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I. INTRODUCTION

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

Argument about affirmative action in the context of racial discrimination is particularly wrenching and divisive, especially among people who agree, formally speaking, on the immorality of racism.[1] In a world

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1. *See* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986). (stating that "[f]or over a decade [the coalition principally responsible for the 'Civil Rights Revolution'] has been riven by bitter disagreement over the means by which American society should attempt to overcome its racist past); *see also* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (asserting that throughout the persistent and strong disagreement among the Justices over the constitutionality of affirmative action, the Justices have failed to address adequately the legislative

where the dominant public ideology is one of nonracism, where the charge of racism is about as explosive a rhetorical move as one can make, disagreement about affirmative action often divides us in an angry and tragic manner.

In this Paper, I examine a recurring element of the rhetoric of affirmative action. This element, the "rhetoric of innocence," relies on the invocation of the "innocent white victim" of affirmative action. The rhetoric of innocence is a rich source of the deeper currents of our affirmative action debate. By revealing those deeper currents, we may gain a clearer sense of why the issue of affirmative action so divides good people, white and of color.[2]

Getting clearer about ourselves often is painful and disturbing. For

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history of the fourteenth amendment and the original intent of its framers); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987) (arguing that the 1986-1987 decisions reveal the divisive nature of the affirmative action issue); Smith, *Affirmative Action in Extremis: A Preliminary Diagnosis of the Symptoms and the Causes*, 26 WAYNE L. REV. 1337 (1980) (asserting that the arguments over affirmative action seem ceaseless and improperly focused). *See generally* A. BICKEL, THE MORALITY OF CONSENT (1975); Belton, *Reflections on Affirmative Action After* Paradise *and* Johnson, 23 HARV. C.R.-C.L. L. REV. 115 (1988) (discussing the continuing debate over the issue of consideration of race or sex in affirmative action settings); Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988) (addressing the variations in constitutional and statutory standards in affirmative action cases); Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343; Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301, 306 (1988) (reviewing "the current status of affirmative action in employment in the wake of the Court's 1986 and 1987 decisions"); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979) (observing that the question of the extent to which the thirteenth, fourteenth, and fifteenth amendments required the exercise of color blindness in allocation or regulation remains unsettled after a century of debate); Weeden, *The Status of Affirmative Action in 1986 and Beyond*, 31 HOW. L.J. 33 (1988) (arguing that America ought to adopt "an aggressive national race-conscious affirmative action policy"); Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 214 (1980) (stating that the view of equality which demands that everyone be treated equally without regard to race "permits the continuation, indeed the exacerbation, of grave disparities in the opportunities and advantages available to persons of different races").

Professor Derrick Bell has chosen narrative as his vehicle for speaking to the question of affirmative action and race. *See* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382 (1989); Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985). In another paper I argued that our best hope of escaping the rhetorical impasse of affirmative action is through just the sort of narratives which Professor Bell and Justice Marshall have offered. *See* Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989). On the power of narrative in law, see the articles in the LEGAL STORYTELLING issue of the Michigan Law Review. 87 MICH. L. REV. 2073-2494 (1989).

2. The names attached to a particular race is a sensitive matter. It also can be a powerful rhetorical move. In this Paper, I shall use the term "black" to refer to people of African ancestry. I use this term because it contrasts so sharply with the term "white" race. The obvious connection between the color white and the cultural conception of innocence, and the corollary connection between "black" and noninnocence, make "white" and "black" proper terms to use here.

many readers, this discomfort will be the case here. Put simply, the rhetoric of innocence is connected to racism. It is connected in several ways, but most disturbingly, the rhetoric embodies and reveals the unconscious racism in each of us. This unconscious racism embedded in our rhetoric accounts, at least in part, for the tragic impasse we reach in our conversations about affirmative action. My hope is that by dragging out these deeper and darker parts of our rhetoric, we may have a better chance of continuing our conversation. If we can each acknowledge the racism that we cannot entirely slough off, we may be able to move past that painful, disturbing assumption and talk of what we ought to do about it.

This Paper has three parts that follow this Introduction. Part II defines the "rhetoric of innocence" and traces its history. Part III explores the cultural conception of "innocence" and the idea of "unconscious racism" and explains how innocence and racism come together in the rhetoric. Part IV concludes by suggesting how all this discussion might help us in our struggle to get to a world where racism is banished, not just forbidden.

