH. TIMES (Dec. 29, 2015), <http://www.washingtontimes.com/news/2015/dec/29/tamir-rices-toy-gun-functionally-identical-to-real/>.

129. Lucille A. Jewel, *Through a Glass Darkly: Using Brain Science and Visual Rhetoric to Gain a Professional Perspective on Visual Advocacy*, 19 S. CAL. INTERDISC. L.J. 237, 256 (2010) (citing MALCOLM GLADWELL, *BLINK* 192 (2005)).

130. *Id.*

131. Elahe Izadi & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/?utm_term=.902273811dc8.

132. See Jewel, *supra* note 129, at 256 (explaining that the killing of Amadou Diallo can be understood as the result of a rapid decision fueled by implicit bias).

133. The language within statutes can be understood as narrative in nature and can influence the citizenry as well as judges. See Elizabeth B. Megale, *Disaster Unaverted: Reconciling the Desire for a Safe and Secure State with the Grim Realities of Stand Your Ground*, 37 AM. J. TRIAL ADVOC. 255, 264–65 (2013).

134. For an explanation of how judicial opinions function as narratives, see ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

135. See Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—The Redeemed South’s Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1320–33 (1995) [hereinafter Cottrol & Diamond, *Never Intended*] (describing the various racialized restrictions imposed on gun use and gun possession that existed prior to and after the Civil War); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 331–38 (1991) [hereinafter Cottrol & Diamond, *The Second Amendment*] (same); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL’Y 17, 18 (1995) (same).

136. See Cottrol & Diamond, *The Second Amendment*, *supra* note 135, at 354–55; Cottrol & Diamond, *Never Intended*, *supra* note 135, at 1325–26, 1330.

by the belief that “‘they’ (i.e., blacks) were too violent and too untrustworthy to be allowed weapons.”¹³⁷

The link between ethnic and racialized fear and gun possession continued into the twentieth century. Some have argued that New York’s 1911 Sullivan Law, which prohibited the concealed carrying of weapons and required a permit to purchase or own a weapon, was fueled by fear of guns in the hands of immigrants from Southern or Eastern Europe.¹³⁸ California’s 1967 adoption of a new arms control law has been explained as a frightened reaction to the appearance of Black Panthers in the California assembly chamber carrying “pistols, rifles, [and] at least one sawed-off shotgun.”¹³⁹ In the 1990s, gun control advocates argued that new restrictions were needed to prevent assault rifles from being wielded by gang members.¹⁴⁰ However, in the discourse about these laws, it was clear that hunting rifles would not be banned.¹⁴¹ The rhetoric posed the question of whether modern gun control laws were, at least implicitly, aimed to limit black ownership and possession of guns, but not affect the rights of whites.¹⁴²

A recursive and causal relationship can be discerned between the law and deeply embedded narratives about black gun ownership. We can look at this issue from Professor Murray’s framework, discussed above, which holds that collective violence aimed at a minority group becomes acceptable through (1) rhetoric, (2) discriminatory laws, and (3) enacted violence.¹⁴³ In the context of blacks bearing arms, all three of these elements are present.

First, prior to and after slavery, black men have been rhetorically framed as monstrous, uncontrollable threats to social order and public safety.¹⁴⁴ Second, the gun control laws, discussed above, further deepened the collective narrative of fear linked to black gun possession and ownership. The fear-based narrative appears in the language of the statutes as well as in the common law court opinions interpreting them. For instance, in one Florida case, in which the court declined to broadly interpret a gun re-

137. Cramer, *supra* note 135, at 22.

138. See Cottrol & Diamond, *Never Intended*, *supra* note 135, at 1334.

139. Cramer, *supra* note 135, at 21 (quoting *Capitol Is Invaded*, SACRAMENTO BEE, May 2, 1967, at A1, A10).

140. *Id.* at 22–23.

141. *Id.* at 22.

