

ARTICLES & ESSAYS

THE MORAL CONFUSION OF AFFIRMATIVE ACTION JURISPRUDENCE OR WHEN WILL WE LEARN TO BEAR THE SHAME OF GUILT?*

Kate Nace Day**

*Indeed I tremble for my country when I reflect that God is
just*

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 163
(William Peden ed., 1954).

*No people . . . were ever yet found who were better than
their laws, though many have been known to be worse.*

WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY
AND PRACTICE 17 (New Am. Library 1969) (1853) (quoting
Dr. Priestley).

*The problem of the twentieth century is the problem of the
color-line*

W.E. BURGHARDT DUBOIS, THE SOULS OF BLACK FOLK 13
(Johnson Reprint Corp. 1968) (1903).

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"[T]hat thou may'st learn to bear/ The shame of guilt, and make a better
show/ Next time"

DANTE, PURGATORY Canto 31:43 (Dorothy L. Sayers trans., 1969) (14th Cent.).

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INTRODUCTION

I now can see the darkness of lightness. And I love light. Perhaps you'll think it strange that an invisible man should need light, desire light, love light. But maybe it is exactly because I am invisible. Light confirms my reality, gives birth to my form. . . . Nothing, storm or flood, must get in the way of our need for light and ever more and brighter light. The truth is the light and light is the truth.

RALPH ELLISON, *INVISIBLE MAN* 6-7 (Vintage Books 1989) (1947).

In 1947, Ralph Ellison wrote a novel about an invisible man, a black man made invisible by the eyes of people who refused to see him. This man attributed his invisibility to the blindness of white America, a blindness of the inner eyes which view and construct reality. As Ellison later said:

[T]here is the joke Negroes tell on themselves about their being so black they can't be seen in the dark. In my book this sort of thing was merged with the meanings which blackness and light have long had in Western mythology: evil and goodness, ignorance and knowledge, and so on. In my novel the narrator's development is one through blackness to light; that is, from ignorance to enlightenment: invisibility to visibility.¹

Ellison rejected any construction of reality which separates one group of human beings from another. For black Americans, such a construction yields the experience of social, political, and personal invisibility. For white Americans, it yields a systemic blindness, an inability to welcome others into the moral community. Ellison rejected this invisibility and blindness, and called for the salvation of light.

Ellison's literary images—invisibility, blindness, and light—provide the structure for this examination of affirmative action jurisprudence. Ellison offers simple metaphors: invisibility is darkness; blindness is the lie of racism; and light is truth. He urges a progression out of darkness toward truth and light—an “ever more and brighter light”² that will restore visibility to blacks and cure the blindness which infects whites.

1. WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS SECOND SERIES 325-26 (George Plimpton ed., 1963).

2. RALPH ELLISON, *INVISIBLE MAN* 7 (Vintage Books 1989) (1947).

Through Ellison's invisible man, we see and feel his truth of black inequality and white racism, and the capacity of the human spirit to rise above both. Ellison's images also provide a construct through which law addressing racial inequality can be understood. Part I of this article examines the relationship between Ellison's images and the law at the time he wrote *Invisible Man*. Easy parallels are drawn between the image of black invisibility and the laws of segregation and between the image of white blindness and the racist ideology that supported segregation. This conjunction of law and literature assists our understanding of segregation. Ellison himself wrote that in giving voice to the invisible and exposing white moral blindness he stood "on safe historical grounds."³

Part I also explores the relationship between Ellison's final image of light and affirmative action jurisprudence. For the metaphor of truth as light to transcend literature and inform affirmative action jurisprudence, Ellison's image of light must suggest some truth about subjective human experience, and this truth must also be contained in law. What could be the subjective and objective content of light, ever more and brighter light? Ellison sought light that would make blacks visible, light that would require whites to see. If truth is light, then the law must reflect the truth of what people endure, or lose its moral integrity. In order to satisfy Ellison's call for light, the law must embrace principles of moral responsibility that promise a transformation of human experience.

Part II of this article examines the major decisions of the United States Supreme Court on issues of racial inequality, from Ellison's time to the present. The early desegregation cases promised light for both the invisible and the blind. Yet, the light of the Court's reasoning has fallen far short of Ellison's call for light. Along the way from the early desegregation cases to the Court's current affirmative action jurisprudence, there has been a gradual erosion of the Court's original conception of moral responsibility. Part II concludes that the moral confusion of current affirmative action jurisprudence lies in the "color-blind" conception of responsibility with which the Court addresses the claims of those the Court terms "innocent whites." This conception of moral responsibility forecloses moral responsibility for invisibility and blindness.

3. *Id.*

At this point, the conjunction of law and literature proves too general. Ellison's metaphor must be reconstructed in the language and principles of morality which are, in turn, related to law. This reconstruction proceeds in two stages. In part III a fictitious observer is created and endowed with moral feelings. What moral feelings might the observer experience as she confronts the human experience of invisibility and blindness? And, since moral feelings prompt actions to resolve those feelings, what actions would she be disposed to undertake?

The observer's experience of two moral feelings, shame and guilt, are explored using modern empirical and theoretical psychological works that attempt to differentiate shame from guilt. Proceeding along the general approach devised by Wittgenstein and adopted by Rawls and others, this analysis reveals that when the observer witnesses the exclusion of blacks and the racism that justified it, she would feel both guilt and shame. For the observer to concern herself only with those the Court terms "innocent whites" would require her to feel no shame, or, to be unable to bear the shame of guilt.

The next step in reconstructing the metaphor is to establish the relation between the observer's moral feelings of shame and guilt and principles of morality that, in turn, relate to law. Drawing on the work of Herbert Morris, John Rawls, and Lon Fuller, part IV of this article establishes that the moral feelings of shame and guilt relate to distinct moral principles: shame relates to the concept of good and the morality of human aspiration; guilt, on the other hand, relates to the concept of right and the morality of duty. The relationship between these two moralities and the law is then examined. Although law is generally derived from the morality of guilt and duty rather than the morality of shame and aspiration, the moral problem of segregation poses the unusual case: the moral responsibility for defining the moral community to exclude blacks. Denying blacks membership in the moral community is a failure within the morality of aspiration and shame.

Part V of this article examines the implications of the observer's moral feelings and the two moralities for affirmative action jurisprudence. The issue is whether the moral feelings of the observer might prompt moral action like affirmative action; and, if so, whether her actions could be defended against the claims of "innocent whites." The examination of this question reveals the underlying tension between the pull of the two moralities. The claim of

whites is that they are "innocent." Yet, in order to satisfy the observer's need to resolve her moral feelings and in order to satisfy the morality of aspiration and shame, moral action must involve transformation of the human experiences of invisibility and blindness. It is inappropriate to test affirmative action by reference to duty and guilt. Guilt, without the transformative power of shame, fails as a conception of moral responsibility. As Ellison's invisible man cried out so eloquently:

I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. Like the bodiless heads you see sometimes in circus sideshows, it is as though I have been surrounded by mirrors of hard, distorting glass. When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.⁴

I. THE METAPHORS: INVISIBILITY, BLINDNESS, AND LIGHT

A. *Invisibility*

In the Prologue to *Invisible Man*, Ellison introduces the voice of the invisible man, an irreverent, honky-tonk trumpet of a voice. The novel is about the invisible man's human experience, his invisibility, and the blindness of those who refuse to see him. From the outset, though, we know one truth that he knows: that he is a human being whom others refuse to see as a human being.

By the time Ellison wrote *Invisible Man*, the United States had adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, abolishing slavery and accepting, at least in principle, equality as a constitutional ideal. It has been said that in any version of equality the difficulty persists about who is in and who is out of the group of beings to which the property of equality is ascribed.⁵ At the time Ellison was writing, that difficulty was easily resolved: whites were in and blacks were out. Racism was institutionalized in the United States under *Plessy v.*

4. *Id.* at 3.

5. John E. Coons, *Who Believes in Equality?* (Mar. 1, 1991) (part II of unpublished manuscript, on file with the author).

*Ferguson*⁶ and Jim Crow segregation.⁷ Blacks were excluded and, thus, invisible; they were not seen as human beings.

According to Professor Charles Black, segregation came down "in apostolic succession from slavery and the *Dred Scott* case. The South fought to keep slavery, and lost. Then it tried the Black Codes,⁸ and lost. Then it looked around for something else and found segregation."⁹ In *Plessy v. Ferguson*, the Supreme Court endorsed segregation of railroad passengers under the doctrine of "separate but equal."¹⁰ However, even under the separate but equal doctrine, segregation was not morally justifiable. As Justice Harlan wrote in his lone dissent: "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."¹¹

Justice Harlan's predictions proved correct: states immediately recognized that the principle of *Plessy* sanctioned the creation and enforcement of racial apartheid. Historian C. Vann Woodward reported the attempts of the editor of the *Charleston News and Courier* to argue against the principle of *Plessy* by anticipating its absurd consequences:

If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of

6. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

7. See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974).

8. Black Codes were enacted in the South in the period following the Civil War. In his book *From Slavery to Freedom*, John Hope Franklin describes the situation:

Most Southern whites . . . were convinced that laws should be speedily enacted to curb the Negroes and to insure their role as a laboring force in the South. These laws, called Black Codes, bore a remarkable resemblance to the ante-bellum Slave Codes . . . and can hardly be described as measures that respected the rights of Negroes as free men. Several of them undertook to limit the areas in which Negroes could purchase or rent property. Vagrancy laws imposed heavy penalties that were designed to force all Negroes to work whether they wanted to or not. The control of blacks by white employers was about as great as that which slaveholders had exercised.

JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 232 (5th ed. 1980).

9. Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960) (*Dred Scott v. Sandford* is reported at 60 U.S. (19 How.) 393 (1856)). See DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978) (full discussion of the *Dred Scott* decision).

10. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

11. *Id.* at 562 (Harlan, J., dissenting).

the jury box, and a separate Jim Crow dock and witness stand in every court—and a Jim Crow bible for colored witnesses to kiss. It would be advisable also to have a Jim Crow section in county auditors' and treasurers' offices for the accommodation of colored taxpayers. The two races are dreadfully mixed in these offices for weeks every year, especially about Christmas. . . . There should be a Jim Crow department for making returns and paying for the privileges and blessings of citizenship. Perhaps, the best plan would be, after all, to take the short cut to the general end . . . by establishing two or three Jim Crow counties at once, and turning them over to our colored citizens for their special and exclusive accommodation.¹²

In a very short time, as Professor Woodward reported, these absurdities became reality. "Apart from the Jim Crow counties and Jim Crow witness stand, all the improbable applications of the principle . . . had been put into practice—down to and including the Jim Crow Bible."¹³ Segregation laws mandated segregation of employees, patients in hospitals, and inmates in prisons. The races were also separated in amusements, sports, and public parks. Residential segregation by block or by district also occurred in some cities. There were curfews for blacks, Jim Crow telephone booths, textbooks, and schools.¹⁴

Despite the apparent thoroughness of segregation laws, the practices of segregation actually exceeded the laws. According to Professor Black:

[S]egregation is the pattern of law in communities where the extralegal patterns of discrimination against Negroes are the tightest, where Negroes are subjected to the strictest codes of "unwritten law" as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying "Sir," and all the rest of the whole sorry business.¹⁵

Thus, segregation created two worlds, two separate human experiences. This separation was so complete that whites were able to ignore the fact that blacks were human beings to whom they

12. WOODWARD, *supra* note 7, at 67-68.

13. *Id.* at 68-69.

14. *Id.* at 97-102.

15. Black, *supra* note 9, at 425.

owed a moral duty. Blacks were, in effect, rendered invisible. As Ellison described the experience:

You go along for years knowing that something is wrong, then suddenly you discover that you're as transparent as air. At first you tell yourself that it's all a dirty joke, or that it's due to the "political situation." But deep down you come to suspect that you're yourself to blame, and you stand naked and shivering before the millions of eyes who look through you unseeingly. *That* is the real soul-sickness, the spear in the side, the drag by the neck through the mob-angry town, the Grand Inquisition, the embrace of the Maiden, the rip in the belly with the guts spilling out, the trip to the chamber with the deadly gas that ends in the oven so hygienically clean only it's worse because you continue stupidly to live.¹⁶

B. Blindness

Nor is my invisibility exactly a matter of a biochemical accident to my epidermis. That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of construction of their inner eyes, those eyes with which they look through their physical eyes upon reality.

RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Books 1989) (1947).

Ellison's second image is blindness. In order to make blacks invisible, whites became blind to black humanity and blind to their own racism. In a nation committed to the ideal of equality, legally sanctioned racial inequality required a justification for ascribing the property of equality to whites and not to blacks. The defenders of segregation, like the defenders of slavery before them,¹⁷ relied upon a theory of race.

16. ELLISON, *supra* note 2, at 576.

17. On slavery and the formation of the United States Constitution, see W.E. BURGHARDT DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638-1870* (Corner House Publishers 1970) (1896); DAVID B. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823* (1975); PAUL FINKELMAN, *THE LAW OF FREEDOM AND BONDAGE: A CASEBOOK* (1986); PAUL FINKELMAN, *SLAVERY IN THE COURTROOM* (1985); A. LEON HIGGINBOTHAM, *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978). On slavery and sectionalism, see DONALD L. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS 1765-1820* (1971); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790-1860* (1961); Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415 (1986).

Winthrop Jordan's study, *White Over Black*, demonstrated how early racist ideology transformed blackness into invisibility. In the mid-1500s, when English voyagers first touched upon the shores of West Africa, "one of the fairest-skinned nations suddenly came face to face with one of the darkest peoples on earth."¹⁸ The juxtaposition of black and white was a marvel, an object of curiosity, and a problem for natural philosophers. In light of the European assumption that all mankind stemmed from a single source, black human beings were a puzzle.¹⁹ Explanations were sought and offered: blackness resulted from proximity to the sun; blackness was God's curse on Ham, or his son Canaan.²⁰ By the 1600s, these explanations became the justifications for England's participation in the slave trade.²¹

Justifications for enslaving human beings have existed ever since antiquity. Defenders of slavery "resorted to dualisms—related opposites that could parallel the distinction between outsiders and insiders and, in so doing, could justify the coexistence of slavery and freedom."²² Freedom within society was considered natural; slavery, contrary to the natural order. Aristotle argued that slaves were naturally suited for the unnatural condition of slavery.²³ The defenders of American chattel slavery adopted this basic paradox and argued that color determined who was naturally suited for slavery. As historian James Oakes observed: "The basic proposition was startlingly simple: 'that the Negroes are not people like ourselves'"²⁴ This sense of difference "provided the mental margin absolutely requisite for placing the European on the deck of the slave ship and the Negro in the hold."²⁵

The mental margin, of course, was racist: blacks were different

18. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO*, 1550-1812, at 6 (1968).

19. *Id.* at 11-20.

20. *Id.*

21. *Id.* at 98.

22. JAMES OAKES, *SLAVERY AND FREEDOM* 25 (1990). See also 3 *THE FOUNDERS' CONSTITUTION* 278-309 (Philip B. Kurland & Ralph Lerner eds., 1987) (documents regarding the slave trade clause, U.S. CONST. art. I, § 9, cl. 1); 2 *THE FOUNDERS' CONSTITUTION* 86-144 (documents regarding the three-fifths clause, U.S. CONST. art. I, § 2, cl. 3); 4 *THE FOUNDERS' CONSTITUTION* 524-42 (documents regarding the fugitive slave clause, U.S. CONST. art. IV, § 2, cl. 3).

23. ARISTOTLE, *THE POLITICS* 66-69 (T.A. Sinclair trans., 1981) (originally written between 335-323 B.C.).

24. OAKES, *supra* note 22, at 29.

25. JORDAN, *supra* note 18, at 97.

and consigned by the laws of nature to be perpetual outsiders. The result of this racist ideology was that no one was to blame—slavery was dictated by the laws of nature not by the laws of man. The end of slavery did not end racism. Segregation was justified upon these same grounds of black inferiority and degradation,²⁶ and of white supremacy.²⁷

Joel Kovel, in his study of white racism, argued that the transition from slavery to segregation merely exposed a different type of racism.²⁸ In Kovel's view, the extreme domination of the American slave culture represented the first type and phase of racism, dominative racism. Dominative racism is "the open flame of race hatred" where overt action and force are used to subjugate blacks and enforce white supremacy.²⁹ Aversive racism, on the other hand, while also based on white supremacy, is a racism of avoidance and separation. Aversive racism requires that blacks be degraded, that they live out the worst images assigned to them by whites.

The accumulation of negative images forced upon blacks in America amounted to presenting them with one massive and destructive choice: either to hate one's self, as culture so systematically demanded, or to have no self at all, to be nothing. With the passage of time and abstraction, these alternatives amounted to the same thing: the only self available for black people . . . would be nothingness.³⁰

Kovel's views on racism show the relationship between blindness and invisibility. While Kovel used the image of "nothingness" rather than the image of invisibility, the two are equivalent. Blindness or racism is the justification for unequal treatment, and invisibility or nothingness is the effect of inequality sanctioned by law. Blindness also provides moral absolution for whites. With blind inner eyes, white America constructed a reality of equality undisturbed by the truth of black humanity, undisturbed by the nature of its own responsibility, undisturbed by its own racism.

26. *Plessy v. Ferguson*, 163 U.S. at 560 (Harlan, J., dissenting) ("[C]olored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens[.]").

27. Black, *supra* note 9, at 424-25 ("The movement for segregation was an integral part of the movement to maintain and further 'white supremacy' . . .").

28. See generally JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* (1984).

29. *Id.* at 54, 187-88.

30. *Id.* at 196.

C. Light

The truth is the light and light is the truth.

RALPH ELLISON, *INVISIBLE MAN* 7 (Vintage Books 1989)
(1947).

