# "Like the Pirate and the Slave Trader Before Him": Precedent and Analogy in Contemporary Law and Literature

JENNY S. MARTINEZ AND LISA SURWILLO

"The Mediterranean, central to the development of human civilization and lovingly celebrated in Euro-American historiography, from the viewpoint of human oppression has been a veritable vortex of horror for all mankind, especially for the Slavic and African peoples. The relationship was in no way accidental."[1]

The transportation of the enslaved across the Mediterranean through the early modern period continued as a primarily northbound trade into the age of industrialized European modernity. In numerous ways, the practices of Mediterranean traffic formed the groundwork for the massive transatlantic slave trade from the African mainland to the European-controlled Atlantic islands in the fifteenth century and, subsequently, to the Americas. This slave trade ceased more than a century ago. But it is this Atlantic slave trade, fundamentally racialized in a way that was not characteristic of the earlier Mediterranean trade, which has provided the terminology for aqueous crossings of the Mediterranean into Europe in recent years. One concept in particular, that of the slave trader, has proven particularly prominent in popular, political, and legal discourse to describe movements of people that evade simple definitions of forced migrations or aspirational

1. Orlando Patterson, *Slavery and Social Death* (Cambridge: Harvard University Press, 1982), 171.

Jenny S. Martinez is Professor of Law & Warren Christopher Professor in the Practice of International Law and Diplomacy, Stanford Law School <jmartinez@law.stanford.edu>. Lisa Surwillo is Associate Professor in the Department of Iberian and Latin American Cultures at Stanford University <surwillo@stanford.edu>. The authors wish to thank Ariela Gross and other participants in the conference "A Crime Against Humanity: Slavery and International Law, Past and Present" 15–16 May 2015.

*Law and History Review* February 2017, Vol. 35, No. 1

doi:10.1017/S0738248016000523

emigration. In this article, we consider the implications of analogic uses of the transatlantic slave trade in legal and popular responses to irregular migration, most visibly across the Mediterranean, to Europe today.

During the height of chattel slavery, from the sixteenth through nineteenth centuries, the enslaved from Sub-Saharan Africa were designated *nègres* and *negros* and those who trafficked them were called *négriers* or *negreros*. The French and Spanish terms reflect a transatlantic trade that elaborated upon the racialization of the enslaved in a way that the Italian *schiavisti* or the English *slave trader* did not.[2] The more capacious application of the term *négrier* or *negrero* in the nineteenth century to any number of people related to the slave trade manifested a general acknowledgement of the importance of the slave trade and a racialized system of forced labor to the larger economic systems of the French and Spanish imperial systems, respectively. For example, in his denunciation of the French role in the slave trade, the Abbé Gregoire declared, "I call *négrier* not only the captain of the ship who steals, buys, chains, barrels, and sells slaves… but also every individual who, by direct or indirect cooperation, is an accomplice in these crimes."[3] A generation later, although from a different ideological position, Dionísio Alcalá Galiano similarly noted that every aspect of life in mid-century Cuba must necessarily be described as *negrero*. "The country is *negrero*. Everything said to the contrary is a farce, as I have hinted before; and except for a few sincere individuals (among whose number I include myself) there is hardly an inhabitant of Cuba that is not a moral accomplice to this kind of smuggling."[4] When used beyond its most narrow meaning, that is, to describe men other than slave traders, the term usually signaled a discomfort with the slave

2. The racialization of Atlantic slavery is rendered linguistically explicit in French, Spanish, and Portuguese. For the French case, see Simone Delesalle and Lucette Valensi on the distinction between *noir* and *nègre*. ("Le mot 'nègre' dans les dictionnaires français d'ancien régime: Histoire et Lexographie," *Langue française* 15 [1972]: 79–104.) ["The word 'nègre' in French dictionaries of the Ancien Regime: History and Lexicography"] For Spain and Portugal, see James H. Sweet, "The Iberian Roots of American Racist Thought," *The William and Mary Quarterly* 54 (1997): 143–166.

3. Henri Gregoire, *Des Peines Infamantes à Infliger Aux Négriers* (Paris: Baudouin Frères, 1822), 1 [Infamous Penalties to Inflict on Slavers] (translation our own).

4. El pais es negrero. Todo lo que se diga en contra es una farsa, como antes ya he insinuado; y salvo algunas pocas individualidades sinceras (entre cuyo número he de incluirme) no hay casi un habitante de Cuba que no sea cómplice moral en este género de contrabando." ["This is a negrero country. Anything said to the contrary is false, as I insinuated before; and except for a few sincere individuals (I include myself among them) there is hardly a single inhabitant of Cuba who is not a moral accomplice in this type of contraband."] Dionisio A. Galiano, *Cuba en 1858* (Madrid: Imprenta Beltrán y Viñas, 1859), 112; quoted in Lisa Surwillo, *Monsters by Trade* (Stanford: Stanford University Press, 2014), 11.

system and the immorality of the trade, as in these examples. After the definitive end of the transatlantic slave trade, the terms almost entirely lost currency.