142. *Id.*

143. See *supra* notes 75–78 and accompanying text.

144. See Tricia Rose, “Fear of a Black Planet”: *Rap Music and Black Cultural Politics in the 1990s*, 60 J. NEGRO EDUC. 276, 279 (1991) (explaining that African American youth are often framed as “a dangerous internal element in urban America”); Sciullo, *supra* note 111, at 206–12 (explaining that the “black danger” cultural narrative can be traced back to white slave-owners’ fears of a revolt as well as the construction of black men as uncontrollable sexual predators).

striction, the concurring judge specifically identified the racist purpose behind the neutrally expressed law:

I know something of the history of this legislation. The original Act of 1893 was passed when there was a *great influx* of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. *The statute was never intended to be applied to the white population and in practice has never been so applied.* We have no statistics available, but it is a safe guess to assume that more than 80% of the white men living in the rural sections of Florida have violated this statute. It is also a safe guess to say that not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied to the Board of County Commissioners for a permit to have the same in their possession and there has never been, within my knowledge, *any effort to enforce the provisions of this statute as to white people*, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.¹⁴⁵

The metaphor of an invasion (“great influx”) serves to heighten the fear stemming from the black laborers entering the state. And, the legal language on the statute’s intent reinforces the dichotomy between white gun ownership (deemed appropriate) and black gun ownership (considered inappropriate and dangerous). A neuro rhetoric approach holds that because of law’s iterative and repetitive nature—it is researched, cited, and applied—the language functions as a rhetorical stimulus that impacts the brains of all the legal actors that come into contact with it. As explained above, the law has a special power to reify cultural beliefs and attitudes.¹⁴⁶ Thus, this rhetoric deepens those neural pathways that link black men with guns with an embodied and reactive fear.

Third and finally, the laws restricting blacks’ access to guns left the black population completely vulnerable to private acts of enacted violence,¹⁴⁷ such as terrorism from the Ku Klux Klan.¹⁴⁸ Now, the violence

145. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (emphasis added).

146. *See supra* Part III.B.

147. As set forth above, enacted violence refers to the public performance of violent acts of physical aggression. *See supra* note 75.

has morphed into state-sanctioned violence—the repeated killings of mostly young black men at the hands of a heavily militarized police. With respect to the last step in Professor Murray’s explanation for how rhetoric morphs into mass violence, these public acts of enacted violence completely dehumanize the targeted group.¹⁴⁹

The end result is that there are two very different cultural images of gun possession—white gun ownership, connected to the land, and black gun ownership, connected to fear and crime. For instance, in July 2016, after the Sterling and Castile shootings, lone gunman Micah Johnson opened fire and killed five Dallas police officers. Very rapidly on social media, the police mistakenly identified Mark Hughes, a black protester, as a suspect.¹⁵⁰ Hughes was carrying a large assault weapon, which was completely legal pursuant to Texas’s liberal open carry laws. The misidentification highlights that, in reality, there are two very different conceptions of gun possession. The rapidly circulated photograph of Hughes was a snap judgment—perhaps unavoidable when there is grave danger to the public—but this snap judgment was based in part on an essential stereotype of a dangerous black man with an assault rifle. And this stereotype is traceable back, at least in part, to the racialized gun laws themselves.

To summarize, neurorhetoric explains that fatal police violence against black men is rooted, at least in part, in stereotypes that have become collectively embedded in individual brains, stereotypes that link black men possessing guns with a propensity for uncontrollable violence. This toxic narrative begins with a fear of violence and ends with a collective acquiescence to state-sanctioned killing. The manifold recordings of police shooting

148. See Cottrol & Diamond, *The Second Amendment*, *supra* note 135, at 342, 347–48. There were some instances where blacks used firearms to defend themselves against the terroristic violence of the post-Reconstruction South, but these attempts were usually unsuccessful in the face of well-armed white mobs. *Id.* at 353–54.

149. See Murray, *supra* note 75, at 49 (explaining that the enacted violence against German Jewish people further cemented the collective understanding that Jewish people were subhuman). While the analogy between state violence and private violence against blacks in the United States and the experience of Jewish people residing in fascist Germany is not clean or neat, the threads of similarity might explain the unabated violence (from different directions) that continues to afflict black Americans. However, unlike the command-and-control violence against Jewish persons, the violence experienced by blacks today is not connected to state agency; it is a more diffuse deployment of force and power. This diffusion of force aligns with theories that contemporary systems of social control are not linked to a top-down state actor; rather, control is carried out in a dispersed form, as a kind of apparatus. See, e.g., VÄLIAHO, *supra* note 29, at 11–14 (citing GILLES DELEUZE & FÉLIX GUATTARI, *MILLE PLATEAU CAPITALISME ET SCHIZOPHRÉNIE* 2, 545–60 (1980)); Michel Foucault, *The Confessions of the Flesh*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS* 194–228 (Colin Gordon ed., Colin Gordon et al. trans., 1980)).