Ellison's final image is light. Ellison called for the salvation of light. Central to the salvation of light is responsibility. In both the prologue and epilogue to *Invisible Man*, the voice of invisibility speaks to us from hibernation, from a New York City basement flooded with light. He speaks about light, the light that illuminates "the blackness of his invisibility," the light that he has stolen from a public power line running into the building where he hides. In the Prologue, the voice of invisibility introduces the issue of responsibility:

I can hear you say, "What a horrible, irresponsible bastard!" And you're right. I leap to agree with you. I am one of the most irresponsible beings that ever lived. Irresponsibility is part of my invisibility; any way you face it, it is a denial. But to whom can I be responsible, and why should I be, when you refuse to see me? And wait until I reveal how truly irresponsible I am. Responsibility rests upon recognition, and recognition is a form of agreement.³¹

The voice of invisibility then tells his story, and we end where we began, in a basement flooded with light. Now, however, Ellison's invisible man understands his invisibility, the blindness of those who refuse to see him, and, finally, the salvation of light:

So why do I write, torturing myself to put it down? Because in spite of myself I've learned some things. Without the possibility of action, all knowledge comes to one labeled "file and forget," and I can neither file nor forget. Nor will certain ideas forget me; they keep filing away at my lethargy, my complacency. . . . Perhaps that's my greatest social crime . . . , since there's a possibility that even an invisible man has a socially responsible role to play.³²

Ellison's invisible man emerges from hibernation to responsibility, and to the possibility of action. It is unclear exactly what action he will undertake after coming to this realization. On the

31. ELLISON, *supra* note 2, at 14.

32. *Id.* at 579, 581.

basis of our understanding of invisibility and blindness, however, we can surmise that the salvation of light requires action sensitive to the historical nature of both invisibility and blindness. His actions must take into account the nature of blindness and its denial of both black humanity and white moral responsibility. Light has made Ellison's invisible man awake to the possibility of action that can transform human experience.

II. LIGHT AND THE LAW: FROM *BROWN*³³ TO *BAKKE*³⁴

The transformation of Ellison's invisible man through light suggests a parallel transformation of law. Law must recognize the truth of exclusion and racism and embody moral responsibility. Two years after the publication of *Invisible Man*, the United States Supreme Court began to address the law of segregation and racial inequality, the law of invisibility and blindness.

A. *The Promise of Light: Brown v. Board of Education*

At one time, it appeared that the United States Supreme Court would provide the best answer to Ellison's call for light. In 1954, in *Brown v. Board of Education (Brown I)*, the Court for the first time directly confronted³⁵ the "separate but equal" doctrine of *Plessy v. Ferguson*. The Court rejected segregation with the sanction of law. Remarkably, *Brown I* was a unanimous decision.³⁶ The opinion was brief and spare in its rationale. Despite the brevity of the decision and the directness with which the Court arrived at its decision, the opinion offers insight into the nature of the moral action taken and the responsibility assumed by the Court.

In *Brown I*, the Court addressed only one aspect of segregation—legally compelled segregation in public schools—and held that "[s]eparate educational facilities are inherently unequal."³⁷

33. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

34. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

35. Prior to *Brown I*, the Court had decided several desegregation cases. *Missouri ex. rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); and *Sweatt v. Painter*, 339 U.S. 629 (1950). In these cases, the Court struck down racial segregation in graduate schools without specifically addressing the continued validity of the "separate but equal" doctrine. See also RICHARD KLUGER, *SIMPLE JUSTICE* (1977).

36. See generally Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).

37. *Brown I*, 347 U.S. at 495.

Yet, the decision was about more than education.³⁸ The Court stated that separating young children "solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone."³⁹ The Court noted that this finding was "amply supported by modern authority,"⁴⁰ citing in a footnote the work of seven sociologists.⁴¹ As general authority, the Court cited Gunnar Myrdal's *An American Dilemma*.⁴² While the Court's reliance on social sciences has been much criticized,⁴³ its reliance on Myrdal revealed the concerns which motivated the Court.

In *An American Dilemma*, Myrdal vividly depicted the lives of American blacks. He showed that they were almost totally excluded from the political and economic life of the nation, and argued that this stood in sorry contrast to what he termed the "American creed."⁴⁴

Blacks were far worse off than whites in this society, and the actions of government had contributed significantly to that situation: the data marshaled in *An American Dilemma* were meant to speak for themselves. These were not mere facts, but facts transformed into revelation. They would serve, Myrdal wrote, as an "educational offensive against racial intolerance." Like the trumpets sounded outside the walls of Jericho, the delineation of inequity would bring about its demise.⁴⁵

An American Dilemma, then, was a source of light adopted by the Court, light that exposed the historical and societal nature of invisibility and prompted the Court to moral action.

38. In a series of terse per curiam opinions in the years immediately following *Brown I*, the Court demonstrated that *Brown I* was about the broader issue of segregation and not the special problem of education by holding segregation in a variety of other public facilities unconstitutional. See *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses).

39. *Brown I*, 347 U.S. at 494 ("A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children . . .").

40. *Id.*

41. *Id.* at 494-95, n.11.

42. *Id.*

43. See, e.g., Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955); Mark G. Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, 42 LAW & CONTEMP. PROBS. 57 (Autumn 1978).

44. GUNNAR MYRDAL, *AN AMERICAN DILEMMA* 812 (1962).

45. DAVID L. KIRP, *JUST SCHOOLS* 14 (1st ed. 1982) (citation omitted).

Without specifically addressing the issue of racism, the Court's reasoning suggested a keen awareness of the ideology underlying segregation. Professor Tribe has argued that the *Brown* Court recognized that the "social meaning [of segregation] is that the minority race is inferior."⁴⁶ In Tribe's view, the harm of segregation was the exclusion of one race from "full communal life in society."⁴⁷ In his defense of *Brown*, Professor Black concluded:

The society that has just lost the Negro as a slave, that has just lost out in an attempt to put him under quasi-servile "Codes," the society that views his blood as a contamination and his name as an insult, the society that extralegally imposes on him every humiliating mark of low caste and that until yesterday kept him in line by lynching—this society, careless of his consent, moves by law, first to exclude him from voting, and secondly to cut him off from mixing in the general public life of the community. The Court that refused to see inequality in this cutting off would be making the only kind of law that can be warranted outrageous in advance—law based on self-induced blindness, on flagrant contradiction of known fact.⁴⁸

In *Brown I*, the Court did not succumb to blindness.

In *Brown v. Board of Education (Brown II)*,⁴⁹ the Supreme Court announced its decision regarding the appropriate relief for victims of segregation. In *Brown II*, the Court rejected petitioners' requests for immediate relief, opting instead for a procedure affording individual resolution of administrative and educational problems by school authorities and district courts.⁵⁰ The Court ex-

46. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-15, at 1477 (2d ed. 1988).

47. *Id.*

48. Black, *supra* note 9, at 426.

49. *Brown II*, 349 U.S. at 294.

50. *Id.* at 299. The Court stated:

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

Id. (footnote omitted). The district courts were to be guided by traditional equitable principles, taking into account not only the private interests at stake, but "the public interest in the elimination [of obstacles to desegregation] in a systematic and effective manner." *Id.* at

pected "a prompt and reasonable start toward full compliance with" *Brown I*⁵¹ and required the district courts to comply with "all deliberate speed."⁵²

Both the defenders and the critics of *Brown II* provide further insight into the Court's understanding of invisibility and blindness. Much criticism has focused on the "all deliberate speed" approach of *Brown II*.⁵³ Some critics argued that if the Court recognized segregation as unconstitutional, then segregation could not be tolerated even while school boards made "a prompt and reasonable start" toward compliance. These critics reasoned that the Court could not ask individual blacks to wait for their rights.⁵⁴ Other critics argued that the "all deliberate speed" approach merely served to provide the South with an opportunity to delay desegregation.⁵⁵

A third group of critics of the *Brown II* decision argued that the "all deliberate speed" approach involved "conceptual" or "unconscious" racism. Richard Wasserstrom, for example, argued that the Court's deference to the difficulties of achieving integrated schools may well have rested on the racist assumptions that black schools were inadequate, that white children could not attend those schools, and that, therefore, black children would have to wait.⁵⁶

Others have defended the decision, arguing essentially that the delay inherent in the "all deliberate speed" approach was necessary. One commentator argued that "any head-on challenge of the

300.

51. *Id.* at 300.

52. *Id.* at 301.

53. See generally LOREN MILLER, *THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO* (1966).

54. See, e.g., Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968); Louis Lusky, *Racial Discrimination and the Federal Law: A Problem of Nullification*, 63 COLUM. L. REV. 1163 (1963); Louis Lusky, *The Stereotype: Hard Core Racism*, 13 BUFF. L. REV. 450, 457 (1963) (Implicit in *Brown II* was the premise that "Negroes (unlike whites) possess rights as a race rather than as individuals, so that a particular Negro can rightly be delayed in the enjoyment of his established rights if progress is being made in improving the legal status of Negroes generally."). See *infra* notes 290-93 and accompanying text (discussing the "group rights" argument advanced by Owen Fiss and others).

55. See, e.g., Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970).

56. Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to Topics*, 24 UCLA L. REV. 581, 600 (1977); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

segregated South in 1955 would have produced civil strife sufficient to make Little Rock and Birmingham seem gatherings of good will."⁵⁷ Indeed, Professor Bickel has argued that the Court required the support of Congress and the President, because without that support the Court would have been unable to fulfill the promise of *Brown I*.⁵⁸ Such a failure would have damaged the institution of the Court.⁵⁹ Professor Bickel argues further that the delay was necessary because

[Congress and the President] are uncomfortable in the presence of hard and fast principles calling for universal and sudden execution. . . . They can most readily be expected to exert themselves when some leeway to expediency has been left open. Therefore, time and an opportunity for accommodation were required . . . to form part of the invitation that the Court might be extending to the political institutions to join with it in what amounted to a major enterprise of social reform.⁶⁰

It is the nature of the moral action taken by the Court which concerns both critics and defenders of the *Brown* decisions. *Brown I* was not just about education, nor just about vindicating individual rights. The decision was about the human experience of exclusion and the racism that was used to justify it; it was about the moral community and the ideal of equality. The phrase "all deliberate speed" from *Brown II* meant, at least intuitively, that the Court had confronted history and recognized that the entire world of segregation needed to be dismantled.

The *Brown* decisions, and the massive social change they initiated, brought a promise of light. Light was brought to buses, beaches, and municipal golf courses—and that was just the beginning. Robert Carter, former NAACP General Counsel, credits *Brown I* with prompting

a social upheaval the extent and consequences of which cannot even now be measured with certainty.

. . . .

. . . Few in the country, black or white, understood in

57. J. HARVIE WILKINSON III, FROM *Brown* to *Bakke* THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978, at 68 (1979).

58. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 251-52 (2d ed. 1986).

59. *Id.* at 252.

60. *Id.*; see also Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193 (1964).

1954 that racial segregation was merely a symptom, not the disease; that the real sickness is that our society in all of its manifestations is geared to the maintenance of white superiority.⁶¹

The decisions in *Brown I* and *II* brought the issue of white supremacy to the forefront. The *Brown* decisions promised the light to end racism and segregation.

B. Limiting Light: The Problems of Resistance and Remedy

The Court's decisions in *Brown I* and *II* brought to light the overt racism at the heart of Southern resistance. In *Hearts and Minds: The Anatomy of Racism from Roosevelt to Reagan*, Harry S. Ashmore detailed the development of the resistance movement in the South and, specifically, the events leading up to the resistance at Little Rock, Arkansas.⁶²

By the spring of 1957 the groundwork for massive resistance, up to and including abandonment of the public school system, had been laid in statutes enacted by eight Southern legislatures. Those who needed a high-sounding rationale . . . reached back to the Kentucky-Virginia interposition resolutions of 1798 to provide a historical gloss for another try at nullification Those who spoke . . . candidly [said] . . . : "The Negro is fundamentally and perhaps unalterably inferior; he is also immoral, indolent, inept, incapable of learning, and uninterested in full racial equality. The segregationist South has no guilt about keeping the Negro in his proper place—that is to say, in separate schools."⁶³

The President first responded to this blatant resistance in Little Rock. The significance of the events at Little Rock was not the actual injuries, which were few, but the psychic damage which resulted from the exposure of naked racism.

Little Rock became the symbol of brutal, dead-end, resistance to the minimum requirements of racial justice. The impression still lives that the city was the scene of sustained race rioting so widespread the United States Army had to be called in to put it down. The fact is that no one, black or white, then or later, was injured seriously enough to require

61. Carter, *supra* note 54, at 246-47.

62. HARRY S. ASHMORE, *HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN* (1987).

63. *Id.* at 255.

hospitalization.

. . . [T]he real significance of Little Rock [was that] . . . a reluctant president [had been forced] into an irrevocable commitment to use his powers to protect and guarantee the declared rights of black citizens wherever they might be denied.⁶⁴

In *Cooper v. Aaron*,⁶⁵ the Court confronted the resistance and delay in Little Rock. This case involved a school desegregation plan. While acknowledging that public education is primarily a state responsibility, the Court held that this responsibility must be exercised in a manner consistent with the federal Constitution. The Court stated:

The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. . . . The principles announced in [*Brown*] . . . and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.⁶⁶

However, exactly what that obedience would entail, other than refraining from active resistance, still remained unclear.

In *Green v. School Board of New Kent County*,⁶⁷ the Court clarified exactly what obedience to the Fourteenth Amendment entailed. The Court imposed an affirmative duty on the states "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."⁶⁸ The Court then required the school board "to come forward with a plan that promises realistically to work, and promises realistically to work *now*."⁶⁹

The Court had little difficulty in addressing the issue of responsibility in the face of massive Southern resistance. Segregated northern cities, however, posed a different problem. Since issues of responsibility in the context of the Fourteenth Amendment neces-

64. *Id.* at 267.

65. *Cooper v. Aaron*, 358 U.S. 1 (1958). See generally Robert B. McKay, "With All Deliberate Speed" A Study of School Desegregation, 31 N.Y.U. L. REV. 991 (1956).

66. *Cooper*, 358 U.S. at 19-20.

67. *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968).

68. *Id.* at 437-38.

69. *Id.* at 439.

sarily involve the responsibility of state actors, de facto discrimination posed a unique problem. It was not clear to the Court whether de facto segregation constituted state action requiring a remedy. In *Swann v. Charlotte-Mecklenberg*, the Court discussed possible techniques which federal courts could employ to ensure that school districts fulfilled their affirmative duty to desegregate.⁷⁰ In this discussion, the Court hinted at the legal significance of the distinction between de jure and de facto segregation.

In *Swann*, there was evidence of residential segregation, both before and after *Brown*. The district court had found, and the court of appeals had accepted the finding, that "residential patterns in the city and county resulted in part from federal, state, and local government action other than school board decisions."⁷¹ With regard to "one-race" schools, the Supreme Court placed "the burden upon school authorities . . . to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part."⁷² The Court could have recognized that a combination of governmental actions created the segregated neighborhoods which in turn created the segregated schools. Instead, the Court in *Swann* reserved the question of "whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action."⁷³

Professor Bell argued that the Court should answer this question in the affirmative. He wrote:

Civil rights lawyers had long argued that no distinction

70. *Swann v. Charlotte-Mecklenberg*, 402 U.S. 1, 22-31 (1971). In *Swann*, the Court formulated more specific guidelines regarding four major concerns about pupil assignment: racial balances or quotas; one-race schools; remedial alteration of attendance zones; and, transportation of students. The Court's discussion of the remedial alteration of attendance zones indicates the Court's understanding that race conscious actions are constitutional.

All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation.

When school authorities present a district court with a "loaded game board," affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments.

Id. at 28.

71. *Id.* at 7.

72. *Id.* at 26.

73. *Id.* at 23.

should be made between de jure segregation, i.e., required by law or policy, and de facto segregation, where no such laws and policies had been in recent effect but a combination of factors including segregated housing as well as more subtle school policies resulted in racial isolation in the schools. . . . But all the efforts to get federal courts to order relief based solely on the harmfulness of racial segregation, without proof of school board responsibility, were almost uniformly unsuccessful.⁷⁴

In *Keyes v. School District No. 1*,⁷⁵ the Court held that only de jure segregation constituted a constitutional violation. In dissent, Justices Douglas and Powell argued that the Court should dispense with the distinction between de jure and de facto segregation.⁷⁶ For Justice Douglas, the existence of segregated schools resulting from state created segregated neighborhoods was enough to constitute a violation of the Fourteenth Amendment.⁷⁷

When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action. The Constitution and Bill of Rights have described the design of a pluralistic society. The individual has the right to seek such companions as he desires. But a State is barred from creating by one device or another ghettos that determine the school one is compelled to attend.⁷⁸

Justice Powell agreed with Justice Douglas and reasoned that "[p]ublic schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle."⁷⁹

Furthermore, Justice Powell argued that the harm to children was the same in both de jure and de facto segregated schools.⁸⁰

The Negro children in Cleveland, Chicago, Los Angeles,

74. DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 393-94, n.20 (1980) (citations omitted).

75. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1972). This case marked the first time the Court addressed school desegregation in the North.

76. *Id.* at 214-15 (Douglas, J., dissenting); *id.* at 224 (Powell, J., concurring in part and dissenting in part).

77. *Id.* at 216 (Douglas, J., dissenting).

78. *Id.* at 216-17 (Douglas, J., dissenting).

79. *Id.* at 227 (Powell, J., concurring in part and dissenting in part).

80. *Id.* at 229 (Powell, J., concurring in part and dissenting in part).

Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the . . . Southern . . . states violates the constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution⁸¹

Certainly, Justice Powell was not the only justice who recognized the harm to all children from the experience of invisibility. No doubt both the majority and the dissenters in *Keyes* recognized the harm done by segregated neighborhoods. Justice Brennan, writing for the majority, "emphasize[d] that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."⁸² Thus, the majority concerned itself with whether the segregation was intentional, and not with the effects of such segregation.