The new millennium has witnessed a resurgence of interest in the historic Atlantic slave trade as part of an academic and popular recovery of a long-overlooked history that stemmed from both the growth of black history and a new assessment of the Atlantic.[5] Here, we consider contemporary France and Spain, major European participants in Atlantic slavery and the site of current immigration. Precisely the terms from those two empires, *negrero* and *négrier,* have re-emerged in popular usage, but not always with denotative clarity. The new, contemporary use of term *negrero* began in Spain in 2000, in discussions of the rapid influx of African immigrants who voluntarily embarked into the Atlantic, bound for the Canary Islands. The year 2006 alone saw the arrival in the islands of more than 31,000 immigrants from Africa, via what had become the primary avenue of entry into Europe. After abating for a few years, this immigrant route was reactivated in 2015 even as crossings of the Straits of Gibraltar and entry into the Spanish cities of Ceuta and Melilla on the North African coast increased. Before the temporary lull in Atlantic crossings, the analogy with the transatlantic slave trade had taken hold, and today's traffickers and their ships alike regularly are called *negreros* whether they sail the Atlantic or the Mediterranean.[6] The analogy of the historical slave trader and twenty-first century traffickers and human smugglers succeeds even though there are many forms of irregular migration. Only a minority of new arrivals in Europe depart from Sub-Saharan Africa, and the Atlantic is not the primary space of crossing. The strength of the metaphorical revival of the concept and the reasons for its acceptance as a reasonable

5. A range of recent studies has addressed the question of memory and slavery in the Atlantic world more generally, and in France and Spain in particular. See Ana Lucia Araujo *Shadows of the Slave Past: Memory, Heritage, and Slavery* (New York: Routledge, 2014); Johann Michel, *Gouverner les mémoires* (Paris: PUF, 2010) [Governing Memories]; and Surwillo, *Monsters by Trade.* See, also, the ongoing project *La Cartographie des Mémoires de l'Esclavage* [The Cartography of Memories of Enslavement] accessible at http://www.mmoe.llc.ed.ac.uk.

6. The usage goes well beyond the examples analyzed here. In 2014, Matteo Renzi, Prime Minister of Italy, argued that Southern European countries (Italy and Spain in particular) had been responsible for managing the Mediterranean migration crisis, and that all of Europe needed to be involved. Steve Sherer, "Italy's Renzi Says EU Must Take Responsibility for Boat Migrants," *Reuters,* 2014. http://uk.reuters.com/article/uk-italy-eu-migrants-idUKKBN0EZ1TK20140624 (July 5, 2016). Early in 2015, Renzi drew on the language of the slave trade to draw attention to the gravity of the situation: "Siamo in presenza di nuovi schiavisti." "Migranti, Renzi: 'Interventi Mirati contro schiavisti.' Giovedì consiglio straordinario Ue," *Reppublica,* 2015. http://www.repubblica.it/politica/2015/04/20/news/migranti_renzi_escludo_intervento_di_terra_salvini_sciacallo_berlusconi_saggio_-112385886/?refresh_ce. (July 5, 2016).

term beg exploration. An analysis of the analogical reasoning in law and popular discourses—two realms that manifest the racialized understanding of "European" and "immigrant" in linguistic terms—sheds light on the politics informing European responses to migration and the uses of history in a postmodern North Atlantic world.

Turning first to the modern inheritors of the Abbé Gregoire, French and francophone politicians have begun to speak of *négriers* when speaking of Mediterranean migrations. In an unusual convergence of ideologies, figures as diverse as spokespersons for the extreme right Front National, Mankeur N'Diayne (Minister of Foreign Affairs of Senegal), to François Hollande (President of France), have analogized Mediterranean smugglers with the historical slave trader.[7] Most significantly for the French case, on May 10, 2015, François Hollande traveled to Pointe-à-Pitre, Guadeloupe to inaugurate a memorial to the transatlantic slave trade where he categorically declared, "Les passeurs sont les négriers des temps modernes." [Smugglers are the *négriers* of modern times.] The slip from smuggler to trafficker is significant, as smugglers transport migrants who have fulfilled their financial obligations and have nothing to gain from their successful arrival in Europe; in contrast, trafficked people are usually transported in a scheme of debt bondage. Hollande and others elide this question of personhood and agency. The construction of analogies between debt bondage or servitude and the slave trade gird the legal cases addressed in this article. However, Hollande specifically referred to smugglers as *négriers*, in a rhetorical gesture that sidesteps the questions of ownership, personhood, or the transportation of persons in slave-like conditions, and instead points to the power of the slave trader and aqueous traffic in the contemporary European imagination. In other words, Hollande evokes the newly acquired discomfort over past imperial crimes to frame the present.