II. The Rhetoric of Innocence

A persistent and apparently important part of the affirmative action dialogue, both judicial and academic, is what can be termed the "rhetoric of innocence."[3] The rbetoric of innocence is used most

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3. *See* Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term's Affirmative Cases*, 100 Harv. L. Rev. 78 (1986). Professor Sullivan powerfully criticized the rhetoric of innocence and its search for perpetrators and victims, suggesting that "voluntary affirmative action is as defensible as the architecture of a better future as it is a remedy for sins of discrimination past." *Id.* at 97; *see also* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978). Professor Freeman criticized what he called the "perpetrator perspective" in the context of antidiscrimination law:

> The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors . . . .
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> . . . .
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> [This perspective] gives rise to a complacency ahout one's own moral status; it creates a class of "innocents," who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.

Id. at 1054-55 (footnotes omitted). *See generally* Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 Harv. C.R.-C.L. L. Rev. 503, 539 (1982) (arguing that the "distrihutive justice claims of the 'innocent' parties" depend on a nonexistent society in which equality of opportunity exists from the outset); Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. Rev. L. & Soc. Change 575, 595 (1985) (asserting that although critics contend that affirmative action harms "innocent" white workers, "white Americans cannot cloak themselves in a mantle of innocence by simply failing to acknowledge that racism has become

powerfully by those who seek to deny or severely to limit affirmative action, the "white rhetoricians."[4] This rhetoric has two related forms.

First, the white rhetorician may argue the plight of the "innocent white victims" of the affirmative action plan. The white applicant to medical school, the white contractor seeking city construction contracts, and so on, are each "innocent" in a particular sense of the word. Their "innocence" is a presumed feature, not the product of any actual and particular inquiry. It is presumed that the white victim is not guilty of a

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institutionalized to protect the white beneficiaries of the status quo"); Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 27 (stating that "[p]referential employment remedies typically result in the exclusion from employment opportunities of a class of persons, most often white males, who themselves may be innocent of any race-based wrongdoing"); Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 450-51 (1980) (arguing that group focused remedies are inconsistent with Title VII because they impose costs on innocent white employees while providing benefits to individuals who have not been identified as victims of discrimination).

The briefs in several of the important affirmative action cases also contain the rhetoric. *See* Brief for Appellee at 30, City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (No. 87-998) (contending that the definition "impacts innocent third parties to sucb an extent that it is not narrowly tailored enough to achieve the objective of the plan"); Brief for Petitioner at 42, Johnson v. Transportation Agency, 480 U.S. 616 (1987) (No. 85-1129) (asserting that "[t]he Court of Appeals' decision would permit not only plans with no legitimate remedial purpose but also plans which impose disproportionate burdens on other innocent employees and trammel their individual rights unnecessarily"); Reply Brief for the EEOC at 19, Sbeet Metal Workers v. EEOC, 478 U.S. 421 (1986) (No. 84-1656) (arguing that "according such preferential treatment to persons who have no claim to a 'rightful place' in the employer's workforce necessarily deprives innocent third parties of *their* 'rightful place' " (emphasis in original)); Reply Brief for Petitioner at 11, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340) (contending that "[c]ertainly, an employer cannot deprive innocent employees of their civil rights without any showing that there are *continuing* effects of past discrimination that must be remedied at their expense" (emphasis in original)); Brief for Petitioner at 11, Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984) (No. 84-1999) (arguing that "[b]y awarding superseniority to persons not shown to have been victims of discrimination at the expense of innocent non-minority firefighters, the District Court has well exceeded the authority granted by Title VII and the decree should therefore be ruled invalid"); Brief for Petitioner, General Building Contractors of New York State, Inc., The New York State Building Chapter, Associated General Contractors of America, Inc. at 10, Fullilove v. Klutznick, 448 U.S. 448 (1980) (No. 78-1007) (asserting that the "Court has recognized that there is a compelling governmental interest for racial classification preferences only where minorities were victims of discrimination by a particular employer"); Brief for Respondents at 74-75, United States Steelworkers v. Weber, 443 U.S. 193 (1979) (No. 78-432, -435, -436) (asserting that "[t]he administrative inconvenience of identifying individual victims of discrimination does not justify broad racial preferences that disadvantage innocent employees").

The rhetoric of innocence has not always been used to argue against the interests of blacks. The "innocent black victim" was an important part of the abolitionist rhetoric in antebellum America. *See* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 216 (1975).

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

racist act that has denied the minority applicant the job or other position she seeks; in that particular sense of the word, the white person is "innocent." The white rhetorician usually avoids altogether questions that suggest a different and more complex conception of innocence in these matters. Most importantly, the rhetoric of innocence avoids the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways. Thus, the rhetoric of innocence obscures this question: What white person is "innocent," if innocence is defined as the absence of advantage at the expense of others?