Professor Lawrence, in his consideration of the doctrine of discriminatory purpose, argued that "the injury of racial inequality exists irrespective of the decisionmakers' motives."⁸³ He went on to state:

In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition . . . ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious.⁸⁴

Justice Powell's dissent in *Keyes* demonstrated an understanding of the unconscious effects of racism. Justice Powell reasoned that because the Court had now framed the *Brown* mandate as an affirmative duty, a narrow focus on causation was inappropriate. He stated that "if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by

81. *Id.* at 229-30 (Powell, J., concurring in part and dissenting in part) (quoting *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 467 F.2d 142, 148 (5th Cir. 1972) (en banc)).

82. *Id.* at 208.

83. Lawrence, *supra* note 56, at 319.

84. *Id.* at 323 (citations omitted).

government action.”⁸⁵ The Court’s focus on intent and causation was misguided because it looked only to the immediate cause of the segregation at issue and not to the chain of events which caused it. In so doing, the Court effectively ensured not only that black children would remain invisible in state created ghettos and their schools, but also that racism would be tolerated.

C. *The Confusion of Light: Innocent Whites
from Milliken to Bakke*

As the Court proceeded with the work of desegregation, another concern emerged: the concern for those who must bear the burden of eliminating invisibility. This concern first emerged in two cases dealing with segregation in the Detroit school system: the 1973 case of *Milliken v. Bradley (Milliken I)*⁸⁶ and the related 1976 decision of *Milliken v. Bradley (Milliken II)*.⁸⁷ The issue of the burden borne by “innocent whites” also emerged in affirmative action jurisprudence beginning with *Regents of the University of California v. Bakke*.⁸⁸

Milliken I involved segregation in the Detroit school system.⁸⁹ The district court rejected a desegregation plan limited to Detroit proper and adopted a remedy which encompassed a three-county metropolitan area.⁹⁰ The district court adopted this remedy despite the fact that of the eighty-five school districts included in the plan, only Detroit had been found to have engaged in intentional segregation.⁹¹ In a five to four decision, the Court reversed the district court’s remedy in spite of the lower court’s finding that “‘any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems’”⁹² As Professor Tribe wrote, “the Court for the first time rationalized a segregated result in a case where a constitutional violation had been found to exist.”⁹³

85. *Keyes*, 413 U.S. at 228, n.12 (Powell, J., concurring in part and dissenting in part).

86. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

87. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

88. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

89. *Milliken I*, 418 U.S. at 721 (The Court reversed an affirmative desegregation order for the first time since before *Brown I*).

90. *Id.* at 729.

91. *Id.* at 729-30.

92. *Id.* at 735 (citation omitted).

93. TRIBE, *supra* note 46, § 16-19, at 1495.

Milliken I narrowed the permissible scope of the remedy in segregation cases, linking the "scope of the remedy" to "the nature and extent of the constitutional violation."⁹⁴ Justice Burger, writing for the majority, stated that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."⁹⁵ The majority found the multi-district remedy impermissible because the district court received no evidence of de jure segregation beyond the Detroit schools. The Court reasoned that "approv[ing] the remedy ordered . . . would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy."⁹⁶

In contrast, Justice White's dissent in *Milliken I* recognized the overall responsibility of the state for segregation in the Detroit schools.⁹⁷ Justice Marshall's dissent argued for a remedy that would transform the human experiences of children in segregated schools.⁹⁸ The dissent recognized that such transformation would not come without difficulty, and criticized the majority for its timidity:

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. . . . Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.⁹⁹

94. *Milliken I*, 418 U.S. at 744.

95. *Id.* at 746.

96. *Id.* at 745.

97. *Id.* at 768, 770-71 (White, J., dissenting).

98. *Id.* at 783 (Marshall, J., dissenting).

99. *Id.* at 814-15 (Marshall, J., dissenting). Many commentators supported the dissent in *Milliken I*. See, e.g., Charles H. Lawrence III, *Segregation "Misunderstood": The Milliken Decision Revisited*, 12 U.S.F. L. REV. 15 (1977); Robert Allen Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535 (1976); William A. Taylor, *The Supreme Court and Urban Reality: A Tactical Analysis of Milliken v. Bradley*, 21 WAYNE L. REV. 751 (1975).

The Court remanded the case for formulation of a desegregation decree.¹⁰⁰ Instead of a plan establishing mixed-race schools, the district court ordered extensive reforms of existing schools.¹⁰¹ These reforms included remedial education, counseling, and career guidance.¹⁰² The Supreme Court affirmed this remedy in *Milliken II*.¹⁰³

In *Milliken II*, the state argued against even these reforms. The state relied on the principle from *Milliken I* that the remedy in segregation cases is limited by the nature of the constitutional violation. The state reasoned that, "since the constitutional violation . . . was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments."¹⁰⁴ The Court found the state's argument unpersuasive concluding that "where, as here, a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" ¹⁰⁵

The condition that offended the Constitution, state created invisibility, was the same in both *Milliken I* and *Milliken II*. The only thing that changed was the nature of the remedy—integration of white suburban schools or the expenditure of funds to improve the all-black schools of Detroit. Arguably, the distinction between the remedies merely reflected the debate about the nature of the right established in *Brown*. That debate had focused on whether there was a right to equal educational opportunities achieved through integrated education or merely a right to quality education. Two years after *Milliken I*, Professor Bell observed:

The espousal of educational improvement as the appropriate goal of school desegregation efforts is out of phase with the current state of the law. Largely through the efforts of civil rights lawyers, most courts have come to construe *Brown v. Board of Education* as mandating "equal educational opportunities" through school desegregation plans aimed at achieving racial balance, whether or not those plans will improve the education received by the children affected.¹⁰⁶

100. *Milliken I*, 418 U.S. at 721.

101. *Milliken II*, 433 U.S. at 272.

102. *Id.*

103. *Id.* at 279.

104. *Id.* at 281.

105. *Id.* at 282 (quoting *Milliken I* at 717).

106. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests*

The real distinction between *Milliken I* and *Milliken II* is the effect of the proposed remedy on white citizens. White citizens throughout the State of Michigan could be asked to finance the educational improvement of Detroit's black children. Whites could not, however, be asked to go to school with blacks. Aversive racism¹⁰⁷ lies at the core of this distinction; unconscious racism¹⁰⁸ may well lie at the core of the Court's toleration of the distinction.

As Justice Douglas noted in dissent in *Milliken I*, the majority's foreclosure of a metropolitan area remedy constituted "a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of *Plessy v. Ferguson*."¹⁰⁹ In *Milliken I* and *II*, the Court showed that it was blind to its obligation to provide authority for actions that promised transformation.

The *Milliken* decisions expose an emerging concern for those who must bear the burden of remedying the wrong. In 1978, Allan Bakke, a white male, forced the Court to confront the ultimate logic of separating invisibility from history and of ignoring white racism. In *Regents of the University of California v. Bakke*,¹¹⁰ the Court, by a vote of five to four, struck down a medical school's special admissions program which set aside a specific number of places for minority candidates.¹¹¹ The Court ordered Allan Bakke, who had been denied admission as a consequence of the special program, admitted to the school.¹¹² However, a different set of five Justices also ruled that state educational facilities need not be "color-blind" in devising their admissions policies.¹¹³ Instead, these Justices held that under some circumstances, race may be a consideration in constitutionally acceptable admissions programs.¹¹⁴

Justice Powell, the only Justice participating in both majorities, wrote the opinion of the Court and revealed the Court's con-

in *School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976). See also DERRICK A. BELL, JR., AND WE ARE NOT SAVED 102-22 (1987); DAVID L. KIRP, JUST SCHOOLS (1st ed. 1982).

107. See *supra* note 28 and accompanying text.

108. See *supra* notes 83-85 and accompanying text.

109. *Milliken I*, 418 U.S. at 759 (Douglas, J., dissenting).

110. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

111. *Id.* at 271. The five Justices who constituted the majority for this holding were Powell, Burger, Stewart, Rehnquist, and Stevens.

112. *Id.*

113. *Id.* at 272. The five Justices who constituted the majority for this holding were Powell, Brennan, White, Marshall, and Blackmun.

114. *Bakke*, 438 U.S. at 272.

cern for "innocent whites." In rejecting the medical school's argument that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign,'" ¹¹⁵ Justice Powell reasoned that "there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."¹¹⁶ Justice Powell expanded on this point in a footnote: "The denial to innocent persons of equal rights and opportunities may outrage those so deprived These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority"¹¹⁷

Having introduced the experience of innocent whites into affirmative action jurisprudence, Justice Powell then tied this concern for innocent whites to the Court's rationale regarding the experience of invisibility. Justice Powell rejected the petitioner's claim that the state's interest in countering the effects of societal discrimination was substantial enough to support the use of a race-conscious admissions policy. In distinguishing the desegregation cases, Justice Powell reasoned as follows:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases . . . attests to the importance of this state goal 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.¹¹⁸

In conclusion, Justice Powell noted that the medical school's attempt to help victims of "'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who

115. *Id.* at 294.

116. *Id.* at 298.

117. *Id.* at 294, n.34.

118. *Id.* at 307.

bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."¹¹⁹

Thus, the view of a majority of the Court has changed. Where the *Brown* Court saw pervasive racism, the *Bakke* Court merely saw the absence of individual racists. This change in perception transformed centuries of black invisibility into the harms blacks "are thought to have suffered."¹²⁰ This dramatic transformation is, to say the least, confusing. We must turn to the moral principles underlying law to resolve the confusion and to restore light.

III. BRINGING LIGHT TO LAW: THE MORAL FEELINGS OF SHAME AND GUILT

Eve looked upon the tree of knowledge of good and evil and saw that it was good for food. It was pleasing to her eyes, and she believed, because of the serpent's words, that eating of it would make her wise You will recall that Eve succumbs to temptation; Adam joins in disobedience; and each appears then to experience what is, arguably, the first peculiarly human and painful emotion alluded to in the Old Testament Adam and Eve feel before each other shame.

HERBERT MORRIS, ON GUILT AND INNOCENCE 139-40 (1976).

Immediately after [Adam's fall] comes the story of jealousy and rivalry, or rage and sin—the murder of Abel by Cain. Here is emphasis not on opening eyes, exposure, and hiding, but on sin, . . . on controlling the aggressive drive and being overwhelmed by it, on murder, blood and retaliation.

LEON WURMSER, THE MASK OF SHAME 58 (1981).

The tale of Adam and Eve is a tale of shame and the loss of innocence; the tale of Cain and Abel is a tale of guilt and sin. Guilt and shame play a significant role in mythology, in biblical stories, in literature, and in tales of fundamental truths and moral force. Perceiving shame and guilt in these tales is merely recognizing different aspects of human nature, and the natural conflicts and attachments of man's common fate.

Part II examined the responses of the Court to the common fate of the invisible and the racist from the early desegregation cases to its first affirmative action decision. This part creates a fic-

119. *Id.* at 310.

120. *Id.*

tional character, an observer of invisibility and blindness who is endowed with moral feelings of shame and guilt. The observer is a reader of stories, both the story of Ellison's invisible man and the story of the law. As a reader, she may feel both shame and guilt.

The focus on shame and guilt, as opposed to other moral feelings—such as regret or indignation—is due to the nature of the metaphor that guides this inquiry. Our goal is to show how Ellison's call for light and its conception of moral responsibility bears on the law. In order to do this we must be faithful both to the subjective truths offered by Ellison and to the requirements of law.

Philosophers have long debated the differing roles of shame and guilt in an enlightened morality. Anglo-American jurisprudence, however, is based on a model of individual responsibility framed in terms of guilt. Thus, an inquiry into the moral feeling of guilt is fundamental to our purpose.

Ellison, on the other hand, suggests that it is appropriate to feel shame when we lack identity and direction. When the invisible man was still a young man in school, a white man told him that he was the white man's destiny.¹²¹ Years later, in the final pages of his story, the invisible man sees the now old man in the subway.

At first I saw only an old gentleman who for the moment was lost. I knew he was lost, for as I looked down the platform I saw him approach several people and turn away without speaking. He's lost, I thought, and he'll keep coming until he sees me, then he'll ask his direction. Maybe there's an embarrassment in it if he admits he's lost to a strange white man. Perhaps to lose a sense of *where* you are implies the danger of losing a sense of *who* you are. That must be it, I thought—to lose your direction is to lose your face.¹²²

As the old man approaches, the invisible man recognizes him and asks whether the old man recognizes him. The old man does not, and asks why he should. "Because I am your destiny," the invisible man answers. The old man remembers nothing. Then the invisible man asks, "Now, aren't you ashamed?" The old man answers indignantly, "Ashamed? ASHAMED!" The invisible man laughs, "Because, . . . if you don't know *where* you are, you probably don't

121. ELLISON, *supra* note 2, at 578.

122. *Id.* at 577.

know *who* you are."¹²³

Ellison's focus was on the moral feeling of shame. In contrast, the moral feeling underlying legal responsibility is usually guilt. In order to further our inquiry, therefore, the observer should be endowed with the moral feelings of shame and guilt. So long as the observer is neither a victim of the experience of invisibility nor inflicted with blindness, the moral feelings of that observer provide the subjective moral response to invisibility and blindness that is the first step in resolving the confusion in the Court's affirmative action jurisprudence.

A. *The Development of Moral Feelings*

The first question we must ask is how moral feelings form in our observer. There are two major psychological theories regarding the development of moral feelings. The first is Freud's theory that the development of moral feelings results from the psychological resolution of the Oedipus Complex. The second is Piaget's and Kohlberg's theory based on the transformation of primitive attitudes and conceptions. Both theories concentrate on the role of guilt in the development of moral feelings and unfortunately say very little about shame.

According to Freudian theory, male children develop sexual longings for their mothers, and concomitant hatred of their fathers for frustrating these desires. These children fear that in reprisal for their sexual longings, they will be castrated.¹²⁴ Paradoxically, male children also love their fathers.¹²⁵ This creates what Freud called an "economically difficult situation."¹²⁶ The child resolves this conflict by both developing a superego and by identifying with his father.¹²⁷ The development of a superego is essentially the development of a conscience.¹²⁸ Identification with the father is the internal incorporation of his values and the formulation of an internalized moral code.¹²⁹ When that internalized moral code is vio-

123. *Id.* at 578.

124. SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 79 (James Strachey trans. & ed., 1962).

125. *Id.*

126. *Id.* at 76.

127. *Id.* at 79.

128. *Id.* at 72.

129. *Id.* at 75-77.

lated, a sense of guilt is invoked.¹³⁰

In Freud's view, human beings are born narcissistic,¹³¹ absorbed in themselves. They are motivated by three drives: the libido, aggression, and a desire to avoid pain. Given these aggressive and sexual instincts, human beings require some restraint to prevent a reversion to animal instincts. For Freud, that was guilt: "[t]he sense of guilt is the most important [factor] in the evolution of culture The price of progress is forfeiting happiness through a heightening sense of guilt."¹³²

The other prevailing theory on moral development is contained in the works of Piaget and the studies of Kohlberg. Both Piaget and Kohlberg reject the Freudian view of conscience as the punitive superego. Their theory of moral development holds that "internal moral standards are . . . the outcome of a set of transformations of primitive attitudes and conceptions."¹³³ Piaget divides moral development into two stages: the morality of constraint and the morality of cooperation.¹³⁴ In the first stage, the child is ego-centric and subordinate to his parents.¹³⁵ The child offers blind obedience to the unilateral moral rules of parents, viewing these rules as if they were natural law handed down.¹³⁶ The violation of these rules warrants retribution in the form of punishment decreed

130. *Id.* at 74-75.

131. Much of Freud's theory of infancy and early child development has been disregarded. The attachment theory has replaced Freud's view that infants are basically narcissistic. This theory holds that the infant is interactive with the caregiver from birth. *See, e.g.*, Donald L. Nathanson, *A Timetable for Shame*, in *THE MANY FACES OF SHAME* 1, 9 (Donald L. Nathanson ed., 1987). In this article the author offers the following explanation of the theory of attachment:

This theory of how attachment occurs is at considerable variance with the theory that states that, subsequent to biological caretaking, the infant only gradually awakens psychologically to the existence of mother as an oral-need-satisfying "part-object." In the view of contemporary infant research, attachment is a continuous process, from the first few minutes of postnatal experience. It extends throughout life, taking different forms at different times.

Id. (citation omitted).

132. FREUD, *supra* note 124, at 81. Subsequent theorists have expanded the Freudian theory of moral development, but their basic conception of the role played by guilt is consistent with Freud's original theory. *See, e.g.*, ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 225 (1985).

133. Lawrence Kohlberg, *The Development of Children's Orientation toward a Moral Order*, 6 *VITA HUMANA* 11 (1963).

134. JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* 103, 193 (Marjorie Gabian trans., 1st ed. 1965).

135. *Id.* at 101-07, 159-62, 193.

136. *Id.* at 105-06, 116-28.

by the authority figure. Obedience to authority figures derives, in part, from the child's respect for the parents.¹³⁷ This obedience fosters a "heteronomous" attitude toward adult rules.¹³⁸

In the second stage of moral development, the child assumes an equal status among his peers and begins to look objectively at himself. In this second stage, the child's moral consciousness changes: an adherence to fixed moral rules becomes a respect for others and action according to the practice of reciprocity.¹³⁹ Mutual respect develops as a result of the developing capacity to trust others, primarily peers or those who are roughly equal.¹⁴⁰

Kohlberg agreed with many of Piaget's findings regarding the characteristics of developing moral feelings. Kohlberg, however, postulated six stages of moral development,¹⁴¹ and distinguished between three levels of moral orientation: pre-morality, conventional role-conformity, and self-accepted moral principles.¹⁴² Kohlberg, like Piaget, regarded mature moral principles as evolving in a developmental schedule of natural attitudes, each of which is transformed into the next. In the final stage of moral development, the individual has a conscience based on "socialized concerns about good and bad rather than the deep self-punitive trends implied by the superego concept."¹⁴³

While it is not necessary to decide the ultimate merits of each theory of moral development, it is important to note that strict Freudian theory is inadequate for our purpose. At the very least, Freudian theory fails to account for an equally moral male or female observer. In Freud's model of human development, guilt and not shame is relevant to moral development. Because guilt arises out of the resolution of the Oedipus Complex, women, who do not suffer from the same castration fears as men, are assumed to have inadequate superegos and, therefore, less developed senses of morality.¹⁴⁴ Thus, if we assume that either a man or woman would

137. *Id.* at 133-35.