The growing popular awareness of the French participation in the transatlantic slave trade has not been simple happenstance, but rather the result of sustained educational, political, and commemorative efforts by citizens, many of whom were slave descendants, a campaign that culminated in the

7. See, for example, "Les migrants : une manne pour les "négriers" des temps modernes," November 6, 2015 ["Migrants: Manna for Modern-Day *Négriers*"]. http://www.frontnational.com/videos/les-migrants-une-manne-pour-les-negriers-des-temps-modernes/; "Mankeur N'diaye annonce une croisade contre les passeurs et déclare fantaisistes les chiffres sur le nombre de disparus Sénégalais en Méditerranée," *Dakaractu,* 2015 ["Mankeur N'Diaye Announces a Crusade Against Smugglers and Deems the Number of Disappeared Senegalese in the Mediterranean to be Unbelievable"]. http://www.dakaractu.com/Mankeur-N-diaye-annonce-une-croisade-contre-les-passeurs-et-declare-fantaisistes-les-chiffres-sur-le-nombre-de-disparus_a90341.html (July 5, 2016).

Taubira law of 2001.[8] Named for its sponsor, Christiane Taubira, deputy from Guyane, the legislation recognized the slave trades in the Atlantic and Indian Oceans of African, Amerindian, Malagasy, and Indian peoples as crimes against humanity, and required the discussion of the slave trade in the school curriculum. Subsequent to the legislation, a number of memorials in Africa, Europe, and the Americas have been created, the last in Guadeloupe in 2015. The risk of a modern appreciation of history framed by a tendency toward presentism has become immediately evident. Significantly, on the occasion of Hollande's analogy of smugglers with historical *négriers*, none other than Christiane Taubira expressed her concern that historical slavery should not be confused with modern practices.[9]

In this article, we explore the metaphor of the *négrier/negrero*, and the analogy of slavery in the past and present, as they are employed in both international law and in film, and how this bears on the European migration crisis today. In the pages that follow, we consider the rhetorical reasoning that has placed history at the heart of assessments of the contemporary migrant crisis in both law and literature. Both law and literature are rhetorical spaces in which public discourse plays out, but with different rules and conventions; in both spaces, we observe the reframing of contemporary migrations and labor practices with reference to the historic slave trade in ways that alter the understanding of both past and present.

In Western rhetoric, analogy is the logic of comparison, whereas metaphor is the use of language that expresses these comparisons. Metaphor, the trope of conceptual movement, is particularly apt for discussing the figure of the slave trader, the actor responsible for forced transference, par excellence. Strictly defined, metaphor ("transference" in Greek) implies movement and change, in which a word is transferred from its usual context to a new one where it generates new meanings. However, the transference of meaning is not unidirectional. Following Max Black, we argue that metaphor is more than a comparison between source and target; it is, rather, a lexical relationship. In what Black calls an "interaction view," successful metaphors emerge from the interaction of contexts of the two terms compared, such that both gain new meanings. For example, "to call a man a

8. Johann Michel, *Devenir Descendant D'Esclave: Enquête sur les régimes mémoriels* Rennes: PUR, 2015.

9. Diagne reported that Taubira "a voulu éviter que l'on fasse la confusion entre l'esclavage historique dont on célèbre l'abolition aujourd'hui et l'esclavage moderne." [has wished we could avoid confusing the historic slavery, whose abolition we celebrate today, with modern slavery.] Madiambale Diagne, "Passeurs de la Méditerranée : Hollande s'en prend aux «négriers modernes»," [Mediterranean Smugglers: Holland Takes on Modern *Négriers*] *Le Quotidien,* 2015. http://www.lequotidien.sn/index.php/international/passeurs-de-la-mediterranee-hollande-s-en-prend-aux-negriers-modernes (July 5, 2016).

'wolf' is to put him in a special light [and] we must not forget that the metaphor makes the wolf seem more human than he otherwise would."[10] That is, the conjunction of the terms of comparison in metaphors generates derivative meaning for both the target (man) and the source in its original context (wolf). What Black describes on the rhetorical level also happens in terms of historical knowledge and legal argumentation.

Analogies are the heart of common law legal reasoning.[11] Legal theorists have thoroughly debated jurisprudential questions such as the difference between reasoning by analogy and other forms of legal reasoning (such as deductive reasoning from general theories); the normative advantages and disadvantages of using analogic reasoning; the relationship between the analogies and the idea of precedent; and whether analogic reasoning can produce determinative outcomes or is, instead, subject to endless results-oriented manipulation. Here, we consider a different question, which others have not sufficiently addressed: when and how does the use of analogy in legal reasoning alter understanding of the past?

The ostensible purpose of analogy in legal reasoning is to illuminate the present. Analogies do so by guiding the court to a particular outcome in the case at hand; the analogy suggests that the present case is similar to a past case in legally relevant ways, and that the outcome today should therefore be the same as in a previous case. As Cass Sunstein explains, legal analogic reasoning typically proceeds as follows: "(1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects but shares characteristics X, or characteristics X, Y, and Z; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way."

The analytic work done by the analogy is in highlighting that the shared characteristics X, Y, and Z in fact pattern B as well as A, and in declaring them to be legally relevant characteristics that dictate a particular outcome. What is often overlooked is that the selection of characteristics X, Y, and Z not only illuminates fact pattern B, but also illuminates fact pattern A. In other words, legal analogies can also alter understanding of the past; of what characteristics are salient to understanding fact pattern A as well as fact pattern B. It changes the way one understands both the man and the wolf.