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

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

The Supreme Court's affirmative action jurisprudence essentially began with *Regents of the University of California v. Bakke*.[5] From its beginning in *Bakke* through the most recently decided cases, the Court has splintered again and again, and the Justices have authored opinions that constitute a bitter and divisive dialogue.[6] Within that dialogue the rhetoric of innocence is a persistent and powerful presence.

In *Bakke* a majority of the Court struck down a medical school

5. 438 U.S. 265 (1978).

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

admissions program that set aside a specific number of places for minorities only.[7] The majority concluded that, although the admissions process might take account of race, the quota system employed by the state medical school either violated Title VI or denied the white applicants their constitutional right to equal protection under the fourteenth amendment.[8]

Justice Lewis Powell introduced the rhetoric of innocence to the Court's affirmative action discourse while announcing the judgment for the Court in *Bakke*. He used the rhetoric several times in the course of the opinion. Powell wrote of the patent unfairness of "innocent persons . . . asked to endure . . . [deprivation as] the price of membership in the dominant majority."[9] He wrote of "forcing innocent persons . . . to bear the burdens of redressing grievances not of their making."[10] In a passage that embodies both the assumption of white innocence and the questioning of black victimization, Powell distinguished the school desegregation cases and other precedents in which racially drawn remedies were endorsed.

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.
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> We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. . . . Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.[11]

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

In contrast to Powell's opinion, the dissenting opinions in *Bakke*

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

8. *Bakke*, 438 U.S. at 421 (opinion of Stevens, J.); *id.* at 319-20 (opinion of Powell, J.).

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

10. *Id.* at 298.

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

authored by Justices William Brennan and Thurgood Marshall each challenged the premises of the rhetoric. Justice Brennan rejected the idea of requiring proof of individual and specific discrimination as a prerequisite to affirmative action.[12] Marshall attacked directly the rhetoric of white innocence and the questioning of black victimization: "It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."[13]

The rhetoric of innocence continued in the cases following *Bakke*. In *Fullilove v. Klutznik*[14] a majority of the Court upheld a federal statute mandating a ten percent set-aside for minority contractors in federally supported public works projects. Justice Warren Burger made use of the rhetoric of innocence, even while writing to uphold the set-aside: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . 'a sharing of the burden' by innocent parties is not impermissible."[15] He proceeded to emphasize the "relatively light" burden imposed on the white contractors and the flexible nature of the set-aside provisions.[16] Thus, although Justice Burger wrote an opinion that upholds a particular affirmative action program, he used the rhetoric of innocence to emphasize the limitations of his endorsement. Burger thereby implied that a heavier burden on the innocent white parties might have made the plan unconstitutional.

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

> [The federal statute's characteristics] are not the characteristics of a racially conscious remedial decree that is closely tailored to the evil to be corrected. In today's society, it constitutes far too gross an oversimplification to assume that

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

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

14. 448 U.S. 448 (1980). The Minority Business Enterprise (MBE) provision was created as part of the Public Works Employment Act of 1977 with the purpose of directing funds into the minority business community. The amendment provided that no grant would be made for public works unless at least 10% of the amount of the grant was to be expended for minority business enterprises. *Id.* at 453. A MBE was defined to be " 'a business at least 50 per centum of which is owned by minority group members or, in case of publicly owned business, at least 51 per centum of the stock of which is owned by minority group members.' " *Id.* at 459 (quoting 42 U.S.C. § 6705(f)(2) (1982)). The grantee was required to give "satisfactory assurance" that this requirement would be complied with before the grant would be issued. The provision was designed to eliminate the longstanding disparity in participation in public contracting caused by both blatant and indirect discrimination. *Id.*

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

16. *Id.*

every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination. Since the MBE set-aside must be viewed as resting upon such an assumption, it necessarily paints with too broad a brush. Except to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race.[17]

Justice Powell again invoked the rhetoric in his majority opinion in *Wygant v. Jackson Board of Education*.[18] In *Wygant* the majority struck down the provisions of a collective bargaining agreement that gave blacks greater protection from layoffs than that accorded white teachers with more seniority. The agreement was a product of prior litigation seeking to provide meaningful integration of the school faculties in the county. Without the special protection for the newly hired black teachers, the layoffs essentially would have undone the previous integration efforts. The majority nonetheless concluded that the agreement violated the constitutional rights of the laid-off white teachers.[19]

Justice Powell rejected the sufficiency of what he termed "societal discrimination":

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[20]

Thus, mere societal discrimination is an insufficient predicate for the disadvantaging of innocent white teachers. This "societal discrimination" point is an important variant of the rhetoric of innocence. The black teachers are not real victims; they are subject merely to societal discrimination, a phenomenon that seems weak and abstract, practiced by no one in particular against no one in particular.[21]

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

18. 476 U.S. 267 (1986).

