

# Critical Race Theory

T H E C U T T I N G E D G E

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# 61 Innocence and Affirmative Action

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WHEN we create arguments, we reveal ourselves by the words and ideas we choose to employ. Verbal structures that are used widely and persistently are especially worth examination. Arguments made with repeated, almost formulaic, sets of words suggest a second argument flowing beneath the apparent argument. Beneath the apparently abstract language and the syllogistic form of these arguments, we may discover the deeper currents that explain, at least in part, why we seem so attached to these verbal structures.

Argument about affirmative action is particularly wrenching and divisive, especially among people who agree, formally speaking, on the immorality of racism. In a world where the dominant public ideology is one of nonracism, where the charge of racism is about as explosive as one can make, disagreement about affirmative action often divides us in an angry and tragic manner.

I shall examine a recurring element of the rhetoric of affirmative action. This element, the "rhetoric of innocence," relies on invocation of the "innocent white victim" of affirmative action. The rhetoric of innocence is a rich source of the deeper currents of our affirmative action debate. By revealing those deeper currents, we may gain a clearer sense of why the issue of affirmative action so divides good people, white and of color. Getting clearer about ourselves often is painful and disturbing. And the reason is simple—the rhetoric of innocence is connected to racism. It is connected in several ways, but, most disturbingly, the rhetoric embodies and reveals the unconscious racism in each of us. This unconscious racism embedded in our rhetoric accounts, at least in part, for the tragic impasse we reach in our conversations about affirmative action. My hope is that by dragging out these deeper and darker parts of our rhetoric we may have a better chance of continuing our conversation. If we each can acknowledge the racism that we cannot entirely slough off, we may be able to move past that painful impasse and talk of what we ought to do.

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### The Rhetoric of Innocence

A persistent and apparently important part of the affirmative action dialogue, both judicial and academic, is what can be termed the "rhetoric of innocence." The rhetoric of innocence is used most powerfully by those who seek to deny or severely to limit affirmative action, the "white rhetoricians."<sup>1</sup> This rhetoric has two related forms.

First, the white rhetorician may argue the plight of the "innocent white victims" of the affirmative action plan. The white applicant to medical school, the white contractor seeking city construction contracts, and so on are each "innocent" in a particular sense of the word. Their "innocence" is a presumed feature, not the product of any actual and particular inquiry. It is presumed that the white victim is not guilty of a racist act that has denied the minority applicant the job or other position she seeks; in that particular sense of the word, the white person is "innocent." The white rhetorician usually avoids altogether questions that suggest a different and more complex conception of innocence. In particular, the rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways. Thus, the rhetoric of innocence obscures this question: What white person is "innocent," if innocence is defined as the absence of advantage at the expense of others?

The second and related part of the rhetoric of innocence is the questioning of the "actual victim" status of the black beneficiary of the affirmative action plan. Because an affirmative action plan does not require particular and individualized proof of discrimination, the rhetorician is able to question or deny the "victim" status of the minority beneficiary of the plan. "Victim" status thereby is recognized only for those who have been subjected to particular and proven racial discrimination with regard to the job or other interest at stake. As with the first part of the rhetoric, the argument avoided is the one that derives from societal discrimination: If discrimination against people of color is pervasive, what black person is not an "actual victim"?

These two parts work as a unitary rhetoric. Within this rhetoric, affirmative action plans have two important effects. They hurt innocent white people, and they advantage undeserving black people. The unjust suffering of the white person becomes the source of the black person's windfall. These conjoined effects give the rhetoric power. Affirmative action does not merely do bad things to good ("innocent") people nor merely do good things for bad ("undeserving") people; affirmative action does both at once and in coordination. Given the obvious power of the rhetoric of innocence, its use and persistence in the opinions of those Justices who seek to deny or severely to limit affirmative action [are] not surprising.