Slavery and the slave trade are foundational offenses in international human rights law, and analogies to these historical practices are made not

10. Max Black, *Models and Metaphors: Studies in Language and Philosophy,* (Ithaca: Cornell University Press, 1962), 44.

11. See, for example, Cass R. Sunstein, "*On Analogical Reasoning,*" *Harvard Law Review* 106 (1993): 741 ("Reasoning by analogy is the most familiar form of legal reasoning").

only in law related to contemporary forms of forced labor and trafficking, but in entirely separate areas of international law. Lists of *jus cogens* norms (that is, peremptory norms of international law from which no derogation by states is permitted) virtually always include slavery and slave trading.[12] The prohibition on slavery is one of the relatively few non-derogable norms in most modern human rights treaties.[13] Historically, it was in connection with suppressing the transatlantic slave trade that international treaties were first used for the advancement of global human rights objectives.[14]

The status of slave trading as perhaps *the* paradigmatic international human rights violation is illustrated by the use of an analogy to slave trading in *Filártiga v. Peña-Irala*, the 1980 case that inaugurated the use of the Alien Tort Statute to pursue human rights violators in United States courts.[15] Whereas most of our analysis in this article focuses on contemporary Europe, this famous case illustrates the prevalence of the analogic use of slavery across the interconnected imagined space of international law, a body of law shared among many nations, including those in Europe. Like most landmark human rights cases, the lawsuit in *Filártiga* began with a tragedy: the kidnapping, torture, and extrajudicial killing of Joelito Filártiga, the 17-year-old son of a political activist, by Inspector General of Police, Américo Norberto Peña-Irala, and other officials during the regime of Paraguayan dictator Alfredo Stroessner.[16]

Some years later, Joelito's father and sister discovered that Peña-Irala had left Paraguay and was living in the United States.[17] With the help of human rights groups, they sued him under a previously obscure law, the Alien Tort Statute, which had been on the books since 1789 and provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[18] Until seized upon by the human rights

12. See, for example, Restatement of the Law, Third, Foreign Relations Law of the United States, §102, Reporter's Note 6 ("Such [*jus cogens*] norms might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights. . . .").

13. Treaties including slavery as a non-derogable norm include: International Covenant on Civil and Political Rights, Article 8 (slavery, slave trade, and servitude); European Convention on Human Rights, Article 4(1) (slavery and servitude); American Convention on Human Rights, Article 6(1) (slavery, involuntary servitude, and slave trade); and African Charter on Human and Peoples' Rights, Article 5 (slavery and slave trade).

14. See, generally, Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford: Oxford University Press, 2012).

15. *Filártiga v. Peña-Irala,* 630 F.2d 876 (2d Cir. 1980), 878.

16. Richard Alan White, *Breaking Silence: The Case That Changed the Face of Human Rights* (Washington, DC: Georgetown University Press, 2004).

17. *Filártiga v. Peña-Irala,* 630 F.2d 876.

18. 28 U.S.C. § 1350.

lawyers representing the surviving Filártigas in this lawsuit, the statute had laid dormant for more than a century, but the court of appeals in *Filártiga* allowed her lawsuit to proceed, concluding in one of the most quoted passages in the decision that "for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind." In this reasoning, slave trading (along with piracy) is the quintessential international law violation, by which modern violations are judged to determine if they can proceed. *If* the torturer is like the slave trader in relevant respects, *then* that person is an enemy of humanity and can be sued wherever he or she is found. The analogy between piracy and slave trading was widely used in international law discourse in the nineteenth century in an attempt to justify the exercise of universal jurisdiction over slave traders by other nations, because piracy was the main offense over which such jurisdiction was recognized at the time.[19] In the first half of the twentieth century, international jurisdiction over piracy and the slave trade were invoked as precedents for the creation of international criminal courts, including the International Military Tribunal at Nuremberg.[20] *Filártiga* follows this line of international law and extends the usage by adding the torturer to the list of universal criminals.

*Filártiga* does not explain precisely how the torturer is like the slave trader; indeed, part of what is interesting is that the court does not even feel the need to explain the analogy. The power of the image of the slave trader is enough to make the analogy work. Herein lies the crux of what we examine in this article: the role in contemporary human rights law and discourse of the analogy to the historical slave trade and what is at stake in applying this analogy liberally, throughout the juridical space of international law, but even more in the European arena of the Mediterranean, where the site of original horrors has again become the stage of migrations framed as anachronistic.

*Filártiga* revives the slave trader explicitly through simile, with a "like" comparison that, characteristically, reveals a surprising commonality between two different concepts. The case used simile because torture is an entirely different offense, and the domains of comparison had fewer commonalities. Subsequent evocation of the *negrero* has been one of transference: the meaning is the same except that the explicit comparison is stripped of the framework of the simile. Now, smugglers and traffickers in the Mediterranean and West African coast are *negreros* themselves, rather than *as* much an enemy of all humanity *as* the slave trader. The object of

19. Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (New York: Oxford University Press, 2012), 114–39.