138. *Id.* at 110, 138.

139. *Id.* at 315-25.

140. *Id.* at 95.

141. See generally Kohlberg, *supra* note 133, at 13-14.

142. *Id.*

143. Lawrence Kohlberg, *Moral Development and Identification in CHILD PSYCHOLOGY* 292 (Harold W. Stevenson, Jerome Kagan & Charles Spiker eds., 1963).

144. *Some Psychological Consequences of the Anatomical Distinction between the Sexes*, in 19 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 257-58 (James Strachey trans. & ed., 1923-25).

have equal moral capacity to serve as the observer, Freudian theory is inapplicable.

Subsequent interpretations of Freudian theory are better able to account for female moral development. Noted psychoanalyst and researcher Helen Block Lewis¹⁴⁵ demonstrated that there are important differences in the mode of the superego, in what Lewis termed superego style, that affect proneness to shame or guilt.¹⁴⁶ Lewis observed that Freud focused on the internalization of the punitive parent and the incorporation of the threat of castration, and largely ignored identification through

imitation or emulation of an admired or beloved parental figure. This kind of identification involves the incorporation of an ego-ideal: an admired imago who serves as a positive model for the child's activities. . . . This route of identification also involves threat, but of a complicated punishment known as "loss of love"; this loss of parental love becomes loss of "self-love," via loss of esteem in their eyes.¹⁴⁷

This type of identification leads to the development of feelings of shame.

In her clinical and experimental work with the two different styles of superego, Lewis expanded upon the theory of field dependence.¹⁴⁸ This theory holds that people differ in cognitive style, that is, in their capacity to perceive objects that must be disembedded from context, even when the perceived object is the self in relation to space.

Lewis' empirical work with the field dependence theory revealed that people have different perceptual styles. These perceptual styles determine the way we view ourselves in relation to

145. Lewis is noted for her empirical research on both shame and guilt. See generally HELEN BLOCK LEWIS, SHAME AND GUILT IN NEUROSIS (1971). Lewis characterizes the essential nature of shame and guilt; she analyzes the structure and function of shame and guilt; she formulates an analytical framework for assessing these two feelings; she develops her differentiation theory; and, she discusses the practical implications for psychotherapy. Lewis has also written a number of theoretical works. See Helen Block Lewis, *Shame—The Sleeper in Psychotherapy* in THE ROLE OF SHAME IN SYMPTOM FORMATION 1-28 (Helen Block Lewis ed., 1987) [hereinafter *Shame*]; Helen Block Lewis, *The Role of Shame in Depression Over the Life Span* in THE ROLE OF SHAME IN SYMPTOM FORMATION 29-50; Helen Block Lewis, *Shame and the Narcissistic Personality* in THE MANY FACES OF SHAME 93-132 (Donald L. Nathanson ed., 1987).

146. LEWIS, SHAME AND GUILT IN NEUROSIS, *supra* note 145, at 136.

147. *Id.* at 25.

148. See generally *id.* at 126-64.

others. In the extreme, people are either "field dependent" or "field independent." Field dependent people perceive themselves in relation to the surrounding world. Field independent people, on the other hand, have an immediate sense of their separateness from the surrounding world.¹⁴⁹

Lewis predicted and confirmed a connection between the perceptual style of individuals and their prevailing style of superego. Specifically, she focused on whether the superego induced feelings of guilt or of shame. People differ in the ease with which the sense of guilt or the sense of shame is stirred. Depending on their primary pathway of identification, positive or negative, different moral feelings are evoked.¹⁵⁰ Lewis found that, given the same stimulus, field dependent people are more prone to shame, through the stirring of the ego-ideal. Field independent people, on the other hand, are more prone to guilt, through the stirring of the punitive aspects of the superego. Recognition of the process of positive identification and, thus, the other aspect of the superego construct, the ego-ideal, completes Freud's theory of moral learning, at least sufficiently to permit a possible account of the moral development of the observer.

Whether moral development is attributed to transformation of natural attitudes or to identification with parental figures, certain things can be said about the moral development of our fictional observer. The observer has moral feelings including both shame and guilt. She can recognize the appropriate setting for each of those feelings. We can now proceed with an analysis of the difference between the moral feelings of shame and guilt.

B. The Moral Feelings of Shame and Guilt: Characterizing the Distinction

It is difficult to define precisely the distinction between guilt and shame. There is a consensus on the meaning of guilt in its legal, moral and psychological aspects. There is less clarity, however, on the meaning of shame. "Often it is coupled with guilt, and the phrase 'shame and guilt' is used as if it were one descriptive term"—as if shame has no independent meaning or experience.¹⁵¹

149. *Id.* at 132.

150. *Id.* at 82-83.

151. See, e.g., HELEN MERRELL LYND, ON SHAME AND THE SEARCH FOR IDENTITY 21 (1961) ("The phrase 'shame and guilt' is used as if it were one descriptive term.").

Guilt and shame are used interchangeably, with guilt the preferred term. "There is shame about shame and so it remains under strict taboo. . . ." ¹⁵²

Many modern theoretical and empirical works have attempted to differentiate shame from guilt. This section draws from these works, and follows the general approach devised by Wittgenstein in *Philisophical Investigations*¹⁵³ as it has been adopted by John Rawls¹⁵⁴ and others.¹⁵⁵ This system consists of characterizing moral feelings and principles by asking a series of questions.¹⁵⁶ The questions examined in this section offer a general conception of the distinction between shame and guilt. Then, in the next section, similar questions will be used to examine the relationship between distinct moral feelings and action.

The first question we must ask under this method of analysis is what are the behavioral manifestations and characteristic sensations of shame and guilt? If upon understanding invisibility and blindness the observer feels both shame and guilt, what sensations would she have and how would she betray how she feels? For example, covering oneself is a natural expression of shame. As Darwin observed, "Under a keen sense of shame there is a strong desire for concealment."¹⁵⁷

Shame is an acutely painful feeling about oneself. It prompts a desire to hide, and causes sweating or blushing.¹⁵⁸ Helen Block Lewis, in her research on the phenomenology of shame and guilt, found that it is difficult to identify one's own experience of shame

152. GERSHEN KAUFMAN, *SHAME: THE POWER OF CARING* 29 (1985). See also LEWIS, *SHAME AND GUILT AND NEUROSIS*, *supra* note 145, at 37 ("One is often ashamed of being or having been ashamed.").

153. LUDWIG WITTGENSTEIN, *PHILISOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1953).

154. See JOHN RAWLS, *A THEORY OF JUSTICE* 480, n.17 (1st ed. 1971) ("These questions are suggested by applying to the concept of moral feelings the kind of inquiry carried out by Wittgenstein . . .").

155. See, e.g., DAVID A.J. RICHARDS, *A THEORY OF REASONS FOR ACTION* 250 (1971).

156. RAWLS, *supra* note 154, at 480-85.

157. CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* 320 (Univ. of Chicago Press 1965) (1899).

158. LEWIS, *SHAME AND GUILT IN NEUROSIS*, *supra* note 145, at 37. The author writes: In shame, there is . . . an implosion of the self. The body gestures and attitude include head bowed, eyes closed, body curved in on itself, making the person as small as possible. At the same time that it seeks to disappear, the self may be dealing with an excess of autonomic stimulation, blushing or sweating or diffuse rage, experienced as a 'flood' of sensations.

because there is an intrinsic connection between shame and denial.¹⁵⁹ Patients often say they feel “lousy” or “blank” rather than being able to identify the feeling of shame underlying their behavior.

Furthermore, shame may hide itself under the manifestations of guilt. In guilt, there is often a wince or jolt, quickly followed by doubts about what has happened and the self being lost in thoughts.¹⁶⁰ This wince or jolt may also be a manifestation of denied shame. Since shame is a wordless experience,¹⁶¹ the feeling of shame underlying guilt may quickly be absorbed in the reasoning process stimulated by guilt, the process of ascribing responsibility to self and others. Thus, the observer reacting to the experience of invisibility or racism might manifest shame by blushing and seeking to hide. The observer, feeling either or both shame and guilt, might also wince or feel a jolt.

Regarding the characteristic sensations associated with shame and guilt, one of the early formulations of the distinction between shame and guilt suggested that different sensations were a result of the distinction between internalized and externalized punishment. Social anthropologist Ruth Benedict, in her post-World War II study of Japanese culture, articulated the distinction between cultures which rely heavily on shame and those which rely heavily on guilt.¹⁶² “A society that inculcates absolute standards of morality and relies on men’s developing a conscience is a guilt culture True shame cultures rely on external sanctions for good behavior, not, as true guilt cultures do, on an internalized conviction of sin.”¹⁶³ Thus, according to Benedict, cultural moral development proceeds either internally, through the internalization of values and the development of a sense of guilt, or externally, through the fear of ridicule by others and the development of a sense of shame.

Benedict’s distinction between self-criticism and criticism by

159. *Id.* at 38. (“[S]hame is connected to a specific defense of hiding or running away. It is a state in which the mechanism of denial seems particularly to occur. . . . Denial makes shame difficult for the person experiencing it to identify even though there is a strong affective reaction. The person often does not know what has hit him.”).

160. *Id.* at 252.

161. *Id.*

162. RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946).

163. *Id.* at 222-23 (“Shame is a reaction to other people’s criticism. A man is shamed either by being openly ridiculed and rejected or by fantasizing to himself that he has been made ridiculous [Shame] requires an audience or at least a man’s fantasy of an audience. Guilt does not.”).

others is in accord with Freud's psychoanalytic theory regarding the development of shame and guilt.¹⁶⁴ Freud viewed both guilt and shame as tensions originating in the superego. Guilt results from the violation of an internalized moral code. Shame originates in a particular portion of the superego, the ego-ideal, which is resolved and restrained sexual exhibitionism. Freud assigned shame to an earlier, pre-Oedipal phase of development¹⁶⁵ and assigned it a lower relative value in the development of morality, falling short of Freud's conception of the internalized conscience of guilt.¹⁶⁶ Freud and Benedict both say that shame differs from guilt in that feelings of shame originate from external sources and feelings of guilt arise from internal sources.

In the decade following Benedict's work, both psychoanalysts and social scientists began to question the Freud-Benedict conceptions of shame and guilt. It is possible to tremble internally and feel a tightening of the stomach at feeling either shame or guilt. Thus, the characteristic sensations and behavior associated with shame and guilt are inadequate to distinguish the moral feelings of our observer. The answers to the next question in our analysis will be more useful in distinguishing between feelings of shame and guilt. This is the main question in distinguishing moral feelings: what characteristic explanations will the observer offer for having these feelings of shame and guilt?¹⁶⁷ Here, the influential psychoanalytic formulation of Gerhart Piers proves useful.¹⁶⁸

164. Freud also applied his psychoanalytical theories to cultural interpretation. See generally FREUD, *TOTEM AND TABOO* (1912); FREUD, *supra* note 124.

165. See also ERIKSON, *supra* note 132, at 253 ("Visual shame precedes auditory guilt . . ."). Contemporary theorists and researchers dispute Freud and Erikson on this point. See, e.g., Lewis, *The Role of Shame in Depression Over the Life Span*, *supra* note 145, at 31-32 ("The essential misunderstanding of shame . . . is the implied hierarchy, in which shame is preoedipal, whereas guilt is oedipal. This hierarchy assumes that shame is more primitive But there is no concrete evidence that shame precedes guilt in development. On the contrary, it seems likely that both shame and guilt messages are exchanged between mother and infant.").

166. Cf. Hoblitzelle, *Differentiating and Measuring Shame and Guilt: The Relation between Shame and Depression*, in *THE ROLE OF SHAME IN SYMPTOM FORMATION* 207, 208 (Helen Block Lewis ed., 1987) ("[E]arly writers . . . suggested shame was less advanced developmentally and thus was perhaps considered less worthy of study. There seems to be an agreement in the more recent literature that shame and guilt represent equally advanced levels of moral development . . ."). See also *infra* notes 191-94 and accompanying text (discussing Helen Merrell Lynd's argument that shame leads to a more enlightened morality than guilt).

167. See RAWLS, *supra* note 154, at 481.

168. GERHART PIERS & MILTON B. SINGER, *SHAME AND GUILT* (1971).

Piers argued quite persuasively, that the crucial distinction between shame and guilt is not between self-criticism and criticism by others, rather it is the distinction between the transgression of prohibitions and the failure to achieve ideals and goals. "Whereas guilt is generated whenever a boundary . . . is touched or transgressed, shame occurs when a goal . . . is not being reached. . . . Guilt anxiety accompanies transgression; shame, failure."¹⁶⁹ In psychoanalytic terms, Piers argued that both shame and guilt arose from a process of identification. Where a sense of guilt develops in the superego as a result of identifying with the image of a "punitive parent,"¹⁷⁰ a sense of shame develops in the ego-ideal (part of the superego) by identification with positive parental images.

Piers pointed out that even Freud recognized that the superego involves both forms of identification: those which encourage the child "to become like father"¹⁷¹ and those that prohibit the child from exercising the father's prerogative.¹⁷² In concluding his discussion of the two faces of the superego's process of identification, Piers stated, "Indeed, it is not the malevolently destructive eye, but the all-seeing, all-knowing eye which is feared in the condition of shame, God's eye which reveals all shortcomings of mankind."¹⁷³

169. *Id.* at 24. In psychoanalytic terms, Piers argued that "[s]hame arises out of a tension between the ego and the ego ideal, not between the ego and the superego as in guilt." *Id.* at 23. Piers did not find it relevant to his discussion to determine whether the ego ideal is a particular aspect of the superego or a separate formation independent of the superego. Rather, he concerned himself with more clearly delineating the function of the ego ideal as distinguished from the superego:

First, the ego ideal appears to contain a *core of narcissistic omnipotence* . . . a minimum of [which] . . . seems to be necessary to establish such healthy integrative functions as self-confidence, hope, and trust in others. . . . Second, the ego ideal represents the sum of *positive identifications* with the parental images Third, the ego ideal contains layers of *later identifications* . . . of the greatest social importance. The "social role" that an individual assumes in any given social situation is largely determined by the structure of his . . . ego ideal Fourth, the ego ideal is in continuous dynamic interfunction with the unconscious and conscious *awareness of the ego's potentialities*. This part of the ego ideal must contain the *goals* of . . . the maturation drive.

Id. at 26-27.

170. *Id.* at 17 ("[N]o one develops a sense of guilt without a punitive parent image").

171. *Id.* at 25.

172. *Id.*

173. *Id.* at 30. Piers' reference to God is in accord with the Judeo-Christian tradition and the general belief that natural man knew no shame. *Id.* at 19. This is reflected in the story of Adam and Eve. One's relationship to God was to be marked by humility, and the principal emotion governing that relationship was shame. Theologian Dietrich Bonhoeffer

If the observer expressed guilt feelings at the exclusion of blacks, this guilt would be a response to the transgression of moral principles involved in the wrongs of segregation. If, on the other hand, she expressed shame, she could explain her shame as a response to the failure to live up to an ideal. Both explanations invoke moral principles.

John Rawls, in his treatment of shame and guilt, essentially adopted Piers' psychoanalytic formulation and pointed out the significance of the moral beliefs associated with these feelings:

[I]t is a necessary feature of moral feelings . . . that the person's explanation of his experience invokes a moral concept and its associated principles. His account of his feeling makes reference to an acknowledged right or wrong. . . . What distinguishes the moral feelings from one another are the principles and faults which their explanations typically invoke.¹⁷⁴

It seems essential that some principle of reciprocity is believed to have been transgressed by the person who feels guilty. Guilt feelings occur, for example, when a person violates a "just scheme" and thereby disadvantages others.¹⁷⁵ With shame, the defining explanation involves one's belief that one has failed to live up to an ideal. For shame to be explained as a moral feeling, that ideal must involve a moral principle. If our observer feels both guilt and shame, she may explain her feelings by her belief that invisibility and blindness involve both transgressions of principles of reciprocity and a failure to live up to an ideal involving a moral principle.

Herbert Morris' examination of the moral feelings of Germans about their collective responsibility for the Holocaust aids our discussion of this issue.¹⁷⁶ He did not concern himself with the responsibility of those Germans directly involved with the Holocaust, but instead, he concentrated on two other cases. First, he considered the responsibility of those who had the opportunity to act but failed to do whatever they could to prevent the evil;¹⁷⁷ second, he

offers one of the most eloquent definitions of shame. He stated, "Shame is man's ineffaceable recollection of his estrangement from the origin; it is grief for this estrangement, and the powerless longing to return to unity with the origin. Man is ashamed because he has lost something which is essential to his original character, to himself as a whole . . ." DIETRICH BONHOEFFER, *ETHICS* 145 (Eberhard Bethge ed. & Neville Horton Smith trans., The Macmillan Co. 6th ed. 1963) (1949).

174. RAWLS, *supra* note 154, at 481-82.

175. *Id.* at 482.

176. HERBERT MORRIS, *ON GUILT AND INNOCENCE* 133-34 (1976).

177. *Id.*

considered the responsibility of those who did not necessarily fail in any way, but remained alive while others died unjustly.¹⁷⁸ In the first case, Morris recognized guilt: the individual had the opportunity to act and is responsible for the voluntary failure, a failure which violated the moral principle of reciprocity.¹⁷⁹

The second case touches upon the differing explanations of shame and guilt. All the second individual failed to do was sacrifice his life. While that person might feel what is often termed guilt, in this case, the idea of guilt is merging into something else:¹⁸⁰

First, in failing to do the extraordinary, we may feel that we are less than we would desire to be. . . . Second, our failure may be, not in neglecting to do the extraordinary, but in doing and failing to do things that, while ultimately involving harm to others, are most directly crimes involving ourselves, crimes that consist in one way or another in failures of integrity, failures to be and to act as our conception of ourselves dictates.¹⁸¹

Morris' explanation of the moral feelings aroused in the second case is a fine example of the distinction between guilt's focus on the transgression of moral principles and shame's focus on the failure to live up to moral self-ideal.