The Supreme Court's affirmative action jurisprudence essentially began with *Regents of the University of California v. Bakke*.<sup>2</sup> From *Bakke* through the most recently decided cases, the Court has splintered again and again, the Justices authoring opinions that constitute a bitter and divisive dialogue.<sup>3</sup> Within that dia-

logue the rhetoric of innocence is a persistent and powerful presence. In *Bakke* a majority of the Court struck down a medical school admissions program that set aside a specific number of places for minorities only.<sup>4</sup> The majority concluded that, although the admissions process might take account of race, the quota system employed by the state medical school either violated Title VI or denied the white applicants their constitutional right to equal protection under the fourteenth amendment.<sup>5</sup>

Justice Lewis Powell introduced the rhetoric of innocence to the Court's affirmative action discourse while announcing the judgment for the Court in *Bakke*. He used the rhetoric several times in the course of the opinion. Powell wrote of the patent unfairness of "innocent persons . . . asked to endure . . . [deprivation as] the price of membership in the dominant majority."<sup>6</sup> He wrote of "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."<sup>7</sup> In a passage that embodies both the assumption of white innocence and the questioning of black victimization, Powell distinguished the school desegregation cases and other precedents in which racially drawn remedies were endorsed.

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.<sup>8</sup>

Thus Powell, who sought to circumscribe tightly the ambit of affirmative action, relied on the rhetoric of innocence.

In contrast to Powell's opinion, the dissenting opinions by Justices William Brennan and Thurgood Marshall each challenged the premises of the rhetoric. Justice Brennan rejected the idea of requiring proof of individual and specific discrimination as a prerequisite to affirmative action.<sup>9</sup> Marshall attacked directly the rhetoric of white innocence and the questioning of black victimization: "It is unnecessary in 20<sup>th</sup>-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."<sup>10</sup>

The rhetoric of innocence continued in the cases following *Bakke*. In *Fullilove v. Klutznick*<sup>11</sup> a majority of the Court upheld a federal statute mandating a ten percent set-aside for minority contractors in federally supported public

works projects. Justice Warren Burger made use of the rhetoric of innocence, even while writing to uphold the set-aside: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . 'a sharing of the burden' by innocent parties is not impermissible."<sup>12</sup> He proceeded to emphasize the "relatively light" burden imposed on the white contractors and the flexible nature of the set-aside provisions. Thus, although Justice Burger wrote an opinion that upholds a particular affirmative action program, he used the rhetoric of innocence to emphasize the limitations of his endorsement. Burger thereby implied that a heavier burden on the innocent white parties might have made the plan unconstitutional.

Justice Potter Stewart, dissenting, expressed the rhetoric in both its "innocence" and "actual victimization" parts:

[The federal statute's characteristics] are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE [Minority Business Enterprise] set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.<sup>13</sup>

Powell again invoked the rhetoric in his majority opinion in *Wygant v. Jackson Board of Education*.<sup>14</sup> In *Wygant* the majority struck down the provisions of a collective bargaining agreement that gave blacks greater protection from layoffs than that accorded white teachers with more seniority. The agreement was a product of prior litigation seeking to provide meaningful integration of the school faculties in the county. Without the special protection for the newly hired black teachers, the layoffs essentially would have undone the previous integration efforts. The majority nonetheless concluded that the agreement violated the constitutional rights of the laid-off white teachers:

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. . . . But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.<sup>15</sup>

Thus, mere societal discrimination is an insufficient predicate for the disadvantaging of innocent white teachers. This "societal discrimination" point is an important variant of the rhetoric of innocence. The black teachers are not real victims; they are subject merely to societal discrimination, a phenomenon that

seems weak and abstract, practiced by no one in particular against no one in particular.<sup>16</sup>

Justice Byron White wrote separately in *Wygant*. For him the case was simple. White reasoned: The firing of white teachers to make room for blacks in order to integrate the faculty would be patently unconstitutional; laying off whites to keep blacks on the job is the same thing; therefore, the layoff provision is unconstitutional. In White's pithy one paragraph opinion he used the "actual victimization" part of the rhetoric, referring to "blacks, none of whom has been shown to be a victim of any racial discrimination."<sup>17</sup>