20. Ibid., 152–54.

comparison is substituted by the source, the slave trader, in a full metaphor. Metaphor and analogy transcend the realm of the poetic to shape how Western European society understands itself through the frame of the past.[21] Taking *Filártiga* as a point of departure, it is striking that piracy—the other term of comparison in the case—has not proven to be as useful a rhetorical vehicle as the slave trade for comparing the tenor of terror and tragedy of the high seas of the past with irregular migrants today. (Piracy has moved to the domain of intellectual property, where a different set of laws of theft and personhood are at play.) The move from simile to metaphor indicates a cultural acceptance of the underlying analogy between Atlantic slave traders of the past and traffickers in the Mediterranean today.

An analogy linking source and target draws on knowledge of the source in order to further understand the target. The greater one's knowledge of the two domains compared, the stronger the analogy. The source is not always historically precedent to the target, but rather to the field that is generally better understood. In the present evocation of the slave trader in human rights cases and the *negrero/négrier* in popular discourse, the source is the early modern transatlantic trade; the target is the agent of Mediterranean immigration today. What these two domains share is trafficking via aqueous routes, death of the trafficked in transit, and the absence of the rights of modern personhood for the trafficked either on board or upon arrival. The source and target diverge in that those who are transported today are not directly selected by race, and, moreover, generally wish to move.

Beyond the transference of the terms *negrero* and *négrier*, the present crisis revises understanding of the past, and the roles of target and source are confused, if not entirely reversed. Moving from rhetoric to historical comprehension, a consideration of what is happening in the present is accompanied by a reassessment of what happened in the past and the commonalities between the two domains represented by the slave trader.

The current analogy builds on race and the aquatic element of the two crossings. Although the majority of immigrants today arrive in Europe by air or land, and simply overstay their visas, the analogy of transatlantic slave trading works, especially in Spain, because of a consistently racialized view of immigration.[22]

21. George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: The University of Chicago Press, 2003).

22. Precise statistics about unauthorized migration are difficult to come by, particularly with regard to migrants who overstay initial visas. But at least until very recently, most migration to Europe was by routes other than the Mediterranean, and that is likely still the case. When both lawful and unauthorized migration are included, the number of migrants arriving by boat forms a minority of those immigrating. See Phillip Connor, "Illegal Immigration by Boat: A Dangerous but Common Way of Entering Europe," *Pew Research Center* Spring 2014.

Figure 1. *ABC* stock photo of immigration to Spain.

Spanish media accounts of immigration regularly depict Sub-Saharan Africans (usually men) in boats to illustrate irregular migration, in a rhetorical and visual move that underscores a similarity between past and present through its most tenuous commonality. According to Spanish demographers, most foreigners in Spain are Romanians, Moroccans and British, in that order.[23] Figure 1, from the Spanish daily *ABC*, simultaneously racializes contemporary immigration by reaffirming the image of migrants as black males in maritime transit (in contradiction to the content of the accompanying article) and suggests a gentler state apparatus dealing with these very black male bodies in maritime transit than that which characterized the age of chattel slavery.[24] To be clear, the image does not explicitly analogize past and present, but rather facilitates their comparison, and, subsequently, both revives and minimizes the horror of the historic transatlantic slave trade and the state's role in its creation and proliferation. The elasticity of analogy and its utility in understanding the incomprehensible tragedies of past and present are not limited to journalism.

---

http://www.pewresearch.org/fact-tank/2014/04/30/illegal-immigration-by-boat-a-dangerous-but-common-way-of-entering-europe/ (July 5, 2016); "Migration and Migrant Population Statistics," *Eurostat Statistics Explained,* Spring 2016. http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics (July 5, 2016).

23. Olga R. Sanmartín, "España pierde 200.000 extranjeros en sólo un año," *El Mundo* Winter 2014 ["Spain loses 200,000 foreigners in a single year"] http://www.elmundo.es/espana/2014/01/17/52d913e9268e3e9b5b8b4577.html (July 5, 2016).

24. "España, entre los diez países con mayor número de inmigrantes," *ABC España* Fall 2013 ["Spain, among the ten countries with the highest number of immigrants"]. http://www.abc.es/espana/20130912/abci-espana-inmigrantees-201309111955.html (July 5, 2016).

Several cases in the European Court of Human Rights have considered the state responsibility of European governments for modern day forms of slavery and forced labor in connection with Article 4 of the European Convention on Human Rights (EHCR), which provides that "[n]o one shall be held in slavery or servitude" and "no one shall be required to perform forced or compulsory labor." This line of cases constitutes one of the most significant strands of the courts' jurisprudence on Article 4.