It is possible that the observer might experience a sense of shame even though she does not feel that she herself has personally transgressed a moral principle. Normally we do not feel guilt for another person's action. But, it can be otherwise with shame. For example, a child may feel shame because of her parents transgressions without feeling guilty herself. In her important work, *On Shame and the Search for Identity*, Helen Merrell Lynd¹⁸² pointed out that shame has the power to reveal ideals that may be

178. *Id.* Morris gives the following example of a person in this situation:

When our Jewish friends were taken away, we did not go out into the street and cry aloud until we also met our death. We preferred to remain in life for the weak, even if justifiable, reason that our death would not in any way have helped. It is our own fault that we are still alive. . . . It demands that we should take on us the consequences of being alive in such conditions.

Id. at 133 (citation omitted).

179. *Id.*

180. *Id.* at 134-35.

181. *Id.*

182. LYND, *supra* note 151. Lynd adopted Piers' psychoanalytic distinction between guilt, as developing through the process of identification with punitive parents, and shame, as developing as a result of positive identifications. *Id.* at 22.

part of a wider identity.¹⁸³ Thus, if the observer views the actions of others as involved in the realization of a moral ideal, and those others are guilty of transgressions that constitute a failure to achieve a moral ideal, then the observer would feel shame. The observer feels shame because she identifies with a larger group which includes those who are guilty.

Despite this distinction, it is well recognized that the same situation may give rise to both moral feelings.¹⁸⁴ As Rawls explained:

For example, a person who cheats may feel both guilty and ashamed: guilty because he has violated a trust and unfairly advanced himself, his guilt being in answer to the injuries done to others; ashamed because by resorting to such means he has convicted himself in his own eyes (and in those of others) as weak and untrustworthy, as someone who resorts to unfair and covert means to further his ends.¹⁸⁵

While it would be an oversimplification to reduce the seriousness and complexities of invisibility and racism to a simple act of cheating, the analogy is clear. The observer, reading the story of invisibility and racism that is our history, might well recognize and feel both guilt and shame. On the other hand, if the observer identified with those who were themselves guilty, she, though not personally culpable, might nevertheless feel shame.

C. *Shame and Guilt: The Relation of Moral Feelings to Action*

In characterizing the distinctions between the moral feelings of shame and guilt, we must ask two related questions: (1) how does a person experiencing these feelings expect others to react? and (2) how are the feelings typically resolved?¹⁸⁶ At this juncture the observer provides a subjective account of a moral response that differs from that of the Supreme Court. The observer will respond

183. *Id.* at 204-35.

184. See, e.g., LEWIS, SHAME AND GUILT IN NEUROSIS, *supra* note 145, at 35-36.

[I]n the wake of some transgression, one can feel both guilty and ashamed of oneself. The self-reproaches that are likely to be formed as guilty ideation develops run as follows: how could I have *done that*; what an injurious *thing* to have done; how I *hurt so-and-so*; what a moral lapse that *act* was; what will become of *that* or of *him*, now that I have neglected to *do it*, or injured *him*. How should I be *punished* or *make amends*? Mea culpa! Simultaneously, ashamed ideation says: how could *I* have done that . . .

Id.

185. RAWLS, *supra* note 154, at 482.

186. *Id.* at 483-84.

in certain characteristic ways depending on which set of moral responses is being triggered.

The first questions we must ask is what response does the observer expect from others to the experience which gave rise to the moral feelings in the observer. How does she expect others to feel about her if she is guilty or ashamed? What different attitudes does the observer expect from others? Rawls offers the following response:

[O]ne who feels guilty, recognizing his action as a transgression . . . expects them to resent his conduct and to penalize him in various ways. He also assumes that third parties will be indignant with him. Someone who feels guilty, then, is apprehensive about the resentment and indignation of others, and the uncertainties which thereby arise. By contrast, someone who feels ashamed anticipates derision and contempt. He has fallen short of a[n ideal] . . . given in to weakness, and shown himself unworthy of association with others who share his ideals. He is apprehensive lest he be cut off and rejected, made an object of scorn and ridicule.¹⁸⁷

Both shame and guilt, then, place the person experiencing those moral feelings in uncomfortable and painful states, anticipating either punishment or rejection. Both are negative experiences. Yet the differing nature of the feelings leads to different action by which the observer might resolve the feelings.

Given the self-punishing aspect of each moral feeling, the observer would be prompted to resolve the feelings. Thus, we ask: what are the characteristic dispositions to action by which the feelings of shame and guilt are resolved? Assuming the observer feels the negative and painful aspects of both shame and guilt, what action would she reasonably undertake? In examining this question Rawls noted:

Feelings of guilt and shame have different settings and are overcome in distinct ways, and these variations reflect the defining [moral] principles with which they are connected and their peculiar psychological bases. Thus, for example, guilt is relieved by reparation and the forgiveness that permits reconciliation; whereas shame is undone by proofs of defects made good¹⁸⁸

187. *Id.*

188. *Id.* at 484.

If the observer recognized guilt in the story of invisibility and racism, then she would expect to see restitution made to those who have been wrongly treated. If she herself felt guilty, she would be disposed to make reparation. If she recognized both shame and guilt, she would expect to see both reparation to resolve guilt and additional action to resolve the feeling of shame. That additional action would be designed to achieve successfully the ideal that the guilty parties failed to achieve.

Some researchers and commentators have argued that shame produces more enlightened activity than guilt. Piers, for example, concluded:

Guilt-engendered activity is at best *restitution* (sacrifice, propitiation, atonement) which rarely frees, but brings with it resentment and frustration rage which in turn feed new guilt into the system. The shame-driven individual has better potentialities as to maturation and progress If his ambitious drive is coupled with creativeness, it may actually lead to a spontaneous curing of the original . . . wound. . . . Whereas the shame-driven might be propelled beyond his natural limitations and break, the guilt-ridden as a rule will not even reach his potentialities.¹⁸⁹

This characterization of the relative value of action prompted by the moral feelings of shame and guilt speaks to the larger debate about the relative value of shame and guilt in the development of an enlightened morality.

Helen Merrell Lynd was concerned with the search for identity. Her conclusion that a sense of identity developed through shame, rather than guilt, promises a more enlightened moral identity. Lynd essentially adopted Piers' distinction between shame and guilt:

Guilt is centrally a transgression, a crime, the violation of a specific taboo, boundary, or legal code by a definite voluntary act. . . . Shame is defined as a wound to one's self-esteem, a painful feeling or sense of degradation excited by the consciousness of having done something unworthy of one's previous idea of one's own excellence.¹⁹⁰

In Lynd's view, guilt involves a separate, discrete act of trans-

189. PIERS & SINGER, *supra* note 168, at 28-29.

190. LYND, *supra* note 151, at 23-24.

gression. Guilt focuses on an individual act that can be detached from the self and ameliorated by reparation, confession, or punishment. Shame, on the other hand, exposes "the quick of the self"¹⁹¹ and its failure to reach an ideal. In shame, the self stands revealed.¹⁹² The exposure at the heart of shame often arises suddenly or unexpectedly, "flooding light on what and who we are."¹⁹³ Because of this characteristic of shame, an experience of shame can only be transcended by a change within the self.¹⁹⁴ Thus, Lynd recognizes a positive aspect in shame that she finds lacking in guilt, the power to transform moral identity.¹⁹⁵

Lynd's view, while basically sound, is open to criticism. First, it is difficult to speak of moral identity as being formed by either shame or guilt in the alternative. Piers and others who have addressed the distinction between shame and guilt recognize that speaking of guilt-ridden and shame-driven people as separate and distinct is an abstraction.¹⁹⁶ Furthermore, both shame and guilt involve moral principles: guilt involves transgressing moral principles; shame involves the failure to live up to an ideal involving a moral principle. Thus, shame is inseparable from the very moral principles that underlie guilt.

A second criticism of Lynd is advanced by David Richards. He argued that theorists like Lynd "who propose a concept of internal ideals of excellence, as basic to the concept of an enlightened morality, all do so because they conceive any alternative conception of morality in terms of a concept of guilt as some form of unreasoned, internalized aggression"¹⁹⁷ In Richards' view, Lynd, in focusing on the positive aspects of shame failed to recognize the positive aspect of guilt, the reparation that guilt induces.¹⁹⁸

191. *Id.* at 208.

192. Sartre also noted this capacity of shame:

Consider for example shame. . . . [I]ts structure is intentional; it is a shameful apprehension of something and this something is *me*. I am ashamed of what I *am*. Shame therefore realizes an intimate relation of myself to myself. Through shame I have discovered an aspect of *my* being. . . .

Shame is by nature *recognition*. I recognize that I *am* as the Other sees me.

JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 197-98 (Hazel E. Barnes trans., 1977) (1943).

193. LYND, *supra* note 151, at 49.

194. *Id.* at 50.

195. *See generally id.* at 27-71, 183-258.

196. *See, e.g.,* PIERS AND SINGER, *supra* note 168, at 7; *Shame, supra* note 145.

197. RICHARDS, *supra* note 155, at 261-62.

198. *Id.* at 262.

Even conceding Richards' point, however, Lynd's distinction between shame and guilt informs our understanding of the distinction between the actions undertaken to resolve the moral feelings. Action to resolve guilt may be in the negative form of punishment or the positive form of reparation. Shame also has a negative component, it is a painful feeling, but it can only be transformed by a change in the self, by action that requires the self to live up to the moral ideal. Thus, in the positive aspects of guilt, the focus is on others. In contrast, the focus of shame is on the self.

We now return to our observer and her disposition to action in response to invisibility and racism. Assuming she feels both shame and guilt, her actions would be designed to resolve both moral feelings. Thus, her actions would have both reparative and transforming aspects. Guilt would dispose the observer to offer compensation to those unjustly injured by the wrongs of invisibility and racism. Shame, on the other hand, would require the observer to transform herself in accord with her moral ideal. Given that invisibility and blindness are the human experiences that fail to live up to the observer's moral ideal, shame requires essentially what Ellison called for: transforming the human experiences of invisibility and blindness.

IV. BRINGING LIGHT TO LAW: THE RELATION OF THE MORAL FEELINGS OF SHAME AND GUILT TO MORAL PRINCIPLES AND LAW

[T]he claim that we are all responsible for everything, particularly when tied to narrower cases, say, being told that as whites we are responsible for the condition of the black man, responsible even for the evils perpetuated before our birth, produces not just intellectual disagreement, not just critical analysis but unquestionably, in the case of some people, considerable anger, sometimes anger of such intensity that we may become suspicious and wonder what nerve the claim has touched. . . .

But I think that for some persons it will be a troubled anger. We know too well that the paradoxical reveals the hidden. . . . and that some insights not yet revealed underlie the claim.

HERBERT MORRIS, ON GUILT AND INNOCENCE 116-17 (1976).

Our observer is but one, albeit hypothetical, person; her feelings, although grounded in sound psychological theory and under-

standing, are only the subjective feelings of one person. Others endowed with moral feelings might well argue that they have different feelings, that they feel no guilt and no shame at the story of invisibility and blindness. The moral feelings of the observer and her dispositions to action are, therefore, but the first step in understanding the conception of moral responsibility that must be embodied in law in order to satisfy Ellison's call for light. The next steps in bringing Ellison's insight to the law are to establish the relationship of the observer's moral feelings to moral principles, and to relate those moral principles to law. This part draws upon the works of Herbert Morris, John Rawls, and Lon Fuller that address distinct conceptions of morality and their relation to law.

A. *The Distinction between the Moralities of Shame and Guilt*

Herbert Morris, in *On Guilt and Innocence*, contrasted the features of two alternative moralities: a shame morality and a guilt morality.¹⁹⁹ Morris' shame morality overlaps the moral world of guilt because both involve moral criticism. However, the shame morality involves "criticism within a framework different from that of guilt and suffering."²⁰⁰

Morris' comparison of shame and guilt moralities adopted Piers' distinction between shame and guilt. Morris did not directly address the relationship between moral feelings and moral principles, but he used the same distinguishing features to compare the principles Piers used to compare the feelings.²⁰¹ For example, Morris distinguished between guilt's focus on transgression and shame's concern with ideals and identity.²⁰² In shame, moral criticism proceeds by comparing conduct with a certain ideal identity; in guilt, moral criticism employs the concepts of violating a rule or disobeying an order.²⁰³

Another way of distinguishing shame and guilt moralities is to examine the difference between a "scale" morality and a "threshold" morality:

There is the conception of a good toward which we may have travelled some distance but not the whole way. The critical

199. MORRIS, *supra* note 176, at 59-63.

200. *Id.* at 60.

201. *Id.* at 59-63.

202. *Id.* at 60-61.

203. *Id.*

concept associated with shame is failure, shortcoming, not violation. With guilt one has either done wrong or not; it is not a concept admitting of degrees of realization. . . . [C]onnected with this contrast between the conception of a scale and a threshold is the fact that with shame we may focus on failure to achieve an ideal, perfection, some maximum whereas with guilt it is a minimum demand that has not been met.²⁰⁴

Because shame is associated with an ideal or maximum, it is a scale morality. Guilt, which is associated with a minimum, is a threshold morality. Because guilt is tied with transgression and failure to meet the minimum demands reasonably placed on us, it is essentially tied to fault and blame. Shame, on the other hand, is tied to one's self-ideal and may arise by the "failure to do the extraordinary."²⁰⁵

Morris further contrasted shame and guilt by examining their effect on our relationships with others. A guilt morality focuses on a relationship's duties: "With guilt we have a conceptual scheme of obligations and entitlements. . . . [T]his leads to the idea of owing something to others because one has taken something one is not entitled to."²⁰⁶ A shame morality focuses on one's own worthiness. Morris noted that maintaining relationships with others is an element of one's ideal identity. Where one acts in a relationship contrary to one's ideal, one feels unworthy.²⁰⁷

Morris argued that shame and guilt prompt different moral actions. A guilt morality prompts one to restore the damaged relationship by meeting an obligation or paying a price.²⁰⁸ However, if a person is ashamed and feels unworthy of a relationship, the only way to restore the relationship is to be the kind of person that conforms with one's ideal. "One is not forgiven one's shame and punishment does not divest one of it. . . . [T]he steps that are appropriate to relieve shame are becoming a person that is not shameful. Shame leads to creativity; guilt to restoration."²⁰⁹ Morris' characterization of shame and guilt moralities accords with the characterization of the underlying moral feelings. The moral feelings of the observer, her feelings of shame and guilt, rest soundly

204. *Id.* at 61.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 61-62.

209. *Id.*

in moral principles as described by Morris.

John Rawls offered a more complex analysis in *A Theory of Justice*. Rawls, like Morris, essentially adopted Piers' formulation of the distinction between shame and guilt.²¹⁰ According to Rawls, in guilt "we focus on the infringement of the just claims of others and the injury we have done to them,"²¹¹ while in shame we focus on "the feeling someone has when he experiences an injury to his self-respect or suffers a blow to his self-esteem."²¹² Rawls defined self-esteem in terms of the goals and ideals that one incorporates into one's life plan.²¹³

As discussed in part III, Rawls concluded that the significant distinction between the moral feelings of shame and guilt lies in the explanations offered for these feelings: the distinctive moral principles which are used to define and explain each moral feeling. Rawls argued that guilt invokes the concept of right and justice, whereas shame appeals to the concept of goodness and the moralities of supererogation.²¹⁴ "We tend to feel guilty when we do not honor our duties and obligations When we go against our sense of justice we explain our feelings of guilt by reference to the principles of justice."²¹⁵ Shame, on the other hand, involves the moralities of supererogation. "Thus in particular, the moralities of supererogation provide the stage for shame; for they represent the higher forms of moral excellence, the love of humankind and self-command, and in choosing them one risks failure from their very nature."²¹⁶

In his explanation of supererogatory acts, Rawls contrasted the actions prompted by the morality of supererogation with the acts prompted by the morality of duty:

[Supererogatory acts] are acts of benevolence and mercy, of heroism and self-sacrifice. It is good to do these actions but it

210. RAWLS, *supra* note 154, at 443 n.26.

211. *Id.* at 446.

212. *Id.* at 442.

213. *Id.* at 443-45. While Rawls' characterization of the distinction between guilt and shame has been criticized for recognizing "no distinction between questions of identity and questions of life pursuits, between who one is and how one conducts one's life," John Deigh, *Shame and Self-Esteem: A Critique*, 93 *ETHICS* 225, 235 (1983), the incorporation of one's ideals into his definition of shame suffices for the purpose of understanding the relation between feelings of shame and guilt and particular moral principles.

214. RAWLS, *supra* note 154, at 479-85.

215. *Id.* at 474.

216. *Id.* at 484.

is not one's duty or obligation. Supererogatory acts are not required, though normally they would be were it not for the loss or risk involved for the agent himself. . . . For while we have a natural duty to bring about a great good, say, if we can do so relatively easily, we are released from this duty when the cost to ourselves is considerable.²¹⁷

Our observer's feelings of guilt can be explained in terms of the morality of duty; her feelings of shame, on the other hand, are related to the moralities of supererogation.

Lon Fuller proceeded along somewhat different lines. In an essay entitled *The Two Moralities*,²¹⁸ Fuller began by saying that he was dissatisfied with the existing literature on the relation between morality and law. He then identified the source of his dissatisfaction as the "failure to clarify the meaning of morality itself."²¹⁹ Fuller argued that there is a distinction between the morality of duty and the morality of aspiration, and that this distinction has implications for law which have not been generally recognized.

Although Fuller did not use the nomenclature of shame or guilt, he drew a similar distinction between the two moralities as Piers drew between the feelings of shame and guilt. Fuller stated that the morality of aspiration is most plainly exemplified in Greek philosophy:

It is the morality of the Good Life, of excellence, of the fullest realization of human powers. In a morality of aspiration there may be overtones of a notion approaching that of duty. But these overtones are usually muted, as they are in Plato and Aristotle. Those thinkers recognized, of course, that a man might fail to realize his fullest capabilities. As a citizen or as an official, he might be found wanting. But in such a case he was condemned for failure, not for being recreant to duty; for shortcoming, not for wrongdoing.²²⁰

Fuller's characterization of the two moralities corresponds with the distinction between the moral feelings of shame and guilt. What Fuller referred to as a morality of aspiration involved shortcoming, or the same failure to achieve a human ideal that lies in shame. In contrast, Fuller's morality of duty involved wrongdoing, or the

217. *Id.* at 117.