*City of Richmond v. J. A. Croson Co.*<sup>18</sup> continues the uninterrupted use of the rhetoric of innocence in affirmative action dialogue within the Court. Justice Sandra Day O'Connor's opinion for the Court struck down Richmond's ordinance setting aside thirty percent of the dollar amount of city construction contract work for minority contractors. Her opinion relied on the essential premises and conclusion of the rhetoric without using the usual phrases. Justice O'Connor wrote of the "generalized assertion" and "amorphous claim" of racism in the Richmond construction industry, thereby denying the actual victimization of the black beneficiaries.<sup>19</sup> Other justices followed suit.

As we have seen, from *Bakke* through *Richmond* the Court has splintered on the issue of affirmative action. Through the splintering and uncertainty, the rhetoric of innocence persists as an important tool in the hands of those who seek to limit the use of affirmative action. I now explore the deeper nature and special power of this important rhetorical tool.

### Innocence and Racism

It is hard to know whether, and how, rhetoric works. We do know, however, that both judges and academicians often use the rhetoric of innocence. Those who use the rhetoric presumably find it persuasive or at least useful. What then could be the sources and nature of its apparent power?

#### INNOCENCE

The power of the rhetoric of innocence comes in part from that of the conception of "innocence" in our culture. The idea of innocent victims, particularly when coupled with the specter of those who victimize them, is a pervasive and potent story in our culture. "Innocence" is connected to the powerful cultural forces and ideas of religion, good and evil, and sex. "Innocence" is defined typically as "freedom from guilt or sin" or, in the sexual sense, as "chastity."

The centrality of the conception of "innocence" to the Christian religion is obvious. Christ is the paradigmatic "innocent victim." Mary is the perfect embodiment of innocence as chaste. Although the concept of "original sin" complicates the notion of innocence in Christian theology, the striving toward innocence and the veneration of those who come closest to achieving it and thereby

suffer are important ideas in modern Christian practice.<sup>20</sup> "Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven."<sup>21</sup> The idea of innocence also is connected to the myths and symbols of evil. For example, Paul Ricoeur in *The Symbolism of Evil* demonstrates the cultural significance of the "dread of the impure" and the terror of "defilement."<sup>22</sup> The contrasting state for "impure," or the state to which the rites of purification might return us, is "innocence," freedom from guilt or sin. Ricoeur's thesis spans the modern and classical cultures. He makes clear the persistence and power of the symbolism of evil and its always present contrast, the state of innocence.

What is central within the modern culture surely will be reflected in its literature. And in literature the innocent victim is everywhere. In *Innocent Victims: Poetic Injustice in Shakespearean Tragedy*, R. S. White argued "that Shakespeare was constantly and uniquely concerned with the fate of the innocent victim."<sup>23</sup> White observed, "In every tragedy by Shakespeare, alongside the tragic protagonist who is proclaimed by himself and others as a suffering centre, stands, sometimes silently, the figure of pathos who is a lamb of goodness: Lavinia, Ophelia, Desdemona, Cordelia, the children."<sup>24</sup> Shakespeare was not alone in the use of women and children drawn as innocent victims. In the work of Dickens, Hugo, Melville, and others, the suffering innocent is a central character.

The innocent victim is part of sexual practice and mythology. The recurring myth of the "demon lover" and its innocent victim is one example.<sup>25</sup> Moreover, we are preoccupied with innocence in the female partner as part of the mythological background of rape and prostitution and in our prerequisites in the chosen marriage partner.<sup>26</sup> The idea of the innocent victim always conjures the one who takes away her innocence and who thereby himself becomes both the "defiler" and the "defiled." In literature and in life the innocent victim is used as a means of conjuring the notion of defilement. In fact, it is impossible to make sense of the significance of either the "innocent victim" or the "defiler" without imagining the other. Each conception is given real significance by its implicit contrast with the other. Thus, the invocation of innocence is also the invocation of sin, guilt, and defilement.