19. *Id.* at 270-73.

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

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

> We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, *innocent* persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of

Justice Bryon White wrote separately in *Wygant*. For him the case was simple. White reasoned: The firing of white teachers to make room for blacks in order to integrate the faculty would be patently unconstitutional; laying off whites to keep blacks on the job is the same thing; therefore, the layoff provision is unconstitutional. In White's pithy one paragraph opinion he used the "actual victimization" part of the rhetoric, referring to "blacks, none of whom has been shown to be a victim of any racial discrimination."[22]

The recent case, *City of Richmond v. J.A. Croson Co.*,[23] continues the uninterrupted use of the rhetoric of innocence in affirmative action dialogue within the Court. Justice Sandra Day O'Connor's opinion for the Court struck down Richmond's ordinance setting aside thirty percent of the dollar amount of city construction contract work for minority contractors.[24] Her opinion relied on the essential premises and

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prior discrimination, such a 'sharing of the burden' by *innocent* parties is not impermissible. In *Fullilove*, the challenged statute required at least 10 percent of federal public works funds to be used in contracts with minority-owned business enterprises. This requirement was found to be within the remedial powers of Congress in part because the "actual 'burden' shouldered by nonminority firms is relatively light."

Significantly, none of the cases discussed above involved layoffs. Here, by contrast, the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. We have previously expressed concern over the burden that a preferential-layoffs scheme imposes on *innocent* parties. In cases involving valid *hiring* goals, the burden to be borne by *innocent* individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some *innocent* individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 280-83 (emphasis added) (citations and footnotes omitted) (quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980)).

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

23. 109 S. Ct. 706 (1989).

24. The Minority Business Utilization Plan (the Plan) adopted by the Richmond City Council in 1983 provided for a 30% set-aside. Any prime contractor to whom the city awarded a construction contract was required to subcontract at least 30% of the dollar value of the contract to Minority Business Enterprises. *See supra* note 14. Recipients of the set-aside were not limited to local contractors; any qualified MBE was entitled to participate in the Plan. A partial or complete waiver would be granted only upon a showing of "exceptional circumstances." The lowest bidder on a city construction contract was required to submit a form naming the MBEs to be used and the percentage of the contract price awarded to minority firms, or to use the form to request a waiver. The form then was transferred to the Human Relations Commission, which verified the MBEs named and either approved the commitment form or made a recommendation concerning the request for waiver. The Director of General Services made all final determinations. The purpose of the ordinance was to promote greater participation by MBEs in public construction contracts. *Richmond*, 109 S. Ct. at 707-08.

The Richmond ordinance obviously was patterned after the federal program that was validated in the *Fullilove* case. *See supra* note 14 and accompanying text. Justice O'Connor distinguished *Fullilove* by arguing that, unlike the Richmond City Council, Congress especially is empowered under the fourteenth amendment to address racial discrimination. "What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional

conclusion of the rhetoric without using the usual phrases. Justice O'Connor wrote of the "generalized assertions" and "amorphous claim" of racism in the Richmond construction industry, thereby denying the actual victimization of the black beneficiaries.[25]

Justice John Paul Stevens, concurring in *Richmond*, used both the premises and the usual language of the rhetoric. Stevens denied the "actual victim" status of the minority contractors, stating that "[t]he class of persons benefited by the ordinance is not, however, limited to victims of . . . discrimination."[26] Continuing the rhetoric of innocence, he pointed out the innocent status of at least some of the white contractors: "[T]he disadvantaged class of white contractors presumably includes . . . some who have never discriminated against anyone on the basis of race."[27]

Justice Antonin Scalia, who has staked out the most extreme antiaffirmative action position on the Court, concurred in the *Richmond* judgment but was dissatisfied with O'Connor's reasoning. He would declare essentially all affirmative action unconstitutional, unless it was a response to a particular and proven act of discrimination against a person of color. This approach, as Scalia concedes, is not affirmative action but merely a remedy for a particular cognizable wrong.[28] This position rejects the "actual victimization" status of blacks who benefit from any true affirmative action plan. By contrast Justice Scalia expressed in his

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mandate to enforce the dictates of the Fourteenth Amendment. . . . Thus, our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.* at 719-20.