218. LON L. FULLER, *The Two Moralities*, in *THE MORALITY OF LAW* 3 (1964).

219. *Id.* at 3.

220. *Id.* at 5.

transgressions that pertain to guilt.

Expanding upon this basic distinction, a morality of aspiration involves ideals. A morality of duty, on the other hand, provides the basic rules of an ordered society:

It is the morality of the Old Testament and the Ten Commandments. It speaks in terms of "thou shalt not," and, less frequently, "thou shalt." It does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living.²²¹

While the moralist of aspiration might find a particular action unworthy of a being with human capacities, the moralist of duty concerns herself with whether actions are "so harmful that we ought to consider that there is a general moral duty, incumbent on all, to refrain from engaging in it."²²²

The moral feelings of our observer are directly related to moral principles. We may refer to them as guilt and shame moralities, as the moralities of duty and supererogation, or as the moralities of duty and aspiration. That both moralities are properly invoked, however, does not end our inquiry. The same situation can prompt both moral feelings which, in turn, invoke different moral principles and are resolved by different positive moral actions: reparation and transformation. In many circumstances, the observer may be free to do both and our inquiry is over. But what if she is told that the action she might undertake to resolve her shame violates the principles of duty and guilt? If she can resolve only one moral feeling and must choose between them, are there moral principles by which she may choose reparation or transformation? In order to answer these questions, we must understand the relationship between the two moralities.

B. The Relationship between the Moralities of Shame and Guilt

The moral feeling of shame necessarily involves a moral ideal, an ideal that embodies the principles of reciprocity which produce guilt. This inevitable relationship between the two moral feelings suggests an analogous relationship between the two moralities. De-

221. *Id.* at 5-6.

222. *Id.* at 7.

termining this relationship seems essential to providing our observer with the correct moral principles to guide her actions.

Both Morris and Rawls, while not directly addressing this question, discussed the underpinnings of guilt and shame from which we can derive and articulate their view of the relationship between them. In an essay entitled *Shared Guilt*, Morris argued that there are cases where, even though we may speak in terms of a guilt morality, the concepts of a shame morality are more naturally invoked.²²³ Morris examined Dostoevsky's claim in *The Brothers Karamazov* that "we are responsible for everything."²²⁴ Morris reasoned that if we evaluate this claim of responsibility by reference to a model of individual responsibility—a guilt morality—then such a claim seems false; if we are responsible for everything, then the concept of responsibility fails to make meaningful distinctions.²²⁵

In Morris' view, however, the claim that "we are responsible for everything" was a moral claim, one that "seem[ed] to have implications for the kinds of persons we are, the conduct we should and should not engage in, the feelings we should, but do not, have."²²⁶ For example, Morris examined a class of cases where we speak of "shared guilt" and attempted to resolve the conflict between his intuitive feeling that this claim has meaning with his logical conclusion—based on concepts of individual responsibility—that it did not. While we are not all individually guilty with respect to all types of wrongdoing, these cases do support the claim that we are all guilty of some evil.²²⁷

Morris used Camus' *The Fall* to make his point.²²⁸ Camus' hero was walking across a bridge, heard a splash, and did nothing. As Morris put it: "His guilt is apparent. . . . [I]f we could in fact

223. MORRIS, *supra* note 176, at 111-38.

224. *Id.* at 112. Morris quotes Father Zossima's brother in *The Brothers Karamazov* who says:

Little heart of mine, my joy, believe me, everyone is really responsible to all men for all men and for everything. I don't know how to explain it to you, but I feel it is so, painfully even. And how is it we went on then living, getting angry and not knowing.

Id. (quoting Fyodor M. Dostoevsky, *THE BROTHERS KARAMAZOV*) (1952).

225. *Id.* at 112-15.

226. *Id.* at 117.

227. *Id.* at 117-35.

228. *Id.* at 132-35.

prevent suffering and do not then we are responsible for it."²²⁹ Morris noted, however, that the concepts of a guilt morality could be used to

block the claim that we are guilty [for failing] to prevent suffering we might have prevented. The concept of guilt is linked to that of fault and this concept is in turn linked to demands that may rightfully be placed upon man. These in turn connect with the reasonableness of a man's conduct. And it may be argued that it is at least not unreasonable to act in ways that are not related to alleviating suffering.²³⁰

Morris argued that the morality of guilt does not conclude the inquiry. If we reflect upon the lives of those persons who have acted to alleviate suffering, those who have sacrificed more than we, then we may be struck by our own selfishness and weakness. Confronting our own failure to prevent suffering, especially in the light of the actions of those who have done more to alleviate suffering than we have, our failure to act implicates our moral condition:

There is a strong temptation to talk of guilt here—guilt before ourselves—rather than shame, for fault conditions do obtain in many instances, and it is our own choices that have turned us away from being ourselves. The impulse to talk of shame . . . comes from the inappropriateness in these cases of alleviating the feelings we have by conduct such as confession, making amends, asking forgiveness or receiving punishment.²³¹

While we may talk of these cases of responsibility in terms of guilt, where the problem involves more than just doing what is reasonably asked of us but, rather, requires confronting our moral condition, the concept of shame is more appropriate than the concept of guilt.

Thus, our observer, if confined to a choice, must decide whether her understanding of the exclusion of blacks justified by racism requires her to do what is reasonably asked of her, or whether invisibility and blindness require her to confront her moral condition. Morris suggested, when he spoke about "guilt before ourselves," that the concepts of shame and guilt may merge

229. *Id.* at 132.

230. *Id.* at 133.

231. *Id.* at 135.

with one another.²³² Unfortunately, Morris was not explicit about exactly what circumstances require confrontation with our moral condition.

Rawls did not directly address the question of when we must confront our moral identity and make ourselves liable to shame. However, his analysis does offer further insight into the relationship between the moral principles invoked by the two moral feelings. It is a central feature of Rawls' conception of justice that "in justice as fairness, the concept of right is prior to that of good."²³³ On first reading, this suggests that Rawls has answered our question. If guilt relates to right and shame relates to good, it would seem, that as a matter of moral principle, that if our observer is forced to choose, then she must act in accordance with the moral principles involved in guilt.

However, a closer reading of Rawls makes it apparent that he has not really answered the question. Rawls argued that both shame and guilt involve principles of right and justice: "Moral shame and guilt, it is clear, both involve our relations to others, and each is an expression of our acceptance of the first principles of right and justice."²³⁴ Thus, Rawls suggested that both moral feelings can be explained within the principles of right and justice.²³⁵

Rawls' discussion of shame was confused by the fact that he recognized a distinction between natural and moral shame. In moral shame "a principle of right [is] cited to account for it [N]atural shame is aroused by blemishes in our person, or by acts

232. *Id.* at 134-35.

233. RAWLS, *supra* note 154, at 31. Rawls prefaces this remark with the following:

In justice as fairness, . . . persons accept in advance a principle of equal liberty and they do this without a knowledge of their more particular ends. They implicitly agree, therefore, to conform their conceptions of their good to what principles of justice require, or at least not to press claims which directly violate them. An individual who finds that he enjoys seeing others in positions of lesser liberty understands that he has no claim whatever to this enjoyment. The pleasure he takes in other's deprivations is wrong in itself: it is a satisfaction which requires the violation of a principle to which he would agree in the original position. The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good. In drawing up plans and in deciding on aspirations men are to take these constraints into account.

Id.

234. *Id.* at 446.

235. *Id.*

and attributes indicative thereof, that manifest the loss or lack of properties that others as well as ourselves would find it rational for us to have."²³⁶ Thus, according to Rawls, failure to achieve the self-ideal of wit or beauty might invoke shame.

While Rawls was not alone in speaking of nonmoral shame,²³⁷ this usage, arguably, is a corruption. Furthermore, it makes it difficult to assess Rawls' view on the relationship between the moralities of duty and supererogation. If we can confine Rawls to moral shame, we can at least speculate on his apparent preference for actions explained with reference to a guilt morality and whether this preference survives. If we require, as we must, that the ideal implicated by shame is a moral ideal, then shame involves the same principles of justice and right as guilt, because the ideal implicated by shame is a moral ideal. Rawls himself concluded:

For the theory of right and justice is founded on the notion of reciprocity which reconciles the points of view of the self and of others as equal moral persons. This reciprocity has the consequence that both perspectives [shame and guilt] characterize moral thought and feeling, usually in roughly even measure.²³⁸

Taking into account these statements about moral, as opposed to natural shame, Rawls' stated preference for right over good blurs—the principles of right and justice govern both.

Like Morris, Rawls did not address the question of where the morality of duty leaves off and the morality of supererogation begins. He did reason that the principles of justice provide the balance between concern for others and concern for the self: "where this balance moves to one side, as with the moralities of supererogation, it does so from the election of self, which freely takes on the larger part."²³⁹ However, Rawls is unclear on where the balance

236. *Id.* at 443-44.

237. See, e.g., CARL D. SCHNEIDER, SHAME, EXPOSURE, AND PRIVACY 18-21 (1977). Schneider, a theologian, draws the distinction between what he terms "disgrace-shame" (feeling ashamed) and "discretion-shame" (a moral sense of shame). *Id.* In arguing that "discretion-shame" should be treated as a virtue and not merely a feeling, Schneider is responding to early philosophers who regarded shame as an emotion and dismissed it as an insufficient foundation for morality. See, e.g., ARISTOTLE, THE ART OF RHETORIC 211 (John Henry Freese trans., Harvard Univ. Press ed. 1947) ("Let shame then be defined as a kind of pain or uneasiness in respect of misdeeds, past, present, or future, which seem to tend to bring dishonour . . .").

238. RAWLS, *supra* note 154, at 485.

239. *Id.* at 485.

lies.

Here, Fuller offers guidance. Fuller spoke of a moral scale in discussing the relationship between the two moralities:

[W]e may conveniently imagine a kind of scale or yardstick which begins at the bottom with the most obvious demands of social living and extends upward to the highest reaches of human aspiration. Somewhere along this scale there is an invisible pointer that marks the dividing line where the pressure of duty leaves off and the challenge of excellence begins. The whole field of moral argument is dominated by a great undeclared war over the location of this pointer.²⁴⁰

The location of the pointer marks the dividing line between the two moralities—the lower rungs of “this scale represent[s] the morality of duty; its higher reaches, the morality of aspiration.”²⁴¹

In Fuller’s view, the proper location of the pointer on the moral scale is the basic problem of social philosophy:

If it is set too low, the notion of duty itself may disintegrate under the influence of modes of thought appropriate only to the higher levels of a morality of aspiration. If the pointer is set too high, the rigidities of duty may reach up to smother the urge toward excellence and substitute for truly effective action a routine of obligatory acts.²⁴²

Placing the pointer on the proper location on the moral scale does not require that we view the two moralities as in opposition. Rather the difficulty lies in maintaining a balance between the two moralities. Duties, by their very nature, must be somewhat rigid and resistant to change; aspirations, on the other hand, are somewhat pliable and responsive to change. Thus, the nature of the problem is “attaining a harmony and balance” between the “supporting structure” of duty and the “adaptive fluidity” of aspiration.²⁴³

In many ways, Morris, Rawls, and Fuller arrive at the same point. Morris suggested that guilt merges with shame; Rawls, that a complete moral perspective involves balance between the self and others; and Fuller, that there must be harmony and balance be-

240. FULLER, *supra* note 218, at 9-10.

241. *Id.* at 27.

242. LON L. FULLER, *The Substantive Aims of Law*, in *THE MORALITY OF LAW* 152, 170 (1964).

243. FULLER, *supra* note 218, at 29.

tween the moralities of duty and aspiration. Each is consistent with our understanding that for shame to be a moral feeling, the ideal involved must implicate transgressions that give rise to guilt. To put it another way, as Fuller did, in the morality of duty there are muted overtones of the morality of aspiration. Our observer is still left with a choice and no principles with which to select between the principles of guilt or the principles of shame.

C. *The Relation of Shame and Guilt Moralities to Law*

Bringing Ellison's light to law requires that we understand the relationship between the observer's moral feelings, the governing moral principles, and the law. We can understand the problem facing our observer in the context of the relationship of the two moralities to law. She seeks resolution of both moral feelings: reparative action to ameliorate her guilt and transformation through which she can transcend shame. The question, of course, is whether she can resolve one moral feeling without offending the principles governing the other.

Both Morris and Fuller agreed that, at least in most cases, the morality of duty and guilt finds a more natural role in law than the morality of aspiration and shame. In Morris' view, when we concern ourselves with "a certain balanced distribution of freedom . . . we shall think in terms of rights and duties and move to concepts of wrongdoing and guilt."²⁴⁴ Since law often concerns the maintenance of minimum levels through precise rules, a guilt morality is most often and more naturally invoked.

Morris' discussion of the relation of a guilt morality to law did not resolve the more complicated cases he himself addressed in his essay on shared guilt. Because the moral principles of guilt can merge into the morality of shame, there might well be the same merging of moral principles in law. Just as there are moral cases where shame and guilt moralities merge because moral ideals and moral identity are the central issue—those cases where Morris spoke of "guilt before ourselves"—there may be issues in law where the moral principles of shame merge with the rights and duties analysis of guilt. There may be in law, just as there are in morality, issues where moral ideals and moral identity are the central issue.

244. MORRIS, *supra* note 176, at 63.

Fuller, like Morris, recognized that the morality of duty is directly related to law. In *The Two Moralities*, Fuller recognized that legal and moral duties are justified by principles of reciprocity: "In this broad sense there is a notion of reciprocity implicit in the very notion of duty—at least in the case of every duty that runs toward society or toward another responsible human being."²⁴⁵ The principles of reciprocity and the methods employed to decide whether an activity is so harmful that there is a general moral duty to refrain from it are the same principles and methods used to decide whether there is a legal duty to refrain from it. Thus, the morality of duty finds a natural role in law.

However, a morality of aspiration finds no such natural role in law, at least at first look. Fuller noted, "There is no way by which the law can compel a man to live up to the excellences of which he is capable. For workable standards of judgment the law must turn to its blood cousin, the morality of duty."²⁴⁶ Yet even in this general discussion, Fuller was not unsympathetic to the pull of the morality of aspiration. Fuller concluded his general discussion of the relation between the two moralities to law with this comment: "But what the morality of aspiration loses in direct relevance for the law, it gains in the pervasiveness of its implications."²⁴⁷

Therefore, at least in the general case, if our observer seeks to bring her moral feelings into law she must act according to the principles of duty and guilt. The morality of aspiration and shame bear no direct relation to law. The observer may, however, be left with the unresolved feelings of shame. She, of course, can merely deny her shame and satisfy herself with acting only in accord with the morality of duty and guilt. As Morris pointed out in his discussion of German guilt, many people do exactly that—they cannot bear the shame of guilt and react to claims of responsibility with anger.

Of course, acting in accord with the morality of duty will not transcend the shame. If the observer chooses to resolve her shame, to bear the shame of guilt, she might suggest that there is something different about the specific situation confronting her, i.e., the moral problem of the human experiences of invisibility and blindness.

245. FULLER, *supra* note 218, at 21.

246. *Id.* at 9.

247. *Id.*

Fuller made a very similar point. In an essay entitled *The Substantive Aims of Law*, Fuller examined the moral principles involved in the problem of defining the moral community.²⁴⁸ In this discussion, which bears directly on the problem of invisibility and blindness, Fuller articulated the specific transgression at the heart of the observer's guilt feeling, and the ideal at the soul of her shame. Fuller posed the question: "Who are embraced in the moral community, the community within which men owe duties to one another and can meaningfully share their aspirations? In plain straightforward modern jargon, the question is, Who shall count as a member of the in-group?"²⁴⁹ Fuller argued that the morality of duty offers no guidance here. The morality of duty cannot provide rational principles for defining who should be included or excluded within the community for the very reason that the morality of duty is the moral code of those already included within the moral community. The morality of duty, then, is merely the morality of the in-group.²⁵⁰

In Fuller's view, the morality of aspiration offers a measure of resolution. The morality of aspiration tells us that "we should aspire to enlarge [the moral] community at every opportunity and to include within it ultimately, if we can, all men of good will."²⁵¹ The difficulty of any appeal to the morality of aspiration is that in most situations it does not speak in the imperative; only the morality of duty and guilt speaks in the imperative. Fuller argued, however, that in the context of defining the moral community, the morality of aspiration does speak in the imperative. Fuller asked: "Is there no moral principle that can imperatively condemn drawing a line between [different races], and denying to one group access to the essentials on which a satisfactory and dignified life can be built?"²⁵² He responded:

In this case the morality of aspiration speaks in terms fully as imperative as those characteristic of the morality of duty, so that the distinction between the two at this point breaks down. The morality of aspiration is after all a morality of *human* aspiration. It cannot refuse the human quality to human beings without repudiating itself.²⁵³

248. FULLER, *supra* note 242, at 152.

249. *Id.* at 181.

250. *Id.* at 159-86.

251. *Id.* at 183.

252. *Id.*

253. *Id.*

As Fuller concluded, we cannot deny the human quality in others and justify it on the basis of race without in turn repudiating our own human quality.²⁵⁴

It violates the imperative of the morality of aspiration to exclude people from the moral community solely on the basis of race. When we do so, we forfeit the integrity of the morality of aspiration. In the metaphor and language of this article, the morality of shame provides a moral ideal, an imperative not to make people invisible. Furthermore, the moral blindness which permits this invisibility denigrates the human quality of us all.