The rhetoric of innocence in affirmative action discourse thus invokes one of the most powerful symbols of our culture, that of innocence and its always present opposite, the defiled taker. When the white person is called the innocent victim of affirmative action, the rhetorician is invoking not just the idea of innocence but also that of the not innocent, the defiled taker. The idea of the defiled taker is given a particular name in one of two ways. First, merely invoking the "innocent white victim" triggers at some level its rhetorically natural opposite, the "defiled black taker." This implicit personification is made explicit by the second part of the rhetoric, the questioning of the "actual victim" status of the black person who benefits from the affirmative action plan. The contrast is between the innocent white victim and the undeserving black taker. The cultural significance of the ideas of innocence and defilement thus gives the rhetoric of innocence a special sort of power.

## UNCONSCIOUS RACISM

The rhetoric of innocence draws its power not only from the cultural significance of its basic terms but also from its connection with "unconscious racism." Professor Charles Lawrence explored the concept of "unconscious racism" and its implications for equal protection:<sup>27</sup>

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.<sup>28</sup>

We are each, in this sense of the word, racists.

Lawrence's thesis is disturbing especially to the white liberal who can think of a no more offensive label than that of "racist." Moreover, the white intellectual, whether politically liberal or conservative, typically expresses only disgust for the words and behavior of the white supremacists and neo-Nazis he connects with the label "racist." The dominant public ideology has become nonracist. Use of racial epithets, expressions of white genetic superiority, and avowal of formal segregation are not part of the mainstream of public discourse. These ways of speaking, which were part of the public discourse several decades ago, are deemed by most today as irrational utterances emanating from the few remaining pockets of racism.

Notwithstanding that the public ideology has become nonracist, the culture continues to teach racism. The manifestations of racial stereotypes pervade our media and language. Racism is reflected in the complex set of individual and collective choices that make our schools, our neighborhoods, our work places, and our lives racially segregated.<sup>29</sup> Racism today paradoxically is both "irrational and normal,"<sup>30</sup> at once inconsistent with the dominant public ideology and embraced by each of us, albeit for most of us at the unconscious level. This paradox of irrationality and normalcy is part of the reason for the unconscious nature of the racism. When our culture teaches us to be racist and our ideology teaches us that racism is evil, we respond by excluding the forbidden lesson from our consciousness.

The repression of our racism is a crucial piece of the rhetoric of innocence. First, we sensibly can claim the mantle of innocence only by denying the charge of racism. We as white persons and nonracists are innocent; we have done no harm and do not deserve to suffer for the sins of those other white people who were racists. If we accept unconscious racism, this self-conception is unraveled. Second, the black beneficiaries of affirmative action can be denied "actual victim" status only so long as racists are thought of as either historical figures or

aberrational and isolated characters in contemporary culture. By thinking of racists in this way we deny the presence and power of racism today, relegating the ugly term primarily to the past. Thus, by repressing our unconscious racism we make coherent our self-conception of innocence and make sensible the question of the actual victimization of blacks.

The existence of unconscious racism undermines the rhetoric of innocence. The "innocent white victim" is no longer quite so innocent. Furthermore, the idea of unconscious racism makes problematic the "victim" part of the characterization. The victim is one who suffers an undeserved loss. If the white person who is disadvantaged by an affirmative action plan is also a racist, albeit at an unconscious level, the question of desert becomes more complicated.