150. Kira Lerner, *A Black Man Legally Carrying a Gun Was Wrongly Labeled a Suspect by Dallas Police*, THINKPROGRESS (July 8, 2016), <http://thinkprogress.org/justice/2016/07/08/3796589/dallas-misidentified-suspect/>.

black men function somewhat similarly to the messaging that vilified Jewish Germans during the Holocaust, first through violent rhetoric and then through actual enacted violence.¹⁵¹ The images first reinforce fearful stereotypes, held mostly by whites, about armed black subjects and then depict enacted violence against them. The narrative becomes cemented through relentless repeated exposure on the Internet, social media sites, and television. The enacted violence eventually becomes normalized. The neural pathways of fear are deepened, initiating a mindless acquiescence to reactive violence that operates to quell the fear.¹⁵² Finally, these toxic narratives are recursively connected to the law, which has explicitly and implicitly instantiated the fearful stereotypes about blacks in possession of firearms.

While tragic instances of lethal gun violence continue to surface in the United States, this Essay does not engage with normative arguments either in favor or against further gun regulation. Instead, it traces how neuro rhetoric helps us understand the issue, and asks the question of what role, if any, did longstanding legal narratives play in entrenching these stereotypes. We might be seeing what cognitive rhetoric scholar Elizabeth Berenguer has identified—a “culture-law-culture cycle whereby cultural narratives influence the creation of laws, which then impact the cultural narrative, cycling back to affect changes in the law.”¹⁵³ Here, neuro rhetoric contributes the additional point that the law and culture cycle operates through the brains and bodies of the audiences exposed to the narrative.

The connections among gun violence, the right to bear arms, neuro rhetoric, and race represent a single thread of inquiry, chosen because it connects to terrible events currently foregrounded in the public consciousness. There is space, however, to explore other connections between the law and neuro rhetoric, including:

- Public education and traditional concepts of merit: did “separate but equal” become an entrenched neural pathway?
- Social mobility: how has the law, which has operated to implicitly or explicitly condone redlining, race-based discrimination, and restrictive property covenants, embedded toxic stereotypes about minorities living in poverty?
- Criminal justice: have racialized distinctions with statutory criminal law (for example, the vast differences in sentencing for crack cocaine versus powder cocaine) contributed to collective consciousness concerning crime and black citizens?

151. *See supra* notes 75–78 and accompanying text.

152. *See supra* notes 75–78 and accompanying text.

153. Megale, *supra* note 133, at 257.

As far as solutions, a good first step would be to make law enforcement officers cognizant of the toxic neural pathways that link blacks to fear-based reactive violence. For example, some police departments have initiated training programs designed to make police officers aware of their possible implicit biases.¹⁵⁴ Other police departments have accepted that implicit bias is unavoidable in policing and have promulgated new rules designed to dampen the impact of implicit bias, such as a rule prohibiting police officers engaged in a foot chase from touching the person being chased.¹⁵⁵

More importantly, to the extent American culture continues to liberally embrace firearms, celebratory narratives should promote positive images of blacks and guns.¹⁵⁶ This thought is clearly out of step with typical progressive arguments on gun control, which locate the proliferation of guns as the root problem. However, instead of “guns don’t kill people, people do,” a more accurate motto might be to say that “guns don’t kill people, gun culture does.” Moreover, culture is not something that people select like a pair of shoes; culture propagates itself and enters the collective mindset in a semi-autonomous way.¹⁵⁷ American gun culture kills because it reinforces neural links between black gun possession and white fear. Positive gun culture (which already attaches to white gun owners) proudly emphasizes patriotism and self-sufficient security. Efforts might be made to cohere positive aspects of American gun culture with black Americans.