25. O'Connor stated:

> [A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. . . .
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> . . . .
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> . . .[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.

Id. at 723-24.

26. *Id.* at 732 (Stevens, J., concurring).

27. *Id.* at 733.

28. Scalia wrote:

> I agree with the Court's dictum that a fundamental distinction must be drawn hetween the effects of "societal" discrimination and the effects of "identified" discrimination, and that the situation would be different if Richmond's plan were "tailored" to identify those particular bidders who "suffered from the effects of past discrimination by the city or prime contractors." In my view, however, the reason that would make a difference is not, as the Court states, that it would justify race-conscious action—but rather that it would enable race-neutral remediation. Nothing prevents Richmond from according a contracting preference to identified victims of discrimination. While most of the beneficiaries might he black, neither the heneficiaries nor those disadvantaged by the preference would he identified *on the basis of their race*. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, hecause more obviously unneeded.

Id. at 738-39 (Scalia, J., concurring) (emphasis in original) (citations omitted).

Richmond opinion deep concern for the white victims of affirmative action.

> [E]ven "benign" racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race. . . . When we depart from this American principle we play with fire, and much more than an occasional DeFunis, Johnson, or Croson burns.[29]

In dissent Justice Marshall challenged the "actual victimization" part of the rhetoric. He chronicled the City of Richmond's "disgraceful recent history" of racism, "multifarious acts of discrimination, including, but not limited to, the deliberate diminution of black residents' voting rights, resistance to school desegregation, and publicly sanctioned housing discrimination."[30] Marshall characterized the majority position as ignoring the real and continuing victimization of blacks:

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.[31]

In Marshall's vision, "[t]he battle against pernicious racial discrimination or its effects is nowhere near won."[32]

Although it is Justice Marshall's dissent in *Richmond* that challenges the rhetoric of innocence most directly and powerfully, Justice Harry Blackmun's brief dissent contains a sentence that suggests the more complex notion of "innocence" which is obscured by the white rhetoricians: "History is irrefutable, even though one might sympathize with those who—though possibly innocent in themselves—benefit from the wrongs of past decades."[33]

From *Bakke* through *Richmond* the Court has splintered on the issue of affirmative action. Although the *Richmond* case shows the promise of a greater clarity, the constitutional status of affirmative action remains uncertain.[34] Through the splintering and uncertainty, the

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29. *Id.* at 739.
30. *Id.* at 748 (Marshall, J., dissenting).
31. *Id.* at 752.
32. *Id.* at 757.
33. *Id.* (Blackmun, J., dissenting).
34. The *Richmond* case simply may clarify that affirmative action is to be significantly curtailed. *See* Cooper, *A Slow Return to Constitutional Colorblindness*, LEGAL TIMES, May 1, 1989, at 27, 28 (stating that "*Croson* may well mark the penultimate step in the Court's journey from *Bakke* back to *Brown*"); Norton & Norton, *A Setback for Minority Businesses*, *id.* at 31 (observing that over the past 25 years the challenge ironically has changed from the receptivity of state and

rhetoric of innocence persists as an important tool in the hands of those who seek to limit the use of affirmative action. The deeper nature and special power of this important rhetoric is the subject of the balance of this Paper.

III. INNOCENCE AND RACISM

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

A. Innocence

The power of the rhetoric of innocence comes in part from the power of the conception of "innocence" in our culture. The idea of innocent victims, particularly when coupled with the specter of those who victimize them, is a pervasive and potent story in our culture.

"Innocence" is connected to the powerful cultural forces and ideas of religion, good and evil, and sex. "Innocence" is defined typically as "freedom from guilt or sin" or, in the sexual sense, as "chastity."

The centrality of the conception of "innocence" to the Christian religion is obvious. Christ is the paradigmatic "innocent victim." Mary is the perfect embodiment of innocence as chaste. Although the concept of "original sin" complicates the notion of innocence in Christian theology, the striving toward innocence and the veneration of those who come closest to achieving it and thereby suffer are important ideas in modern Christian practice.[35] "Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven."[36]

The idea of innocence also is connected to the myths and symbols of evil. For example, Paul Ricoeur in *The Symbolism of Evil* demonstrates the cultural significance of the "dread of the impure" and the terror of "defilement."[37] The contrasting state for "impure," or the state to which the rites of purification might return us, is "innocence,"

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local governments to "whether the Supreme Court, so long the chief actor in efforts to eliminate discrimination, will this time bar the gate").