The implications of unconscious racism for the societal distribution of burdens and benefits also undermine the "innocent" status of the white man. As blacks are burdened in a myriad of ways because of the persistence of unconscious racism, the white man thereby is benefited. On a racially integrated law faculty, for example, a black law professor must overcome widespread assumptions of inferiority held by students and colleagues, while white colleagues enjoy the benefit of the positive presumption and of the contrast with their black colleague.<sup>31</sup>

The historical manifestations of racism have worked to the advantage of whites in every era. Just as slavery provided the resources to make possible the genteel life of the plantation owner and his white family in early-nineteenth-century Virginia, more than a century later the state system of public school segregation diverted the State's resources to me and not to my black peers in Virginia. The lesson of unconscious racism, however, is that the obvious advantages of state-sponsored racism, the effects of which still are being reaped by whites today, are not the only basis for skewing the societal balance sheet. Even after the abolition of state racism, the cultural teachings persist. The presence and power of unconscious racism [are] apparent in job interviews, in social encounters, in courtrooms and conference rooms, and on the streets. In our culture whites are necessarily advantaged, because blacks are presumed at the unconscious level by most as lazy, dumb, and criminally prone. Because the white person is advantaged by assumptions that consequently hurt blacks, the rhetorical appeal of the unfairness to the "innocent white victim" in the affirmative action contest is undermined.

Moreover, the "actual victim" status of the black person who benefits from affirmative action is much harder to question once unconscious racism is acknowledged. Because racial discrimination is part of the cultural structure, each person of color is subject to it, everywhere and at all times.<sup>32</sup> The recognition of unconscious racism makes odd the question whether this person is an "actual victim." The white rhetorician often seeks to acknowledge and, at the same time, to blunt the power of unconscious racism by declaring that "societal discrimination" is an insufficient predicate for affirmative action.<sup>33</sup> "Societal discrimination" never is defined with any precision in the white rhetoric, but it suggests an ephemeral, abstract kind of discrimination, committed by no one in particular

and committed against no one in particular, a kind of amorphous inconvenience for persons of color. By this term the white rhetorician at once can acknowledge the idea of unconscious racism while giving it a different name and therefore a different and trivial connotation.

The rhetoric of innocence coupled with the idea of "societal discrimination" thus obscures unconscious racism and keeps rhetorically alive the innocence of the white person and the question of actual victimization of the black person. Unconscious racism meets that rhetoric on its own terms. Once one accepts some version of the idea of unconscious racism, the rhetoric of innocence is weakened analytically, if not defeated.

The rhetoric of innocence and unconscious racism connect in yet another way. Through the lens of unconscious racism the rhetoric itself can be seen to embody racism. Professor Lawrence described the two types of beliefs about the out-group held by racists:

[S]tudies have found that racists hold two types of stereotyped beliefs: They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks), or they believe the out-group is pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews).<sup>34</sup>

The stereotype of lazy and oversexed is abundant in our culture's characterization of the black person.<sup>35</sup>

The two parts of the rhetoric of innocence connect to and trigger at some level the stereotypical racist beliefs about blacks. The assertion of the innocent white victim draws power from the implicit contrast with the "defiled taker." The defiled taker is the black person who undeservedly reaps the advantages of affirmative action. The use of the idea of innocence and its opposite, defilement, coalesces with the unconscious racist belief that the black person is not innocent in a sexual sense, that the black person is sexually defiled by promiscuity.<sup>36</sup> The "over-sexed" black person of the racist stereotype becomes the perfect implicit, and unconsciously embraced, contrast to the innocent white person.

A similar analysis applies to the second part of the rhetoric of innocence. The question whether the black person is an actual victim implies that the black person does not deserve what the black person gets. This question draws power from the stereotypical racist belief that the black person is lazy. The lazy black seeks and takes the unearned advantages of affirmative action.

My point is not that the white rhetorician is consciously drawing on the stereotypical racist beliefs. Nor is the white audience consciously embracing those beliefs when they experience the rhetoric of innocence in affirmative action discourse. Both the rhetoricians and their audience are likely to reject the stereotypes at the conscious level. Moreover, they would be offended at the very suggestion that they might hold such beliefs. The great lesson of Professor Lawrence's work is that the beliefs are still there, even in the white liberal. The beliefs are there because the teacher is our culture; any person who is part of the

culture has been taught the lesson of racism. While most of us have struggled to unlearn the lesson and have succeeded at the conscious level, none of us can slough off altogether the lesson at the unconscious level.