In this context, the largest challenge will be to alter pre-existing majoritarian neural pathways, which currently deeply associate armed blacks with fear. Longstanding “urban crime” narratives, based in part on true facts, have created a toxic neural loop that links images of armed black Americans with fear and anxiety. Defusing this narrative would require whites to sit and listen, to be receptive of counter-narratives that challenge existing neural networks. Young people will be important, as their brains have yet to be molded by these longstanding cultural tropes. As fraught as the terms “white privilege” and “white supremacy” are, neuro rhetoric may help bridge gaps because it places racial oppression outside the realm of intentional performance. Instead of intentionally racist behavior and thought

154. See Benedict Carey & Erica Goode, *Police Try to Lower Racial Bias, but Under Pressure, It Isn't So Easy*, N.Y. TIMES (July 11, 2016), https://www.nytimes.com/2016/07/12/science/bias-reduction-programs.html?_r=0; Tasha Tsiaperas, *Top Dallas Cops Take Classes to Learn How to Fight Bias*, DALL. NEWS (June 10, 2016), <http://www.dallasnews.com/news/news/2016/06/10/top-dallas-cops-take-classes-to-learn-how-to-fight-bias>.

155. Mooney, *supra* note 126.

156. This is a suggestion rooted in pragmatism. Given the unlikelihood that Americans will disengage from their attachment to guns and gun ownership, what can be done to shift existing narratives?

157. See Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239, 251 (2012).

patterns, racism and racial oppression are often produced by signals traveling on brain pathways operating below the conscious surface.¹⁵⁸

Alternative narratives might be created from historical details concerning heroic black militias formed to resist white violence in the Jim Crow South¹⁵⁹ or might popularize aesthetically compelling images of militant black resistance to violent oppression.¹⁶⁰ Images of black persons with a gun should become images of pride, protection, and security, rather than images of fear.¹⁶¹ Of course, to the extent that Americans positively associate the use of guns for self-defense, perceptions of when guns are justified should change shape. For instance, while the traditional story is that gun violence is acceptable for protecting the home, other narratives might justify guns as a protective prophylactic for criminally negligent police officers. In order for this alternative narrative to gain traction, however, mainstream white America must accept that black Americans experience encounters with the police in a way that drastically differs from the white experience. This has been one of the great rhetorical successes of the Black Lives Matter movement. For instance, right-wing firebrand Glenn Beck has expressed that listening to the voices of the Black Lives Matter movement caused him to sincerely empathize with the pain and anger felt by black citizens in current times.¹⁶²

158. This is not to suggest that we ignore all aspects of individual agency in evaluating the production and reproduction of racism in the United States.

159. See Cottrol & Diamond, *The Second Amendment*, *supra* note 135, at 354.

160. See, e.g., *Beyoncé References Black Panther Party at Super Bowl Halftime Show*, FOX NEWS (Feb. 8, 2016), <http://www.foxnews.com/entertainment/2016/02/08/beyonce-references-black-panther-party-at-super-bowl-halftime-show.html>.

161. Steven Hildreth, Jr.'s viral Facebook post is one example of such a counter-narrative. Hildreth, a black man, described his experience of being stopped by the police while driving with his gun (concealed) in his lawful possession. Even though he had traffic infractions on his record and was wearing a hoodie, the police still treated him with courtesy and respect, even complimenting him on his Glock gun and how he had accessorized it. In the post, Hildreth took aim at the Black Lives Matter movement, arguing that his experience runs counter to the idea that "the police are allegedly out to kill minorities." See Steven Hildreth, Jr., FACEBOOK (Oct. 27, 2015), <https://www.facebook.com/stevenhildrethjr/photos/a.560555720661154.1073741826.267833853266677/1010278339022221/>. Hildreth's post went viral and is often reposted in opposition to arguments that the police routinely discriminate against and violate the civil rights of black citizens. Dan Evon, *Terrific Stop*, SNOPE.COM (July 8, 2016), <http://www.snopes.com/steven-hildreth-traffic-stop/>. Looking beyond its use by conservative social media commenters, this oft-repeated story strengthens neural pathways linking armed black men with valor and virtue and weakens the pathways associating armed black men with fear and violence. It is, accordingly, an example of a counter-narrative that might help reshape the collective brain.

162. Glenn Beck, Opinion, *Glenn Beck: Empathy for Black Lives Matter*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/07/opinion/glenn-beck-empathy-for-black-lives-matter.html>; see also Nicholas Schmidle, *Glenn Beck Tries Out Decency*, NEW YORKER (Nov. 14, 2016), <http://www.newyorker.com/magazine/2016/11/14/glenn-beck-tries-out-decency>; David Weigel, *Glenn Beck Urges Conservatives to Understand "Black Lives Matter"*, WASH. POST

As this Essay has attempted to show, the creation of new neural pathways would require cultural intervention, media intervention, and an entirely new lens for racial perception. In essence, new powerful modes of discourse, ways of referring to black men and women, must be identified and reiterated, over and over again. Difficult work must be done to erase existing neural pathways and form new pathways that would flow away from violence and toward peace and healing.