35. "[U]nless persons are vulnerable to injury, pain, and suffering as possible consequences of choice, choice would have no meaning. . . . [T]he *necessity* that moral evil be possible seems implied in the possibility of good." R. MONK & J. STAMEY, EXPLORING CHRISTIANITY: AN INTRODUCTION 144 (1984) (emphasis in original). Professor Charles H. Long explored the power of religious symbolism, particularly as it relates to questions of race. *See* C. LONG, SIGNIFICATIONS: SIGNS, SYMBOLS AND IMAGES IN THE INTERPRETATION OF RELIGION (1986).

36. *Matthew* 5:10 (New King James).

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

freedom from guilt or sin. Ricoeur's thesis spans the modern and classical cultures. He makes clear the persistence and power of the symbolism of evil and its always present contrast, the state of innocence.

What is central within the modern culture surely will be reflected in its literature. And in literature the innocent victim is everywhere. In *Innocent Victims—Poetic Injustice in Shakespearean Tragedy*, R.S. White argued "that Shakespeare was constantly and uniquely concerned with the fate of the innocent victim."[38] White observed, "In every tragedy by Shakespeare, alongside the tragic protagonist who is proclaimed by himself and others as a suffering centre, stands, sometimes silently, the figure of pathos who is a lamb of goodness: Lavinia, Ophelia, Desdemona, Cordelia, the children."[39] Shakespeare was not alone in the use of women and children drawn as innocent victims. In the work of Dickens, Hugo, Melville, and others, the suffering innocent is a central character.[40]

The innocent victim is part of sexual practice and mythology. The recurring myth of the "demon lover" and its innocent victim is one example.[41] Moreover, we are preoccupied with innocence in the female partner as part of the mythological background of rape and prostitution and in our prerequisites in the chosen marriage partner.[42]

The idea of the innocent victim always conjures the one who takes away her innocence and who thereby himself becomes both the "defiler" and the "defiled." In literature and in life the innocent victim is used as a means of conjuring the notion of defilement. In fact, it is impossible to make sense of the significance of either the "innocent victim" or the "defiler" without imagining the other. Each conception is given real significance by its implicit contrast with the other.[43] Thus, the invocation of innocence is also the invocation of sin, guilt, and

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

39. *Id.* at 6.

40. *See, e.g.*, C. DICKENS, OLIVER TWIST (1838); V. HUGO, LES MISERABLES (1862); H. MELVILLE, BILLY BUDD (1924).

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

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

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

43. *See* P. RICOEUR, *supra* note 37.

defilement.

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

B. Unconscious Racism

The rhetoric of innocence draws its power not only from the cultural significance of its basic terms but also from its connection with "unconscious racism." Professor Charles Lawrence explored the concept of "unconscious racism" and its implications for equal protection.[44] Lawrence introduced his sense of "unconscious racism" thus:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[45]

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

Lawrence's thesis is disturbing especially to the white liberal who can think of a no more offensive label than that of "racist." Moreover, the white intellectual, whether politically liberal or conservative, typically expresses only disgust for the words and behavior of the white

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

45. Lawrence, *supra* note 44, at 322 (footnotes omitted). "Simply put, while most Americans avow and genuinely believe in the principle of equality, most white Americans still consider black people as such to be obnoxious and socially inferior." Hazard, *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 385.

supremacists and neo-Nazis he connects with the label, "racist." The dominant public ideology has become nonracist. Use of racial epithets, expressions of genetic superiority of the white race, and avowal of formal segregation are not part of the mainstream of public discourse. These ways of speaking, which were part of the public discourse several decades ago, are deemed by most today as irrational utterances emanating from the few remaining pockets of racism.[46]

Notwithstanding that the public ideology has become nonracist, the culture continues to teach racism. The manifestations of racial stereotypes pervade our media and language. Racism is reflected in the complex set of individual and collective choices that make our schools, our neighborhoods, our work places, and our lives racially segregated.[47]

Racism today paradoxically is both "irrational and normal."[48] Racism is at once inconsistent with the dominant public ideology and is embraced by each of us, albeit for most of us at the unconscious level. This paradox of irrationality and normalcy is part of the reason for the unconscious nature of the racism. When our culture teaches us to be racist and our ideology teaches us that racism is evil, we respond by excluding the forbidden lesson from our consciousness.[49]

The repression of our racism is a crucial piece of the rhetoric of innocence. First, we sensibly can claim the mantle of innocence only by denying the charge of racism. We as white persons and nonracists are

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46. For an example of the evolution in public discourse, see Winter, *Recent Legislation in Mississippi on the School Segregation Problem*, 28 MISS. L.J. 148, 150 n.12 (1957). Quoting Governor J.P. Coleman, Winter wrote:

> I am pledged to maintenance of the separation of the races at all costs, but I want to say this further word to the Negroes of Mississippi—As Governor I shall always give sympathetic consideration to any of your problems which deserve the assistance of the state government. If you accept this opportunity, it will mean better days for all of us. If you reject it, the responsibility must be yours.