If we see the rhetoric of innocence as just another part of the debate, we get nowhere. If instead we push past the apparently simple forms of the rhetoric and struggle to understand the deeper currents, perhaps we can acknowledge and then move beyond the question of our own unconscious racism and start talking, in a hopeful and productive way, of what we might do about it.

Examination of the rhetoric of innocence may teach us that "innocence" is a powerful and very dangerous idea which simply does not belong in the affirmative action debate. Real and good people certainly will suffer as a result of the use of affirmative action. Yet, we will be much further along in our efforts to deal with that painful fact if we put aside the loaded conception of innocence. The question for us is not whether we shall make innocent people suffer or not; it is how do we get to a world where good people, white and of color, no longer suffer because of the accidental circumstances of their race. We cannot get from here to there if we refuse to examine the words we use and deny the unconscious racism that surrounds those words.

#### NOTES

1. I do not use the term "white rhetorician" to designate the race of the rhetorician. It is the white perspective, or the "whiteness" of the rhetoric, that makes the label appropriate, whatever the race of the rhetorician. The power of rhetorical perspective of course is not limited to the discourse of affirmative action. See, e.g., Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987). In her thoughtful exploration of the "dilemmas of difference," Professor Minow reminds us: "Court judgments endow some perspectives, rather than others, with power." *Id.* at 94.

2. 438 U.S. 265 (1978).

3. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1530-44 (1988).

4. The admissions scheme in *Bakke* was a special program completely separate from the regular one. If an applicant indicated on the regular application form a desire to be considered as a member of a "minority group," the application was forwarded to a special admissions committee. This committee then reviewed these candidates and rated them according to interview summaries, grade point averages, and test scores. Unlike the regular candidates, the special candidates did not have to meet the minimum grade point average of 2.5. The special candidates also were not compared to the general applicants; rather, they were compared only among themselves. The special committee then recommended candidates for admission until the number prescribed by the faculty was admitted. In 1974 this number was 16 out of a class of 100. *Bakke*, 438 U.S. at 272-75.

5. *Id.* at 421 (opinion of Stevens, J.); *id.* at 319-20 (opinion of Powell, J.).

6. *Id.* at 294 n.34 (opinion of Powell, J.).

7. *Id.* at 298.

8. *Id.* at 307-09 (citations and footnote omitted).

9. "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *Id.* at 363 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

10. *Id.* at 400 (opinion of Marshall, J.).

11. 448 U.S. 448 (1980).

12. *Id.* at 484 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976)).

13. *Id.* at 530 n.12 (Stewart, J., dissenting). In a rather odd extension of the rhetoric, Stewart labeled affirmative action as a form of modern nobility, "the creation once again by government of privileges based on birth." *Id.* at 531. By this analogy the black beneficiaries of affirmative action are like the European noblemen of the Old World, enjoying great and utterly unearned advantage at the expense of the whites, who are like the feudal serfs.

14. 476 U.S. 267 (1986).

15. *Id.* at 276 (emphasis in original).

16. Powell again revealed his commitment to the conception of innocence when he used the term "innocent" to describe the disadvantaged white repeatedly in a brief passage contrasting *Wygant* with the Court's precedents:

We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by *innocent* parties is not impermissible. In *Fullilove*, the challenged statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the actual 'burden' shouldered by nonminority firms is relatively light."

17. *Id.* at 295 (White, J., concurring).

18. 109 S. Ct. 706 (1989).

19. O'Connor stated:

[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. . . .

. . . [A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

*Id.* at 723-24.