A number of these cases involved domestic workers from African countries who worked without pay, often in the households of their co-nationals residing in European countries. One of the first of these decisions was *Siliadin v. France*. In that case, the ECHR considered a claim by a Togolese woman, Ms. Siwa-Akofa Siliadin, who had arrived in France in 1994 at the age of 15, on a tourist visa in the company of a French national of Togolese origin for whom she was to work as a domestic servant. Although Ms. Siliadin was promised that she would be allowed to go to school and would work only until her airfare had been earned back, in fact she was not allowed to go to school, she worked nearly around the clock without pay for her original employer and another family to which she was "loaned," and her passport was confiscated by her employer. She escaped briefly and found paid employment with another family, but her paternal uncle instructed her to return to the household where she had worked without pay. Sometime after that, she recovered her passport and with the help of a neighbor, escaped again, and this time was connected with the Committee against Modern Slavery (Comité Contre L'Esclavage Moderne).[25]

That group filed a complaint with the prosecutor's office, and French authorities prosecuted her employers. France did not have a statute criminalizing the practice of slavery as such, but rather two provisions addressing employment of vulnerable persons. The trial court convicted the employers on charges of having employed a vulnerable person without sufficient pay,[26] but acquitted them of more serious charges on the grounds that the working conditions were not "incompatible with human dignity, which would have implied, for example, a furious pace, frequent insults

25. The Parliamentary Assembly of the Council of Europe in a 2001 report noted that since 1994, this group had "taken up the cases of over 200 domestic slavery victims, mostly originating from West Africa." *Siliadin v. France*, 2005-VII Eur. Ct. H.R, para. 49, 350. The council further noted that "In the last few years a new form of slavery has appeared in Europe, namely domestic slavery. It has been established that over 4 million women are sold each year in the world." *Siliadin.*

26. *Siliadin,* Section 225–13 defining offense as "obtain[ing] from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence."

and harassment, the need for particular physical strength that was disproportionate to the employee's constitution and having to work in unhealthy premises, which had not been the case in in this instance."[27]

The convicted employers appealed their conviction. On appeal, the court noted that Ms. Siliadin had a "degree of independence, since she took the children to the locations where their educational and sports activities were held, and subsequently collected them." She had been allowed to attend church, go shopping, and make phone calls to her uncle from a pay phone. Accordingly, the appeals court acquitted the defendants of all charges, including that of having insufficiently remunerated a person in a vulnerable position. Portions of this judgment were overturned by the Court of Cassation and Ms. Siliadin was subsequently awarded approximately €30,000 in back pay from her employers by an employment tribunal; however, no criminal conviction was entered against her employers.

Ms. Siliadin subsequently took a claim to the European Court of Human Rights, contending that France had failed in its obligation to protect her under Article 4. Before the European Court, she argued that "her situation had corresponded to three of the four servile institutions or practices referred to in Article 1 of the Supplementary Geneva Convention of 30 April 1956, namely debt bondage, the delivery of a child or adolescent to a third person, whether for reward or not, with a view to the exploitation of his or her labour, and serfdom."[28] She further argued that "in addition to the unremunerated exploitation of another's work, the characteristic feature of modern slavery was a change in the individual's state or condition, on account of the level of constraint or control to which his or her person, life, personal effects, right to come and go at will or to take decisions was subjected."[29] She "noted that French criminal law did not contain specific offences of slavery, servitude or forced or compulsory labour, still less a definition of those three concepts that was sufficiently specific and flexible to be adapted to the forms those practices now took."[30]

The Court found that France had "positive obligations under Article 4 of the Convention [that] must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation."[31] The Court explained that the Convention is "a living instrument which must be interpreted in the light of present-day conditions, and that

27. *Siliadin*, para. 26. Section 225–14 defines the offense as "subject[ing] an individual to working or living conditions which are incompatible with human dignity by taking advantage of that individual's vulnerability or state of dependence."

28. *Siliadin* judgment, paras. 92–95.

29. *Siliadin*, para. 96.

30. Ibid, para. 98.

31. Ibid., para. 112.

the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[32]

The Court noted the 1926 Slavery Convention's definition that "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised." Moreover, it noted "that this definition corresponds to the 'classic' meaning of slavery as it was practised for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object."[33] Nevertheless, the Court found that Ms. Siliadin's treatment was in violation of the prohibition on forced or compulsory labor. The Court concluded that "the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim" and that France was liable to her. The state was ordered to pay her €26,000 in costs and expenses, but no compensatory damages, because she had not made a claim for compensation.

France was also found partially liable in a subsequent case involving two orphaned girls from Burundi who had worked without pay in the home of their aunt and uncle in France. In that case, the ECHR found that one of the two girls had been forced to do work that should have been remunerated and was well beyond the type of activity performed by children in a family in terms of nature and volume. The court concluded that France had failed to put in place the legislative and administrative framework necessary to protect against servitude and forced labor.[34] The United Kingdom was similarly found liable in a case by a Ugandan woman who had been forced to work as a domestic caregiver on the grounds that the state, through its failure to adopt legislation criminalizing domestic servitude, had failed in its obligation to provide protection against treatment contrary to Article 4.[35]

The treatment of the applicants in these cases by their employers was deplorable. But the social and economic context in which these young women and girls arrived in Europe was left unexplored in the European Court decisions.[36] All of these women had made the journey from former