IV. CONCLUSION—A COMPARATIVE APPROACH TO RHETORIC CAN UNCOVER HEALING ALTERNATIVES

Neurorhetoric contains frightening implications. Because individuals' brains operate unconsciously, on a metaphorical level, and are physically affected by emotion, reason is often an ineffective strategy for persuasion. Moreover, the brain has been neurally marked by past rhetoric in a way that makes it difficult to change positions.¹⁶³ Finally, it feels good to enter a state of mindlessness and receive rhetorical messages that emphasize commonly held precepts, even when those precepts are founded on biases and stereotypes.¹⁶⁴ The more we understand about the way individuals respond to rhetoric to collectively produce oppressive outcomes, the more depressing the landscape seems. So, what can we do? George Lakoff argues that advocates should develop compelling counter-narratives that work on an emotional, rather than logocentric, basis.¹⁶⁵ Drew Westen theorizes that “[a] central aspect of the art of political persuasion is creating, solidifying, and activating networks that create primarily positive feelings toward your candidate or party and negative feelings toward the opposition.”¹⁶⁶

Rhetoric's power to generate positivity is where neuroplasticity theory offers hope. Despite its dark side, neuroplasticity posits that alternative discourses, when they become widely dispersed in a culture, have the potential to reshape collective neural pathways. If a harmful neural network is not continually reinforced, it can wither away.¹⁶⁷ And, a wide river of toxic sludge can morph back into a trickling stream as new networks take over.¹⁶⁸ In this way, rhetoric can alter the structure of the brain and point it toward healing paths and away from harmful one.¹⁶⁹ Thus, just as negative thought

(Aug. 15, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/08/15/glenn-beck-urges-conservatives-to-understand-black-lives-matter/>.

163. LAKOFF, *supra* note 8, at 42.

164. *See supra* notes 58–70 and accompanying text.

165. *See* LAKOFF, *supra* note 8, at 60 (asserting that we should “[l]earn to argue powerfully and emotionally from the moral perspective of empathy and responsibility”).

166. WESTEN, *supra* note 66, at 85.

167. *See* Ingram, *supra* note 29, at 11.

168. *See id.*

169. *Id.* at 12, 44; LAKOFF, *supra* note 8, at 42.

structures can become entrenched in the brain (for example, the reward pathways prevalent in addicted brains), they can also be weakened, or even removed, with alternative discourses. Talk psychotherapy is an example of a way to rewire alternative pathways because talking and thinking encourages the brain to alter the strength of certain synaptic patterns that produce toxic thoughts and identify new, better pathways.¹⁷⁰ Neurorhetoric allows us to imagine individual and collective therapeutic healing “strategically administered to trigger neurochemical reactions, which produce ‘affective dispositions that operate below the threshold of representation and intellectual regulation alone.’”¹⁷¹

In closing, and as a preview of future projects, this Essay proposes the founding of a new discipline—comparative legal rhetoric. A comparative approach to legal rhetoric carries the potential to broaden our knowledge of rhetoric, improve practical legal advocacy, and uncover alternative discourses that have the potential to heal. Although the study of comparative rhetoric exists as a discipline, a comparative approach has not thus been applied to legal rhetoric. There is value in looking to non-Western forms of rhetoric as guidance for reconstituting aspects of our legal system to make them less toxic and more healing. Sources for inquiry, in developing a comparative approach to legal rhetoric, might include non-Western approaches to argument structure and problem solving. Examples of these approaches can be located in the rhetoric produced by indigenous or oppressed groups, such as American tribal jurisprudence. For instance, the peacemaking process incorporated into the Navajo legal system is one example of legal rhetoric that heals rather than harms.¹⁷²