20. "[U]nless persons are vulnerable to injury, pain, and suffering as possible consequences of choice, choice would have no meaning. . . . [T]he *necessity* that moral evil be possible seems implied in the possibility of good." R. MONK & J. STAMEN, *EXPLORING CHRISTIANITY: AN INTRODUCTION* 144 (1984) (emphasis in original). Professor Charles H. Long explored the power of religious symbolism,

particularly as it relates to questions of race. See C. LONG, SIGNIFICATIONS: SIGNS, SYMBOLS, AND IMAGES IN THE INTERPRETATION OF RELIGION (1986).

21. Matthew 5:10 (New King James).

22. P. RICOEUR, THE SYMBOLISM OF EVIL 25 (1969).

23. R. WHITE, INNOCENT VICTIMS: POETIC INJUSTICE IN SHAKESPEAREAN TRAGEDY 5 (1986).

24. *Id.* at 6.

25. See generally T. REED, DEMON-LOVERS AND THEIR VICTIMS IN BRITISH FICTION (1988).

26. See H. LIPS & N. COLWILL, THE PSYCHOLOGY OF SEX DIFFERENCES 112-13 (1978) (observing that "[i]n our culture young and adolescent girls are not expected to engage in overt sexual activity, although it is more permissible for boys to do so," and that "[s]ociologically, it has been explained in terms of parents' differential expectations of appropriate behavior for boys and girls").

During the early times of Christianity, a woman thought to have become pregnant by a man other than her husband was humiliated publicly by a priest. Her hair was untied and her dress torn, and she was made to drink a potion consisting of holy water, dust, and ink. "If she suffers no physical damage from that terrifying psychological ordeal, her innocence is presumed to have protected her." W. PHIPPS, GENESIS AND GENDER: BIBLICAL MYTHS OF SEXUALITY AND THEIR CULTURAL IMPACT 71 (1989).

27. C. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); see also J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970).

28. Lawrence, *supra* note 27, at 322 (footnotes omitted). "Simply put, while most Americans avow and genuinely believe in the principle of equality, most white Americans still consider black people as such to be obnoxious and socially inferior." G. Hazard, *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 385.

29. A process known as the tipping phenomenon occurs when white families abandon a neighborhood after the black percentage of the population exceeds a certain amount, usually between 30 and 50 percent black. Bruce Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251 (1974); see also Reynolds Farley, *Residential Segregation and Its Implications for School Integration*, 39 LAW & CONTEMP. PROBS. 164 (1975). In 1970 a study of 109 cities was conducted to determine the degree of racial integration. In every one of those cities, at least 60 percent of either the white or the black population would have had to shift their places of residence to achieve complete residential integration. In all but three of those cities, the figure was increased to at least 70 percent. *Id.* at 165. "Where neighborhoods are highly segregated, schools tend also to be highly segregated." *Id.* at 187. In some Northern districts where the courts and HEW had not integrated schools, school segregation was even higher than would be expected based on residential segregation levels. *Id.*

30. Lawrence, *supra* note 27, at 331.

31. See R. Kennedy, chapter 52, this volume; see also D. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F.

L. REV. 385 (1986); A. Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 NAT'L BLACK L.J. 247 (1988).

32. "The battle against pernicious racial discrimination or its effects is nowhere near won." *City of Richmond v. J. A. Crosson Co.*, 109 S. Ct. 706, 757 (1989) (Marshall, J., dissenting).

33. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

34. Lawrence, *supra* note 27, at 333 (footnotes omitted).

35. William Brink and Louis Harris asserted that "[t]he stereotyped beliefs about Negroes are firmly rooted in less-privileged, less-well-educated white society: the beliefs that Negroes smell different, have looser morals, are lazy, and laugh a lot." W. BRINK & L. HARRIS, *BLACK & WHITE* 137 (1976).

36. *See KOVEL, supra* note 27, at 67, 79. The miscegenation laws finally ruled unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967), are a testament to the connection between racism and sex.