32. Ibid., para. 121.
33. Ibid., para. 122.
34. *C.N. and V. v. France* (No. 67724/09).
35. *C.N. v. United Kingdom* (No. 4239/08).
36. Also largely undiscussed in the judicial decisions is the role of gender, social context, and the network of familial relations in which some of the cases took place, in which the

colony to metropole, traveling networks of kinship and common language that tie the European colonizing states to their former colonies. The victims or their families played a role in the decision to send them to Europe, and they risked the trip because of economic hardship and unsafe living conditions in their countries of origin.[37] Often, the greatest threat wielded by their employers was the threat to send them out of Europe and back home.[38] In these cases, the European court considers state responsibility for slavery; however, it is an artificially constrained and almost antiseptic form of responsibility, not for the broader context in which the cases occur, but for failure of specific legal mechanisms to address specific labor practices. What hangs in the balance is a widespread European recognition of historic and present responsibility. The present state of France, for example, may not be legally responsible for the past, although the nation may in some sense be morally responsible. Nevertheless, the cases discussed suggest that the issue of state responsibility is haunted by unresolved anxieties over the historical creation and promotion of slavery and the slave trade by the state. National responsibility for forgotten nineteenth century tragedies is the subtext of the revived use of the image of the slave trader and the transatlantic slave trade.

In French popular culture, as in law, the Atlantic slaving past is the primary source of analogical means to understanding the present, whereas Mediterranean migration is a means for reconsidering the past. Modern migration patterns have triggered metaphorical framings in various realms of public consciousness, including popular culture, law, and politics. Mediterranean migration on a large scale emerged contemporaneously with calls by Taubira, Édouard Glissant, and others for European powers to recognize their role in the historic crimes of the Atlantic. The language and imagery were readily transferred to describe the new phenomenon. One prominent example is the 2012 animated film *Zafara* by Rémi

victims either labored in the households of relatives or at the behest of extended family. See, for example, *C.N. v. United Kingdom* (noting that "a relative named S. and a Mr. A helped her obtain a false passport and a visa to enable her to enter the United Kingdom" and that S. was paid for her labor, although Mr. A did not pass the money on to her).

37. See, for example, *C.N. v. United Kingdom,* para. 5 ("She claimed that she had been raped several times in Uganda and that her purpose in travelling to the United Kingdom was to escape from the sexual and physical violence which she had experienced").

38. See *Siliadin*, para. 94 ("Her freedom to come and go had been limited, her passport had been taken away from her, her immigration status had been precarious before becoming illegal, and she had also been kept by Mr and Mrs B. in a state of fear that she would be arrested and expelled. She considered that this was equivalent to the concept of self-imposed imprisonment described above."); and *C.N. and V. v. France,* para. 20 ("The applicants further alleged that they had been physically and verbally harassed on a daily basis by their aunt, who regularly threatened to send them back to Burundi to punish them . . .").

Bezançon and Jean-Christophe Lie. Ostensibly for children, the historical fiction (loosely based on the story of the first giraffe in France) represents the Mediterranean crossings by a young boy and a giraffe in the 1820s in terms recognizable to a contemporary audience, but in a setting that allows for a deeper understanding of France's role in human traffic in the past. The film's depiction of the migration of Africans into France expands the bounds of a strictly colonial story, to encompass the border where people move and stories blend.

Briefly, the plot is structured as follows. Maki, a young boy in Sudan is shown in chains, captured by a white French slave trader. He manages to escape and find solace with a giraffe and her calf. Almost immediately, the slave trader discovers Maki and kills the mother giraffe. A Bedouin trader appears at this crucial moment and protects Maki but also captures the young giraffe and begins to transport her across the Sahara Desert, through the Maghreb, to the Mediterranean coast. Maki follows them across the sea of sand, nearly perishing in the attempt. Upon arrival in Egypt, the trader Hassan delivers the giraffe to Muhammad Ali, the pacha of Egypt, who arranges for the exotic animal to continue her travels with the Bedouin Hassan to France as a gift to the new French king Charles X and a diplomatic investment of sorts. The difficulties of their desert and maritime crossing form the core of the film. Once in France, the two Africans and the giraffe undertake an arduous journey to Paris, whereupon Zafara is placed in a cage at the zoo and Maki is enslaved by the very same *négrier* who had captured him in Sudan. Maki and Zafara face equivalent oblivion by the Parisians who cease to care about these African lives in France.

Three aspects of the film converge with current events and invite analogic interpretations of the past. The white French slave trader takes Africans (Maki, his friend Soula, and others) to a supposedly slave-free France to live in slave-like conditions. They remain invisible in their domestic labors and entirely unfamiliar with a Paris beyond the garden walls that they are never allowed to see. The similarity with the individual cases of domestic workers discussed in this article as well as with the general perception of slave-like domestic labor is striking and emotive. Furthermore, Charles X's refusal to ameliorate the situation in Alexandria alludes to postcolonial fallout, and questions the responsibility that France has to intercede in and rectify conflicts across the Mediterranean and Maghreb that France and its European allies initiated. Finally, the film illustrates the Mediterranean crossing in terms parallel to those faced by current migrants. Maki and Hassan have to find a vessel that will survive the perilous journey and break the Turkish blockade of the port of Alexandria. The pacha suggests the *négrier*, but Maki and Hassan find him unacceptable for obvious reasons. Hassan, the trader and

smuggler, ultimately decides on a fantastic aerial passage in a hot air balloon, thus bypassing dangerous maritime travel entirely; the array of vessels allude to the similar range of watercraft in the present and the fact that smugglers transport migrants by air, also. Maki initially attempts to travel as a stowaway on the balloon, but ends up on a pirate ship. Significantly, the pirates are the most honorable and trustworthy agents on the Mediterranean, as they ascribe to a recognizable moral code.