Fuller concluded that we can derive from the morality of aspiration a substantive proposition of natural law: "the principle that supports and infuses all human aspiration [is to be found] in the objective of maintaining communication with our fellows."²⁵⁵

In this matter the morality of aspiration offers more than good counsel and the challenge of excellence. It here speaks with the imperious voice we are accustomed to hear from the morality of duty. And if men will listen, that voice, unlike that of the morality of duty, can be heard across the boundaries and through the barriers that now separate men from one another.²⁵⁶

Using this principle, the observer can now choose between rep-
aration and transformation. The morality of shame, which is the
morality of aspiration, commands that she act to enlarge the moral
community to which she belongs. This is an act of transformation
because she may no longer accept being a part of a community
from which others are excluded. Only by changing the moral com-
munity and thus transforming herself can she resolve her feelings
of shame. It is this transformation which is required to address
invisibility and blindness. The voice of invisibility has found its
place in law—the morality of aspiration imposes a duty to listen.

254. *Id.* at 183-84.

255. *Id.* at 185.

256. *Id.* at 186.

V. THE IMPLICATIONS OF THE
MORALITY OF ASPIRATION AND SHAME:
AN ENLIGHTENED AFFIRMATIVE ACTION JURISPRUDENCE

Whence all this passion toward conformity anyway?—diversity is the word. Let man keep his many parts and you'll have no tyrant states. Why, if they follow this conformity business they'll end up by forcing me, an invisible man, to become white, which is not a color but a lack of one. . . . Our fate is to become one and yet many—This is not prophesy but description. Thus one of the greatest jokes in the world is the spectacle of whites busy escaping blackness and becoming blacker every day, and the blacks striving toward whiteness, becoming quite dull and gray. None of us seems to know who is or where he's going.

RALPH ELLISON, *INVISIBLE MAN* 576 (Vintage Books 1989) (1947).

In the epilogue to *Invisible Man*, Ellison suggests that to be lost—not to know who you are, or where you are going—should make one feel ashamed.²⁵⁷ Confronting invisibility and blindness stirs feelings of shame and guilt in our observer, moral feelings that can be explained by reference to the morality of aspiration. The morality of aspiration provides the moral ideal of including all races within the definition of human beings. As Fuller reasoned: "We are above all else human beings. If we have to qualify our answer by adding some biological tag line to our own title, then we deny the human quality to ourselves in an effort to justify denying it to others."²⁵⁸

The morality of aspiration is the source of the imperative *not* to exclude others from the moral community. This imperative is cast in the language of the morality of duty and guilt. At a minimum, we have a moral duty to include all human beings in the moral community of human beings. We shall not exclude on the basis of race. If we do so, we have failed to achieve a moral ideal and violated a principle of reciprocity; we have injured ourselves and others. Faced with such failure, violation and injury, we must take up the positive action of shame, transformation, and the positive action of guilt, reparation (in the form of inclusion).

It is here that affirmative action measures present themselves

257. See *supra* notes 121-23 and accompanying text.

258. FULLER, *supra* note 242, at 183-84.

as moral action. Whether in the form of goals, quotas, or set-asides, affirmative action measures are adopted to redress a history of invisibility. Preferential admissions programs or absolute preferences reflect an understanding of the racism that justified invisibility and exclusion; racism keeps closed the doors that affirmative action measures open. Furthermore, through the guarantee of participation of both races in the daily experiences of the moral community, affirmative action measures hold the promise of transformation.

This part examines the implications of the morality of aspiration and shame for affirmative action jurisprudence. Affirmative action measures provide preferences based explicitly on membership in designated groups. Such race-conscious policies necessarily implicate the Constitution's guarantee of equality. The constitutional question raised by affirmative action is whether governmental action established to benefit individuals solely because of their membership in a designated racial group can be justified in light of the claims of "innocent whites" that such measures discriminate against them. This is the moral confusion of affirmative action jurisprudence. This part demonstrates that the morality of aspiration and shame provide workable moral principles to resolve this moral confusion.

A. *The Imperative of the Morality of Aspiration,
Modern Equal Protection, and Brown*

The Equal Protection Clause declares that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."²⁵⁹ There is much debate about the meaning of the Fourteenth Amendment's equal protection guarantee. The debate in constitutional law today focuses on whether it is permissible for the Court to rely on norms and values not found in the language and structure of the Constitution. This debate touches upon a range of arguments, including the debate between interpretivists and non-interpretivists.

The constitutional argument of interpretivists, as Robert Bork has written, is as follows:

[T]he Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory

259. U.S. CONST. amend. XIV.

derived from the Constitution If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predictions, the Court violates the postulates of the model [of government] that alone justifies its power.²⁶⁰

For the interpretivist, a "valid theory" is derived from the plain and historical meaning of the language in the Constitution and the intent of its drafters.

In the context of equality and race, Raoul Berger has argued the strict interpretivist's case. In *Government by Judiciary*,²⁶¹ Berger reasoned that a valid theory of the Fourteenth Amendment requires interpretation in light of the racism of its drafters. He wrote, "The key to an understanding of the Fourteenth Amendment is that the North was shot through with Negrophobia, that the Republicans, except for a minority of extremists, were swayed by the racism that gripped their constituents rather than by abolitionist ideology."²⁶² Given this historical background, Berger argued that the Fourteenth Amendment was no more than the constitutional confirmation of the Civil Rights Act of 1866.²⁶³ Berger asserted that "[e]qual protection of laws' expressed the central object of the framers: to prevent *statutory* discrimination with respect to the rights enumerated in the Civil Rights Act."²⁶⁴

Berger's historical research and interpretive conclusions are open to criticism. Historian Eric Foner, for example, in his influential study of the reconstruction era,²⁶⁵ argued that to reduce the intent of the framers to validation of the Civil Rights Act of 1866 and invalidation of the Black Codes "is to misconstrue the difference between a statute and a constitutional amendment."²⁶⁶ He noted:

[Even moderate Republicans] understood Reconstruction as a dynamic process, in which phrases like "privileges and immunities" were subject to changing interpretation. They preferred to allow both Congress and the federal courts maxi-

260. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

261. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

262. *Id.* at 10.

263. Act of April 9, 1866, ch. 31, 14 stat. 27.

264. BERGER, *supra* note 261, at 176.

265. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* (1988).

266. *Id.* at 257.

mum flexibility in implementing the Amendment's provisions and combating the multitude of injustices that confronted blacks in many parts of the South.²⁶⁷

Thus, Foner reasoned that the Fourteenth Amendment was a "broad [statement] of principle, giving constitutional form to the resolution of national crises, and permanently altering American nationality."²⁶⁸

In moral terms Foner's argument makes more sense than Berger's. If a moral principle underlies the Fourteenth Amendment, then appealing to the morality of duty is inadequate. The morality of duty was the moral code of the in-group which had sanctioned slavery and the exclusion of blacks from the moral community. In order to understand the moral principle underlying the Amendment, we must apply the morality of aspiration. In this light, the command of the Amendment, "No State shall . . .", is the constitutional confirmation of the imperative of the morality of aspiration not to exclude others from the moral community.

Berger's argument that, in interpreting the Amendment, we must be constrained by the very racism that justified the exclusion, makes little sense. It is beyond the scope of this article to examine fully the historian's task of determining the framers' conceptions of the moralities of shame and guilt, their relation to law generally, and their relation to the specific moral issues posed by slavery. It is worth noting, however, that there is some factual basis for arguing that the members of the thirty-ninth Congress were thinking in terms of a shame morality when they drafted the Fourteenth Amendment.²⁶⁹

Few interpretivists have accepted the full implications of Berger's argument that the Court's decision in *Brown* was beyond the reach of the Fourteenth Amendment. To this extent, interpretivists and non-interpretivists agree on the meaning of the Equal Protection Clause. In the context of equality and race, while the non-interpretivists might concede that the legislative history of the Equal Protection Clause reveals little evidence of intent to prohibit

267. *Id.* at 258.

268. *Id.* at 257.

269. See generally Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 N.W. U. L. REV. 226 (1988). These writers debate the role of the original intent of the framers in constitutional interpretation.

segregation, they would find, as Professor Bickel found, that the original understanding of the Amendment was that it empowered the courts and Congress to enforce evolving ideals of racial justice.²⁷⁰

Professor Bickel's interpretation of equal protection, as an elaboration of the framers' original understanding, is consistent with the argument that the Fourteenth Amendment confirms the imperative of the morality of aspiration. It is also consistent with the manner in which the Supreme Court has historically interpreted the Fourteenth Amendment. An early example of this type of interpretation is found in *Strauder v. West Virginia*.²⁷¹ In that case, the Court relied on the Fourteenth Amendment to reverse the murder conviction of a black man tried before an all-white jury from which the members of his race were excluded. The Court was faithful to the original understanding of the Amendment, holding that the statutory exclusion of blacks from juries denied them a principal judicial protection granted to all residents. However, the Court's language and reasoning suggest a broader understanding of the Amendment.

In *Strauder*, the Court stated:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.²⁷²

Strauder, therefore, suggests a broad understanding of equal protection in accord with the observation that the Equal Protection Clause is a constitutional confirmation of the morality of aspiration.

Michael Perry also read the Fourteenth Amendment broadly. In stating a general principle which should guide our interpretation of the Fourteenth Amendment he argued in terms and lan-

270. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-65 (1955).

271. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

272. *Id.* at 308.

guage very familiar to our moral observer:

It is a notion of the moral equality of the races—the principle that no person is morally inferior to another by virtue of race. Because race is not a factor indicating anything about the moral worth of persons, race is morally irrelevant to state laws and policies. Therefore, state action predicated on the view that one person is by virtue of race inferior to another offends equal protection.²⁷³

The moral equality of the races lies at the heart of both Perry's argument and the morality of aspiration. Exclusion from the moral community on the basis of some morally irrelevant category offends both equal protection and the morality of aspiration.

The imperative of the morality of aspiration is simply the command not to exclude persons from the moral community when the exclusion is based on a morally irrelevant biological tag, such as race. As Frederick Schauer wrote:

[E]ven if there *is* something natural about the fact that some people have darker skin than others, there is nothing natural about the choice to refer to people according to the lines drawn by that division, as opposed to lines drawn on the basis of eye color, height, weight, thigh circumference, or current distance from magnetic north.²⁷⁴

The intuitive appeal of the Court's decision in *Brown* and other early desegregation cases is that it enforced a broad understanding of equal protection and brought the imperative of the morality of aspiration to law. The Court ordered the inclusion of blacks in the moral community and in a later case refused to sanction resistance to its order.²⁷⁵ The Court required "obedience" to itself and the Constitution²⁷⁶ and, in the context of public schools, imposed "an affirmative duty" on the schools to desegregate. While the *Brown* Court spoke in the language of the morality of guilt—obedience and duty—the imperative of the morality of aspiration governed the Court's decisions. The morality of aspiration and shame required the transformation of the schools so as to in-

273. Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030 (1979).

274. Frederick J. Schauer, *Equality and Identity*, 33 N.Y.L. SCH. L. REV. 375, 378 (1988).

275. *Cooper v. Aaron*, 358 U.S. 1 (1958).

276. *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964).

clude all students in the moral community.

B. The Imperative of the Morality of Aspiration, the Concept of Individual Responsibility and Rights, and Group Rights

There is an inherent tension between the moralities of duty and guilt and the imperative of the morality of aspiration and shame. Underlying the morality of guilt is a conception of individual responsibilities and rights. The imperative of the morality of aspiration, on the other hand, involves a sensitivity to the experience of individuals as members of a group. When human beings are excluded from the moral community on the basis of some morally irrelevant biological tag, they are excluded because of membership in that group. The guilt morality would require our observer to refrain from actions differentiating between people based on their membership in a particular group. The morality of aspiration and shame, however, requires our observer to bring the excluded persons within the moral community, which necessarily involves recognizing them as members of a particular group. Thus, there is a tension between the requirements of the two moralities.

This tension emerged early in the desegregation remedy cases and continues to haunt modern equal protection analysis and affirmative action jurisprudence. On the one hand, the Court recognized the need for race-conscious action in formulating specific guidelines to achieve the desegregation of public schools,²⁷⁷ implying that race-conscious remedies were constitutional. They were also in accord with the imperative of the morality of aspiration since it would be logically impossible to command the inclusion of an excluded group without referring to that group.

On the other hand, the Court's concerns regarding intent to discriminate implicate the morality of guilt and duty. Shortly after sanctioning race-conscious remedies, the Court decided *Keyes v. School District*.²⁷⁸ Guilt morality focuses on individual responsibility in its requirement of an intentional act and the principle that one cannot be punished for the act of another. The requirement of intent and purpose emerged when the Court addressed the distinction between de jure and de facto segregation. The Court "emphasize[d] that the differentiating factor . . . is *purpose or intent* to

277. *Swann v. Board of Educ.*, 402 U.S. 1, 28 (1970).

278. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1972).

segregate."²⁷⁹ The Court held that without such intent the law afforded no remedy for segregation. This holding is consistent with the principles of the morality of guilt which focus on individual responsibility and intentional acts.

Intent to discriminate was also a prevailing factor in the Court's reasoning in *Washington v. Davis*²⁸⁰ and *Personnel Administrator v. Feeney*.²⁸¹ *Washington* involved a challenge to the verbal ability test required of applicants by the District of Columbia Police Department. Although the test made no overt racial classification, it had a disproportionate impact on racial groups. Some police officers argued that the test was discriminatory because of its disproportionate racial impact. The Supreme Court rejected the disproportionate impact doctrine and held that only official conduct having "a discriminatory purpose" violates the equal protection clause.²⁸² The Court subsequently defined "discriminatory purpose" in *Feeney*. In *Feeney*, the Court ruled that a "discriminatory purpose . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."²⁸³

The discriminatory purpose doctrine has many critics. In many ways, these critics have struggled against the confines of the underlying morality of duty and guilt: the requirement of an intentional act causing identifiable harm to individuals. Not surprisingly, adherents to the antidiscrimination principle, which also concerns itself with individual harm resulting from intentional racial classifications, have had the most difficult time. Brest, for example, an adherent to the antidiscrimination principle, argued that while the disproportionate impact doctrine sometimes serves the antidiscrimination principle by creating a rebuttable presumption of intentional discrimination,²⁸⁴ it cannot be defended by reference to justice for racial groups. He noted:

The most pernicious feature of racial prejudice and discrimination is their underlying premise that members of some ra-

279. *Id.* at 208.

280. *Washington v. Davis*, 426 U.S. 229 (1976).

281. *Personnel Adm'r of Mass. v. Feeney*, 422 U.S. 256 (1978).

282. *Davis*, 426 U.S. at 239.

283. *Feeney*, 442 U.S. at 279.

284. Paul Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

cial groups are less worthy than members of others. The antidiscrimination principle holds that this assumption is fallacious because race has no moral salience. For administrative purposes, some remedies for racial discrimination are triggered by disproportionate racial impact or treat persons according to membership in racial groups; but group membership is always a proxy for the individual's right not to be discriminated against.²⁸⁵

Here, Brest was responding to other critics of the discriminatory purpose doctrine who have rebelled openly against the morality of guilt and its focus on the individual, and have argued for group rights.

The critics of the antidiscrimination principle rarely speak in terms of morality. They do, however, imply that the issues are so complex that they cannot be resolved under the morality of guilt and duty and its focus on the individual. One of these critics, Professor Tribe, argued that the discriminatory purpose requirement reduces claims of racial discrimination to "a search for a bigoted decision-maker."²⁸⁶ He stated that "[t]his 'perpetrator perspective' sees contemporary racial discrimination not as a social phenomenon—the historical legacy of centuries of slavery and subjugation—but as the misguided, retrograde, almost atavistic behavior of individual actors in an enlightened, egalitarian society."²⁸⁷

In lieu of focusing on the perpetrator, Tribe preferred "an antisubjugation principle, which aims to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens."²⁸⁸ Under the antisubjugation principle, "strict judicial scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward an historically subjugated group, or a pattern of blindness or indifference to the interests of that group."²⁸⁹

In a similar vein, Owen Fiss argued for a "group-disadvantaging" principle that requires relief for any group that constitutes a

285. *Id.* at 48.

286. TRIBE, *supra* note 46, § 16-20, at 1509.

287. *Id.*

288. *Id.* § 16-21, at 1515.

289. *Id.* § 16-22, at 1520.

“perpetual underclass.”²⁹⁰ In Fiss’ view, blacks are “a very special type of social group.”²⁹¹ He notes:

In a sense, they are America’s perpetual underclass. It is both of these characteristics—the relative position of the group and the duration of the position—that make efforts to improve the status of the group defensible. This redistribution may be rooted in a theory of compensation—blacks as a group were *put* in that position by others and the redistributive measures are *owed* to the group as a form of compensation. . . . But a redistributive strategy need not rest on this idea of compensation [Rather it] could give expression to an ethical view against caste, one that would make it undesirable for any social group to occupy a position of subordination for any extended period of time.²⁹²

This is a broad argument in favor of group rights which rejects guilt morality’s narrow focus on individual rights and responsibilities. However, our understanding of the imperative of the morality of aspiration suggests that the proper focus of equal protection cannot be found in this “either-or” debate. Rather, we must focus on the relationship between the two moralities underlying the debate. Interestingly, Brest framed the debate in moral terms:

If a society can be said to have an underlying political theory, ours has not been a theory of organic groups but of liberalism, focusing on the rights of individuals, including rights of distributive justice. . . .

. . . [A]lthough the practices of nations—including our own—often fall short of their aspirations, most societies in which power is formally allocated among racial and national groups are strikingly oppressive, unequal, and unstable. In view of all of this, it seems reasonable to place the burden on proponents of a theory of group racial justice to show that it is morally tenable and consistent with other values that we cherish.²⁹³

Brest correctly suggested that we must appeal to moral principles to resolve the tension between the ideal of individual rights and responsibility and specific cases of failure to achieve the aspiration of human equality between racial groups.

290. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. AND PUB. AFF. 105, 150 & 108 (1976).

291. *Id.* at 150.

292. *Id.* at 150-51.