170. DOIDGE, *supra* note 35, at 221; Ingram, *supra* note 29, at 44.

171. Ingram, *supra* note 29, at 44 (quoting CONNOLLY, *supra* note 29, at 132).

172. See James W. Zion, *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. REV.* 563, 629–38 (2002); James W. Zion, *The Dynamics of Navajo Peacemaking*, 14 *J. CONTEMP. CRIM. JUST.* 58, 58–60 (1998) [hereinafter Zion, *Dynamics*]; James W. Zion, *The Navajo Peacemaker Court: Defiance to the Old and Accommodation to the New*, 11 *AM. INDIAN L. REV.* 89, 89–90 (1983). Navajo peacemaking is a ceremonial mediation that emphasizes listening and giving voice to the perspectives of all individuals affected by the dispute. See Zion, *Dynamics*, *supra*, at 66. The process begins first with a prayer from the peacemaker, the *naat’ aanii*, which focuses the attitudes of the participants and obtains buy-in for the process, a kind of priming that brings certain things to the surface. *Id.* at 67. Second, the participants in the process talk out the problem. *Id.* at 68. Everyone with a stake in the *hoxo* (dispute) is given an opportunity to speak, from offenders, to victims, and family members. *Id.* at 67–68. In voicing his/her narrative, the offender names the monster, or *nayee*—“anything that gets in the way of a person living his life.” *Id.* at 65 (citing Robert Yazzie & James W. Zion, ‘Slay the Monsters’: Peacemaker Court and Violence Control Plans for the Navajo Nation, in *POPULAR JUSTICE AND COMMUNITY REGENERATION: PATHWAYS OF INDIGENOUS REFORM* 67, 69 (Kayleen M. Hazlehurst ed. 1995)). Other stakeholders in the controversy are then free to dispute the offender’s narrative. *Id.* at 68–69.

The third stage of the process is a form of teaching in which the peacemaker explains how similar disputes were resolved in the past. *Id.* at 69. Here, the offender is confronted with any inaccuracies inherent in his/her explanation for the offense. *Id.* The final stage of the process is

Comparative legal rhetoric should also take a broad approach and should not limit itself to comparing the rhetoric of formal legal systems. Legal comparatists, such as Pierre Legrand,¹⁷³ Rodolfo Sacco,¹⁷⁴ Roger Cotterrell,¹⁷⁵ and H. Patrick Glenn,¹⁷⁶ support the idea that comparative law and, by extension, comparative legal rhetoric might develop analyses of differing legal cultures and legal infrastructures—the things that undergird differing modes of legal consciousness. An expansive comparative inquiry opens up explorations of alternative rhetoric such as African-American approaches to rhetoric and persuasion that may not necessarily exist within the

reconciliation, in which the consensus is reached as to what the remedy should be. *Id.* at 69–70. Remedies might include reparation or restitution, and actions might be agreed upon to ensure that the offender does not repeat his/her past mistakes. *Id.* at 70. Actions might include agreements. In this part of the process, there could be a plan, a major Navajo justice concept that encompasses the process of “turning intuition reached through prayer and reflection into talk, and the ‘talking out’ of peacemaking into a concrete plan of action.” *Id.* The overall process does not require coercive or punitive action. *Id.* Instead, it guides people toward an understanding that individual freedom should be exercised in the “context of the group and relationships with others.” *Id.* At the end of this healing process, *hozho*, a state of equilibrium and peace, should be achieved. *Id.*

Navajo peacemaking offers a healing alternative to traditional criminal justice systems that emphasize punitive and retributive approaches. Instead of punishment and control, individuals are encouraged to talk it out and, in cooperation with the community, address the underlying problems responsible for the bad actions. *Id.* at 58. Further, the ceremony’s emphasis on speaking and listening, encouraging participants to voice their perspectives without legal limits (such as those imposed by the rules of evidence), functions as a kind of group talk therapy. *See id.* at 66. Talk therapy can change the brain for the better because the reiteration of good thoughts, through verbal expression and listening, deepens positive neural pathways and weakens negative patterns. *See* DOIDGE, *supra* note 35, at 221. In this way, Navajo peacemaking is an alternative legal process that offers transformative healing for individuals and their brains.

173. Legrand argues that the performance of comparative legal analysis requires engagement with the sociohistorical and sociocultural context and a recognition that law is not a discrete set of rules but “an indissoluble amalgam of historical, social, economic, political, cultural, and psychological data, a compound, a hybrid, a ‘monster’, an ‘outrageous and heterogeneous collag[e].” Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (1996) (quoting John Law, *Introduction: Monsters, Machines and Sociotechnical Relations*, in A SOCIOLOGY OF MONSTERS: ESSAYS ON POWER, TECHNOLOGY, AND DOMINATION 18 (John Law ed., 1991)).