What is of concern is not the actual story of France's first giraffe, but its retelling through the frame of a more familiar story of trafficking across the Mediterranean with dehumanized persons and a heavily anthropomorphized animal. The target and the source of the comparison are set in ambivalent positions, as the present is used to open up the suppressed and forgotten past. In this it shares much with other literary works. Historical fiction always tells us as much about our present as our past. The concerns of the moment of composition motivate characterization and the framing of the plot, but the best historical fiction offers its readers new ways of perceiving history, and incites a desire to learn more.[39]

The expansion of the metaphor of chattel slavery to encompass contemporary servitude and bondage appears positive, because it provides a legal framework for pursuing traffickers. At the same time, the racialization of public perceptions of current migration patterns has other consequences in terms of political responses to migrants. Moreover, the comparison also diminishes the gravity of eighteenth and nineteenth century slave trading. Returning to the rhetorical and linguistic implications of metaphor, and the consistent use of the same word for both situations, Mary Hesse reminds us of the fundamental implications of Max Black's reading of analogy. "The relation between two things of which the same word is predicated is a symmetrical relation; the predication is metaphorical in *both* cases, not literal in one and metaphorical in the other, and this is so because of an *interaction* of meanings of the word in the two contexts. Similarities become highlighted and differences disregarded, and this in turn leads to further similarities being noted, whereas further differences being overlooked."[40] Therefore, in conclusion one could ask: What is the danger of this analogical reasoning and metaphorical transference of the transatlantic slave trader to the contemporary trafficker or smuggler of today?

At stake in the analogy is the sui generis nature of the historic transatlantic slave trade. Not only were more than 12,000,000 people enslaved

39. Rosemary Erickson Johnsen, *Contemporary Feminist Historical Crime Fiction*. (New York: Palgrave Macmillan, 2006), 2–3.

40. Mary Hesse "Aristotle's Logic of Analogy," *The Philosophical Quarterly* 15 (1965): 328–40.

and transported from Africa to the New World, but the trade was foundational to the social and economic structures of the countries involved. This global system of slavery was still within living memory when the 1926 Anti-Slavery Convention was drafted. What effect does analogizing contemporary forced labor practices to the type of slavery contemplated by the drafters of the 1926 Convention have? Does finding that characteristic X is sufficient to support the analogy (in both cases, people were forced to labor without pay and deprived of personal autonomy) strip away the salience of characteristics Y and Z in the historic slave trade? What effect does this stripping away of those characteristics have in terms of historical memory? Does it, as Ariela Gross and Chantal Thomas suggest elsewhere in this issue, minimize nations' sense of responsibility for the legacies of the historic transatlantic slave trade and slavery?

The idea of reparations for transatlantic slavery has been raised in several contexts in the past 20 years,[41] but most salient for the postcolonial context of these cases from Europe are recent claims by a group of Caribbean countries. These countries have called upon European countries to apologize for the slave trade and to pay compensation to those countries to address the lingering legacy of slavery. The Caricom Reparations Commission, representing fourteen Caribbean nations, has asked for government debt write-offs and funding for education and public health. The Caribbean countries threatened to sue the European nations in the International Court of Justice. The issue of reparations became a point of public debate last fall with the visit by British Prime Minister David Cameron to Jamaica. Some critics have noted the irony that the British Government paid £20,000,000 in compensation to slave *owners* for the liberation of slaves upon abolition in British colonies in 1833, the equivalent of £2,000,000,000 today, whereas the victims of slavery received no compensation.[42]

An impression of continuity created through analogies between current-day labor situations and historic slavery gives short shrift to the discontinuities between the past and present and the legal and narrative strategies that have reshaped society's approach to trafficked persons. Regardless of the legal or political viability of claims for monetary reparations, analogies

41. Slavery reparations lawsuits brought in the United States against corporations said to have profited from slavery in the nineteenth century have all been dismissed on various substantive and procedural grounds. See *In re African-American Slave Descendants Litigation,* 375 F. Supp. 2d 721 (2005), aff'd in part and rev'd in part and modified in part, 471 F.3d 754 (7th Cir. 2006); *Cato v. United States,* 70 F.3d 1103 (9th Cir. 1995). Here, we focus on the European postcolonial context and do not address the North American context.

42. See Matthew Weaver, "British Slavery Reparations Q & A," *The Guardian* Fall 2015. https://www.theguardian.com/world/2015/sep/30/british-slavery-reparations-qa. (July 5, 2016).

have an impact on society's moral sense and historical understanding of the ways in which the transatlantic slave trade shaped national economies and societies as well as the international economic and political system. Moreover, analogy focused at the individual level (on the person who has been enslaved or put to forced labor) obscures other aspects of continuity at the level of society; for example, the disparity in accumulated wealth passed down from generation to generation between individuals of different races, or between former colonial and colonizing nations. Most importantly, it impedes understanding of global society today and distorts the questions historians may investigate in the future.