293. Brest, *supra* note 284, at 49-50.

Part IV established that, in the general case, the morality of duty and guilt finds a natural role in law. The antidiscrimination principle with its focus on intentional harm to individuals must obtain as a general rule. This is in accord with the morality of duty and guilt that is inherent in most conceptions of legal responsibility. The morality of guilt focuses on individual responsibility for acts that transgress principles of reciprocity and thereby cause injury to others. Under the principles of guilt morality, we cannot be punished for what we have not intended, nor for what others have done. Thus, the requirement of discriminatory purpose and the antidiscrimination principle, as Brest asserted, "rest[] on fundamental moral values that are widely shared in our society."²⁹⁴

However, as Fuller pointed out, there are extraordinary situations where the morality of aspiration speaks in the imperative and thus finds its own natural role in law. In these extraordinary cases, where the law has sanctioned the exclusion of human beings from the moral community on the basis of some morally irrelevant biological tag, the meaning of membership in the excluded group carries greater significance than "a proxy for the individual's right not to be discriminated against." Here an appeal to the morality of duty and guilt prove inadequate: we must appeal to the morality of aspiration.

Blacks do present themselves, as Fiss argued, as an almost unique group for equal protection purposes. The advocates of an antisubjugation principle or group rights have rightly hit upon a different moral issue: the imperative of the morality of aspiration and shame. Yet, the imperative of the morality of aspiration and shame cannot be invoked by groups who suffer prejudice and racism but who have never been excluded from the moral community. Members of these groups proceed as individuals and are bound by the morality of duty and guilt, or in constitutional terms, the antidiscrimination principle.

Thus, an understanding of the relationship of the two moralities to law and the extraordinary role of the imperative of the morality of aspiration facilitates a morally principled approach to racism. Parts I and II established that racism was used to justify the exclusion of blacks from the moral community; and, further, parts III and IV established that the imperative of the morality of aspi-

294. *Id.* at 5.

ration requires transformation of racism by including blacks within the moral community.²⁹⁵

Racism alone, however, does not itself constitute a transgression of the principles of reciprocity or a violation of the morality of duty and guilt; racism constitutes a failure to achieve an ideal and violates our morality of human aspiration. Thus, in general, law cannot speak about racism in the imperative: law cannot order us to live up to our fullest potentials. However, when racism prompts an act that transgresses the principles of reciprocity it produces guilt and makes the person available for punishment or reparation. Furthermore, when racism has been used to justify the exclusion of human beings from the moral community, the imperative of the morality of aspiration provides the connection between our aspirations and our duty.

Thus, the imperative of the morality of aspiration and our understanding of the relationship between the two underlying moralities impose limits on the law's ability to redress racism. Law can punish racism when it leads to discriminatory acts; law can only require the transformation of racism when it has justified the exclusion of human beings from the moral community.

*C. The Imperative of the Morality of Aspiration,
Innocent Whites, and an Enlightened Jurisprudence
for Affirmative Action*

The debate about affirmative action brings into sharp focus the tension between the morality of duty and guilt and the morality of aspiration and shame. The morality of aspiration and shame, when it speaks in the imperative, requires transformation by inclusion and recognizes the need for race-conscious action to transform and include. Yet, under the principles of the morality of guilt, one cannot be punished for something one has not done. "Innocent whites"—whites who have not committed discriminatory acts—

295. In his reconsideration of the discriminatory purpose doctrine, Charles Lawrence argues against the doctrine on the basis of the existence of unconscious racism. Lawrence, *supra* note 56. Lawrence argues that much of our failure to recognize racial discrimination "results from a failure to recognize that racism is both a crime and a disease." *Id.* at 321. Lawrence continues in a footnote: "'Immorality' and 'criminality' are thought of in terms of blameworthiness." *Id.* at 321 n.15. Lawrence has overlooked the significant distinction between the morality of duty and guilt, which focuses on blameworthiness, and the morality of aspiration and shame, which focuses on our failure to achieve a moral ideal. Racism can be addressed in moral terms, but not in the morality of blame and guilt.

claim that race-conscious affirmative action excludes them and imposes an unprincipled punishment upon them. This is the moral confusion of affirmative action jurisprudence.

The pull of the guilt morality in affirmative action cases is strong: we intuitively feel that the claims of innocent whites are just. Affirmative action measures are voluntarily undertaken without any court finding that such action is necessary to redress the moral exclusion of blacks. Thus, the claim of whites is for the application of the principles of the morality of duty and guilt. These principles should obtain absent such an extraordinary finding. However, where there has been a finding that action is necessary to redress the exclusion, our thinking should be governed by the morality of aspiration and shame. Yet, it is clear that even in this case, the Court is drawn to the morality of guilt.

The strong pull of the morality of guilt was exhibited in the *Milliken* decisions.²⁹⁶ In *Milliken I*, the Court found the existence of a constitutional violation, a wrong that offended the imperative of the morality of aspiration. Yet, the Court permitted a segregated result, finding that the district court was in error in ordering the desegregation of the suburban school districts. In *Milliken II*, the Court approved the expenditure of public funds to improve the all-black schools of Detroit.

The characterization of the distinctive remedies underlying the Court's decisions was governed by the morality of guilt. The Court ordered reparations in the form of compensation (a positive response to guilt) or punishment (a negative response to guilt). Justice White argued in dissent for a remedy governed by the morality of aspiration: "The task is not to devise a system of pains and penalties to punish constitutional violations brought to light. Rather, it is to desegregate an *educational* system in which the races have been kept apart"²⁹⁷ As Justice White suggested, the Court could have looked at the problem of the Detroit schools as a problem of exclusion. The Court could have looked at the remedies, not as punishments or reparations, but as transformation—the positive action which resolves shame.

The tension between the two moralities is even greater in the

296. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*); *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*). See *supra* notes 86-109 and accompanying text.

297. *Milliken I*, 418 U.S. at 764 (White, J., dissenting).

context of affirmative action. Dean Calabresi articulated the tension between the ideals underlying the two moralities in his discussion of the Court's first affirmative action decision, *University of California Regents v. Bakke*.²⁹⁸ Calabresi wrote:

At first glance, *Bakke* appeared to involve a clash of irreconcilable fundamental principles. Two conceptions of egalitarianism, both basic to our society, seemed locked in conflict. On the one hand was the universalist, meritocratic notion of equality of opportunity regardless of race. On the other was the idea that there should be reparation, and even advantage, to those groups which could not share equally in the benefits of the meritocratic ideal of egalitarianism because of society's past decisions and biases.²⁹⁹

Interestingly, Calabresi framed the tension between these competing ideals in much the same way Brest framed the argument regarding the proper focus of equal protection—whether it should be on the group or the individual. Although Calabresi did not take up Brest's challenge in moral terms, he did argue that race-conscious affirmative action can be squared with the other values we cherish.³⁰⁰

Calabresi argued that affirmative action decisions do not involve what he terms tragic choices "in which you may choose to favor one ideal at the expense of the other."³⁰¹ Rather, if we confine affirmative action measures to the extraordinary cases of those who had been excluded from the "ideal of egalitarianism," then we have identified the limited exceptions to the racially blind ideal, exceptions which the ideal can encompass without being destroyed. Calabresi supports his argument by reference to the two "themes" of the Fourteenth Amendment:

We all have grown accustomed to what has properly become the dominant theme—the theme of racial, religious, sexual, and ethnic equality. . . . [T]he Civil War Amendments unmistakably had another theme that ran in a very different direction from the universalist, egalitarian theme that has become increasingly dominant. That other theme . . . was one of special redress for the special disadvantages of blacks even at significant cost to other groups. The words could be egalitarian

298. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

299. Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428 (1979).

300. *Id.*

301. *Id.*

words, because even these were needed to include blacks in our general egalitarian norms. *They had not*, in our Constitution, been treated as "created equal." But the theme was one of specific inclusion, and hence of redress.³⁰²

The exclusion of blacks from the moral community poses the extraordinary case. In modern history, the full implications of racism—the exclusion of human beings from the moral community on the basis of a biological tag, race—were realized in the Holocaust. As Morris pointed out, the discussion of the moral responsibility of Germans is often framed in terms of "German guilt."³⁰³ Yet, both the Holocaust and the case of invisibility and blindness, present cases where guilt, in fact, merges into shame. Thus, Calabresi's argument falls neatly within the imperative of the morality of aspiration and shame.

Affirmative action can be defended in moral terms within the imperative of the morality of aspiration. This morality requires action that embraces both the positive response to guilt, reparation, and the positive response to shame, transformation of the moral identity. Yet, affirmative action cannot be extended to all racial groups. The imperative to include and transform can only be invoked when the imperative not to exclude has been transgressed. Thus, only affirmative action framed as a moral response to the exclusion of blacks from the moral community can be justified by the morality of aspiration and shame.

Other racial groups seeking the benefit of affirmative action programs must establish one of two requirements. First, they must establish that they have been excluded from the moral community. If a racial group does establish this, an affirmative action program would be justified based on the principles of the morality of aspiration. If they are able to identify a specific injury resulting from racism, then an affirmative action program would be justified based on the principles of duty and guilt. Barring a principled appeal to the morality of aspiration, the principles of the morality of duty and guilt should govern. In cases where the imperative of the morality of aspiration cannot be invoked, the law should only prohibit intentional acts committed by identified wrongdoers which cause injury to identified victims. This is consistent with the morality of guilt upon which law has, in most cases, defined moral and

302. *Id.* at 433-34.

303. *See supra* notes 176-81 and accompanying text.

legal responsibility.

It is in this context—where the moral principles of guilt are properly invoked—that the claims of “innocent whites” stand on the same moral footing as claims of members of disadvantaged groups. The claims of “innocent whites” have a natural place in the general cases governed by morality of duty and guilt. Guilt’s focus on individual responsibility leads to a principled characterization of those not responsible for discriminatory acts as “innocent.” In the extraordinary cases, however, claims of “innocence” must be viewed in light of the principles of the morality of aspiration and shame. The moral confusion of affirmative action jurisprudence is that the Court makes no distinction between the general cases where the Court should decide by reference to the morality of duty and those extraordinary cases where the Court should appeal to the morality of aspiration.

And, here, the Court is not alone. Affirmative action legislation typically embraces a wide range of racial groups without any reference to underlying moral principles. The Court, facing a challenge to such legislation, created an affirmative action jurisprudence to address the general case. For example, in *Bakke*, Justice Powell expressed the Court’s concern for “innocent whites.” As Justice Powell reasoned, “there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.”³⁰⁴ Justice Powell expanded on this point in a footnote: “The denial to innocent persons of equal rights and opportunities may outrage those so deprived These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority”³⁰⁵ Justice Powell then tied this concern for innocent whites to the petitioner’s claim that the state’s interest in countering the effects of societal discrimination was substantial enough to support the use of a race-conscious admissions policy. “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.”³⁰⁶ In conclusion, Justice Powell noted that the medical

304. *Bakke*, 438 U.S. at 298.

305. *Id.* at 294 n.34.

306. *Id.* at 307.

school's attempt to help victims of societal discrimination "does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."³⁰⁷

Dissenting in *Bakke*, Justice Marshall, delivered an eloquent history of the Negro and the development of American law affecting race. Marshall argued against the Court's focus on identified harm and individual fault and the Court's failure to affirm the historical and societal nature of the moral wrong. Justice Marshall's dissent can be viewed as an attempt to argue the moral difference between the general case of racial prejudice and the extraordinary case of a racial group being excluded from the moral community. As Marshall wrote:

[T]oday's judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been victims of racial discrimination The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured.³⁰⁸

In contrasting the opinions of Justices Powell and Marshall in *Bakke*, we see the appropriate tension between the moralities of guilt and shame. Justice Powell invoked the principle of individual responsibility and the concept of fault that are central to the morality of guilt. Justice Marshall, on the other hand, argues the extraordinary nature of the exclusion of blacks, an exclusion which invoked the imperative of the morality of aspiration. What is missing is an understanding that, under certain circumstances, both positions are morally principled.

In a series of affirmative action decisions after *Bakke*, culminating in the Court's recent decision in *City of Richmond v. Croson*,³⁰⁹ the Supreme Court repeatedly focused on innocent whites and identified harm to individual blacks. In one of these

307. *Id.* at 310.

308. *Id.* at 400 (Marshall, J., dissenting).

309. *City of Richmond v. Croson*, 488 U.S. 469 (1989).

decisions, *Wygant v. Jackson Board of Education*,³¹⁰ Justice Powell, writing for the majority, reiterated his position regarding the inadequacy of societal discrimination as a justification 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."³¹¹

In *Croson*, a majority of the Court held for the first time that the strict standard of review must be applied to all classifications based on race, regardless "of the race of those burdened or benefited"³¹² and regardless of whether the classification was designed to further remedial goals.³¹³ Justice Scalia, who added the fifth vote to the plurality's holding on the new uniform standard of review, wrote of the relationship between our racial history and the concept of white innocents. He stated that "blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turn-about is not fair play . . ."³¹⁴ He went on to argue:

Racial preferences appear to "even the score" . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.³¹⁵

Justice Scalia proceeded as a moralist of duty and guilt who denies the relevance of the morality of aspiration to the extraordinary claim of blacks. He focused on the individual harm of racial inequality and individual responsibility for acts of discrimination. His approach does not admit that there is moral or legal significance to the historical exclusion of blacks from the moral community.

Justice Blackmun, in his dissent in *Croson*, also addressed the relationship between the history of invisibility and the concept of innocent whites. He wrote:

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confeder-

310. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

311. *Id.* at 276.

312. *Croson*, 488 U.S. at 494.

313. *Id.*

314. *Id.* at 524 (Scalia, J., concurring).

315. *Id.* at 528.

acy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed . . . History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades.³¹⁶

Justice Blackmun viewed affirmative action measures as legislative embodiments of the morality of aspiration. However, affirmative action jurisprudence has developed without any reference to moral principles. Justice Blackmun's view that Richmond acted within a "narrow confine" misses the mark. The affirmative action program instituted by the city of Richmond was not limited to those who had been affected by past discrimination.³¹⁷ Morally principled affirmative action, however, requires inclusion only of those groups that have established that they have been historically excluded from the moral community.

If affirmative action were limited in scope to those excluded from the moral community, the claims of innocent whites that the program is unjust would lose much of their moral force. The imperative of the morality of aspiration requires action that offers transformation by inclusion. The issue is not punishment of innocents but, rather, the inclusion of blacks in the daily endeavors of the moral community. Only in this way can the racism that justified the exclusion be transformed.

We have now returned to Ellison's call for light, a light that would transform the human experiences of invisibility and blindness. If affirmative action programs which include blacks are enacted, they will transform our daily lives. Such actions would be in accord with the principles of morality which bear on the law. Additionally, such actions would answer Ellison's call for light.

Professor Kathleen Sullivan hit upon this in her discussion of the constitutionally permissible purpose of affirmative action measures. She wrote:

[T]he Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past. Not surprisingly, this

316. *Id.* at 560 (Blackmun, J., dissenting).

317. *Id.* at 501-05.

approach has invited claims . . . [that] nonsinners—white workers “innocent” of their bosses’ or union leadership’s past discrimination—should not pay for “the sins of others of their own race,” nor should nonvictims benefit from their sacrifice.³¹⁸

Sullivan thus exposed the morality and duty underlying the Court’s affirmative action jurisprudence.

Sullivan then responded with other possible governmental purposes that affirmative actions might be designed to achieve:

[P]ublic and private employers often adopt affirmative action less to purge their past than to build their future. In so doing, they are not “engineering” racial balance as an end in itself but are promoting a variety of goals dependent on racial balance, from securing workplace peace to eliminating workplace caste. . . .³¹⁹

She went on to say:

If such aspirations for the future rather than past sin were the basis for affirmative action, would white claims of “innocence” count for less? They should, for it is easier to show that displacing “innocent” whites is narrowly tailored to goals that turn on integrating institutions now than it is to show that doing so is narrowly tailored to purging past sins of discrimination that the displaced whites did not themselves “commit.”³²⁰

Sullivan, in arguing that we should change our focus from purging past sins to fulfilling future aspirations, argued the role of shame in thinking about racial equality. Shame requires that we transform, that we achieve the moral ideal. The morality of duty and guilt impose no such moral burden, nor hold such promise.

CONCLUSION

[T]hat thou may'st learn to bear the shame of guilt, and make a better show next time

DANTE, PURGATORY Canto 31:43 (Dorothy L. Sayers trans. 1969) (14th Cent.).

The purpose of this article has been to bring the truth articu-

318. Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986).

319. *Id.* at 80-81.

320. *Id.* at 96.

lated by one voice of black literature, the voice of Ralph Ellison's invisible man, to law. This has required a journey—from Ellison's imagery of blindness, invisibility, and light, to an understanding of the conjunction of law and literature through an analysis of history, to psychological theory and moral philosophy, and, finally, to law. The journey was not simple. Arguably, it is the power of literature to capture truth and the province of poets to make truth look simple. While arguably the business of law is not truth, law cannot be divorced from human truth.

Twenty years after Ellison wrote *Invisible Man*, another black writer, Alice Walker, wrote about her own struggle with the legacy of invisibility. In two essays about Flannery O'Connor,³²¹ Walker attempted to reconcile her admiration and anger for this white Southern writer whose black servants entered through the back door. Alice Walker forgave herself by forgiving Flannery O'Connor, attributing O'Connor with struggling with the puzzle of humanity and knowing that the puzzle of humanity is more difficult to solve than the puzzle of race.³²²

The puzzle of race lies within the puzzle of humanity. If law attempts to address the puzzle of race, it must do so by reference to what we know of human truth. If law does not reflect the enduring truths of the human experience found within literature, if it does not reflect the story of our lives, our moral feelings, and the moral principles that govern us, then law forfeits its moral integrity and the muses and the philosophers alone offer resolution and truth.

321. Alice Walker, *The Black Writer and the Southern Experience* and *Beyond the Peacock: The Reconstruction of Flannery O'Connor*, in *IN SEARCH OF OUR MOTHERS' GARDENS* 15-21, 42-59 (1967).

322. *Id.* at 20, 51-59.