174. Sacco argues that legal comparatists focus on comparing legal formants, not just formal legal rules, but the below-the-surface rules and norms that actors actually follow and apply. *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 26–27 (1991).

175. Cotterrell argues that a comparative approach to law should move beyond positive legal rules and engage with the cultural elements that inform legal reality. Roger Cotterrell, *Comparative Law and Legal Culture*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 709, 710–11 (Mathias Reimann & Reinhard Zimmermann eds., 2006). Within culture, Cotterrell includes “underlying values or principles of a legal system, as well as traditions, shared beliefs, common ways of thinking, constellations of interests or patterns of allegiances of lawyers, lawmakers, and citizens.” *Id.* at 710.

176. Glenn argues legal comparatists can use traditions as the subject matter for comparison, which would allow the comparatist to “step outside of the system, still remaining within (traditional) law, and require it to justify itself, to provide the means of comparing and grounds for reconciliation.” H. Patrick Glenn, *Comparing*, in COMPARATIVE LAW: A HANDBOOK 91, 103 (Esin Örtücü & David Nelken eds., 2007).

confines of formal legal advocacy. For instance, critical race theory, although it has not been incorporated into binding legal authority within the United States, still offers a competing take on the law that embraces context, emphasizes narrative, and critiques existing legal categories that continue to harm the lives and wellbeing of communities of color.¹⁷⁷ We might study the similar and dissimilar ways that speakers deploy irony in legal and quasi-legal proceedings. As rhetoric professor Nick Sciullo suggests, there are hidden similarities between the caustic irony deployed by the former Supreme Court Justice Antonin Scalia and that deployed by hip-hop songwriter Wyclef Jean.¹⁷⁸ There is space for instruction on *Nommo*, the ancient Egyptian rhetorical concept that “embodies the idea of incantation as transformation,” and the idea that the spoken word contains “life-giving power” over “life, death, disease, health, and . . . liberation.”¹⁷⁹ Future comparative legal rhetoric projects might compare different modes of discourse with the goals of developing new knowledge, applying that knowledge to practical legal advocacy settings, and identifying strategies for carving healing paths in collective brain structures.

However, in undertaking this endeavor, there is great potential to fetishize or essentialize these “other” systems and improperly reduce other cultures to simple categories that function as foils to the Western system that is being compared.¹⁸⁰ There is also a danger that traditional law might coopt these reasoning forms, which exist outside of the system, in order to promote goals that conflict with the aims of the original rhetors. By way of example, one might think of how Eastern forms of thought have morphed into crassly commercial feel-good mantras and yoga poses. Accordingly, we must remain vigilantly critical in developing comparative legal rhetoric as a discipline.

177. See generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3–14 (2d ed. 2012).

178. Nick J. Sciullo, *Conversations with the Law: Irony, Hyperbole, and Identity Politics or Sake Pase? Wyclef Jean, Shottas, and Haitian Jack: A Hip-Hop Creole Fusion of Rhetorical Resistance to the Law*, 34 OKLA. CITY U. L. REV. 455, 480 (2009).

179. Arthur L. Smith, *Socio-Historical Perspectives of Black Oratory*, 56 Q.J. SPEECH 264, 264 (1970); see also Felicia R. Walker, *An Afrocentric Rhetorical Analysis of Johnnie Cochran's Closing Argument in the O.J. Simpson Trial*, in UNDERSTANDING AFRICAN AMERICAN RHETORIC 245, 248 (Ronald L. Jackson II & Elaine B. Richardson eds., 2003) (analyzing how Johnnie Cochran deployed *Nommo* rhetorical principles in his advocacy at the O.J. Simpson trial). Arthur L. Smith is better known as Molefi Kete Asante, the prolific scholar and preeminent African American studies professor.

180. Comparative rhetoricians have fleshed out this concern. See generally Guo-Ming Chen, *Moving Beyond the Dichotomy of Communication Studies: Boundary Wisdom as the Key*, in DE-WESTERNIZING COMMUNICATION RESEARCH: ALTERING QUESTIONS AND CHANGING FRAMEWORKS 157, 157–67 (Georgette Wang ed. 2011); Georgette Wang, *Orientalism, Occidentalism and Communication Research*, in DE-WESTERNIZING COMMUNICATION RESEARCH: ALTERING QUESTIONS AND CHANGING FRAMEWORKS, *supra*, at 58–64.