Id. (quoting Address by Governor J.P. Coleman, Miss. Legislature (Jan. 17, 1956)). Contrast this statement with Rhodes, *Enforcing the Voting Rights Act in Mississippi Through Litigation*, 57 MISS. L.J. 705, 737 (1987) (emphasizing that "Mississippi should be proud to have a black Congressman, a black supreme court Justice, and almost 600 other black elected officials").

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

48. Lawrence, *supra* note 44, at 331.

49. *See id.* at 335-36.

innocent; we have done no harm to those people and do not deserve to suffer for the sins of the other, not innocent white people who were racists.[50] If we accept unconscious racism, this self-conception is unraveled. Second, the black beneficiaries of affirmative action can be denied "actual victim" status only so long as racists are thought of as either historical figures or aberrational and isolated characters in contemporary culture. By thinking of racists in this way we deny the presence and power of racism today, relegating the ugly term primarily to the past.[51] Thus, by repressing our unconscious racism we make coherent our self-conception of innocence and make sensible the question of the actual victimization of blacks.

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

The implications of unconscious racism for the societal distribution of burdens and benefits also undermines the "innocent" status of the white man. As blacks are burdened in a myriad of ways because of the persistence of unconscious racism, the white man thereby is benefited. On a racially integrated law faculty, for example, a black law professor must overcome widespread assumptions of inferiority held by students and colleagues, while white colleagues enjoy the benefit of the positive presumption and of the contrast with their black colleague.[52]

The historical manifestations of racism have worked to the advan-

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50. *See* Freeman, *supra* note 3.

51. *See supra* note 31 and accompanying text.

52. *See* Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989); *see also* Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986); Haines, *Minority Law Professors and the Myth of Sisyphus: Consciousness and Praxis Within the Special Teaching Challenge in American Law Schools*, 10 NAT'L BLACK L.J. 247 (1988). Interestingly, this point is used by the white rhetoricians to make an argument against affirmative action. The "stigma" of affirmative action on blacks is offered as a reason for precluding hiring preferences for blacks. In City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), Justice O'Connor wrote: "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Id.* at 721.

What rarely is mentioned is that the stigma already is present through unconscious racism. We are all taught that blacks are lazy and dumb. We do not need affirmative action to embrace an idea that is everywhere in our culture and long predates the very idea of affirmative action. There is no doubt, however, that many whites use the phenomenon of affirmative action as a way of explaining this piece of unconscious racism. And of course the white rhetorician can distort the meaning and purpose of affirmative action to fit the stereotypes of unconscious racism and thereby feed the racism.

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

Moreover, the "actual victim" status of the black person who benefits from affirmative action is much harder to question once unconscious racism is acknowledged. Because racial discrimination is part of the cultural structure, each person of color is subject to it, everywhere and at all times.[53] The recognition of unconscious racism makes odd the question whether this person is an "actual victim."

The white rhetorician often seeks to acknowledge and, at the same time, to blunt the power of unconscious racism by declaring that "societal discrimination" is an insufficient predicate for affirmative action.[54] "Societal discrimination" never is defined with any precision in the white rhetoric, but it suggests an ephemeral, abstract kind of discrimination, committed by no one in particular and committed against no one in particular, a kind of amorphous inconvenience for persons of color. By this term the white rhetorician at once can acknowledge the idea of unconscious racism but by giving it a different name, give it a different and trivial connotation.

The rhetoric of innocence coupled with the idea of "societal discrimination" thus obscures unconscious racism and keeps rhetorically alive the innocence of the white person and the question of actual victimization of the black person. Unconscious racism meets that rhetoric on its own terms. Once one accepts some version of the idea of uncon-

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53. "The battle against pernicious racial discrimination or its effects is nowhere near won." *Richmond*, 109 S. Ct. at 757 (Marshall, J., dissenting).

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

scious racism, the rhetoric of innocence is weakened analytically, if not defeated.

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

> [S]tudies have found that racists hold two types of stereotyped beliefs: They believe the out-group is dirty, lazy, oversexed, and without control of their instincts (a typical accusation against blacks), or they believe the out-group is pushy, ambitious, conniving, and in control of business, money, and industry (a typical accusation against Jews).[55]

The stereotype of lazy and oversexed is abundant in our culture's characterization of the black person.[56]

The two parts of the rhetoric of innocence connect to and trigger at

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55. Lawrence, *supra* note 44, at 333 (footnotes omitted).

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

> When asked directly whether they believe the disadvantaged status of urban Negroes to be the result of discrimination or to be "something about Negroes themselves," a majority choose the latter explanation. . . . Most commonly the "something" they have in mind is what they take to be the Negro's lack of ambition, laziness, failure to take advantage of his opportunities.

A. CAMPBELL, WHITE ATTITUDES TOWARD BLACK PEOPLE 14 (1971). Dennis Clark observed that "the morhid preoccupation with the suhject of interracial marriage and Negro sexual propensities is so widespread in our society that it suggests a serious sickness to any thoughtful observer." D. CLARK, THE GHETTO GAME: RACIAL CONFLICTS IN THE CITY 66 (1962). In a recent article, Wyn Craig Wade recounted the twentieth century revival of the Klan and release of the 1915 movie, "The Birth of a Nation," a movie which had as its centerpiece the suicide of an "innocent" white girl forced to choose between the physical touch of a black man and death. W. WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 119-39 (1987).

The stereotypical depiction of blacks has been a persistent feature of American literature. In 1937 Sterling Brown, a black poet and literary theorist, puhlished *The Negro in American Fiction*, a compelling analysis of the depiction of blacks in American literature. Brown found the stereotypical depiction the norm and expressed his analysis: "Whether the Negro was human was one of the problems that racked the brains of the cnltured Old South. The finally begrudged admission that perhaps he was, has remained largely nominal in letters as in life. Complete, complex humanity has been denied to him." *Id.* at 2-3. Scholars who followed Brown also saw this tragic weakness in our literature. Seymour Gross wrote: "[In American literature] the Negro has always been more of a formula than a human being." Gross, *Stereotype to Archetype: The Negro in American Literary Criticism*, in IMAGES OF THE NEGRO IN AMERICAN LITERATURE 2 (S. Gross & J. Hardy eds. 1966). The depiction in American literature of the humanness of blacks has been expressed most powerfully by this century's black poets, playwrights, and novelists. See N. TISCHLER, BLACK MASKS: NEGRO CHARACTERS IN MODERN SOUTHERN FICTION 26-27 (1969).

The stereotypical depiction of blacks also has been a persistent feature of American art. A recent art exhibition, *Facing History: The Black Image in American Art 1710-1940*, is devoted to this particular instance of stereotyping. *See Two Centuries of Stereotypes*, TIME, Jan. 29, 1990, at 82-83; *Black Images of American History*, N.Y. Times, Jan. 18, 1990, at 17, col. 1. *See generally* 4 H. HONOUR, THE IMAGE OF THE BLACK IN WESTERN ART, pts. 1 & 2 (1976).

some level the stereotypical racist beliefs about blacks. The assertion of the innocent white victim draws power from the implicit contrast with the "defiled taker." The defiled taker is the black person who undeservedly reaps the advantages of affirmative action. The use of the idea of innocence, and its opposite, defilement, coalesces with the unconscious racist belief that the black person is not innocent in a sexual sense, that the black person is sexually defiled by promiscuity.[57] The "over-sexed" black person of the racist stereotype becomes the perfect implicit, and unconsciously embraced, contrast to the innocent white person.

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

The point here is not that the white rhetorician is consciously drawing on the stereotypical racist beliefs. Nor is the white audience consciously embracing those beliefs when they experience the rhetoric of innocence in affirmative action discourse. Both the rhetoricians and their audience are likely to reject the stereotypes at the conscious level. Moreover, they would be offended at the very suggestion that they might hold such beliefs. The great lesson of Professor Lawrence's work is that the beliefs are still there, even in the white liberal. The beliefs are there because the teacher is our culture; any person who is part of the culture has been taught the lesson of racism. While most of us have struggled to unlearn the lesson and have succeeded at the conscious level, none of us can slough off altogether the lesson at the unconscious level.

IV. CONCLUSION

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

Examination of the rhetoric of innocence may teach us that "innocence" is a powerful and very dangerous idea which simply does not belong in the affirmative action debate. Real and good people certainly

57. *See* J. KOVEL, *supra* note 44, at 67-79. The miscegenation laws finally ruled unconstitutional in Loving v. Virginia, 388 U.S. 1 (1967), are a testament to the connection between racism and sex.

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