

LOST INNOCENCE AND THE MORAL FOUNDATION OF LAW

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[A]nd I walk on in there and smash a myth.
GLORIA ANZALDUA¹

INTRODUCTION

Once upon a time, on the day before the first day that truly mattered,² there was a garden filled with innocence. Within that garden and its innocence, there were first beings, beings of color and sex. When these first beings met, they recognized each other as human and recognized within themselves the moral obligations of being human.³ Human moral reciprocity arose in the garden blessed with innocence, color, and sex.

And then, on the first day that truly mattered,⁴ innocence was lost. Human knowledge of good and evil entered the garden and the human beings were expelled and banished, not because of their color or sex, but rather, and always, for their knowledge of good and evil. The human beings could always remember the garden and innocence and moral reciprocity.⁵

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1. GLORIA ANZALDUA, *O.K. Momma, Who the Hell am I?: an Interview with Luisah Teish*, in *THIS BRIDGE CALLED MY BACK* 231 (Cherríe Moraga & Gloria Anzaldua eds., 1981).

2. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 40 (1987). In her discussion of "the first day that mattered," MacKinnon uses the phrase to refer to the creation of patriarchy and male dominance in society.

3. I wish to express special thanks to Professor John E. Coons, University of California School of Law at Berkeley (Boalt Hall), for his invaluable encouragement and support, as well as for his insights into the story of the first human encounter. John E. Coons, *Who Believes in Equality?* (Mar. 1991) (unpublished manuscript, on file with the author). See MARK TWAIN, *The Diary of Adam and Eve*, in *THE COMPLETE SHORT STORIES OF MARK TWAIN* 272, 282 (Charles Neider ed., 1957) (providing a fictional account of that first meeting and Eve's recognition of Adam's and her own humanity).

4. MACKINNON, *supra* note 2.

5. Regardless of one's religious tradition or personal philosophy, everyone is raised with myths and metaphors that teach us how to be good human beings. The garden of the Judeo-Christian tradition is the story that the author was given, but it is not the only one. I do

My own memory of the garden is rooted in the memories of a childhood game.⁶ On warm afternoons, on the way home from Abe's corner market in the Flatbush section of Brooklyn, I would dash out into the middle of Avenue L, sit down cross-legged on the warm street and transform the flat, grey macadam into a garden of wildflowers. I would sit there in silence happily admiring the palette of colors in my garden until the honking from some rounded, rumbling automobile would send me dashing for the curb, the tips of my fingers trailing in the flowers as I fled. Wherever that child went, she walked within this power to transform. Wherever she was, *there* was the garden.

Before the child was eight, however, the world pressed in; human beings who were once distant and opaque became concrete and angry. Thus, I learned that in order to preserve the power to transform, I must place the garden deep within me. From deep within the garden, I wrote poetry and stories and filmscripts; I held my son when he was born; I held my brother when he died. Sometimes, on very good days, I teach and write about law from within the garden. Other days, I struggle hard to transform the light from the garden "into language, then into idea, then into more tangible action."⁷

The story of the garden may be termed myth or metaphor. My memory of the garden may be termed feminist narrative⁸ or feminist method.⁹ Regardless, both the story and one's memory of the garden instruct us of a world across the horizon, a world both before and beyond the world that transformed color and sex into racism

not discuss other stories due to a lack of confidence to speak of them, not a lack of respect or regard. See AUDRE LORDE, *An Open Letter to Mary Daly*, in *SISTER OUTSIDER* 67 (1984) (asking Mary Daly why she failed to discuss African myths and metaphors in a positive way and only referred to them with regard to genital mutilation).

6. See bell hooks, *Theory as Liberatory Practice*, 4 *YALE J.L. & FEMINISM* 1, 11 (1991):

Our search leads us back to where it all began, to that moment when an individual woman or child, who may have thought she was all alone, began feminist uprising, began to name her practice, indeed began to formulate theory from lived experience.

7. AUDRE LORDE, *Poetry is Not a Luxury*, in *SISTER OUTSIDER* 37 (1984).

8. For a discussion of feminist narrative, see generally Kathryn Abrams, *Hearing the Call of Stories*, 79 *CAL. L. REV.* 971, 982 (1991) (examining feminist narrative scholarship — the use of stories and personal experiences to discuss legal issues affecting women — as a distinctive form of critical legal discourse, and discussing responses and objections to this form of scholarship).

9. For a description of feminist method, see CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989) (depicting feminist method as consciousness-raising). MacKinnon explains,

The point of the process was not so much that hitherto-undisclosed facts were unearthed or that denied perceptions were corroborated or even that reality was tested, although all these happened. It was not only that silence was broken and that speech occurred. The point was, and is, that this process moved the reference point for truth and thereby the definition of reality as such.

Id. at 87.

and misogyny. This essay is about restoring the light from the garden and transforming that light into language and principles that, in turn, will transform the law affecting color, sex, and the exclusion produced by racism and misogyny.

The history of American constitutional law began when the framers of the United States Constitution gathered and fashioned law to embody their human moral obligations. From the beginning, color and sex were used to exclude human beings from the moral community.¹⁰ As the late United States Supreme Court Justice Thurgood Marshall wrote upon the Bicentennial of the Constitution, the framers' intent was to exclude both slaves and women from "We the People."¹¹

"[S]everal amendments, a civil war, and momentous social transformation" were required to remedy these historical exclusions and bring these outsiders even formally within the system of constitutional government.¹² As Justice Marshall concluded:

The men who gathered in Philadelphia in 1787 could not have envisioned these changes. They could not have imagined, nor would they have accepted, that the document they were drafting

10. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973):

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . .

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suits in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.

Id.; see also *infra* notes 42-44 and accompanying text (discussing the laws of slavery, segregation, domesticity and dominance).

11. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (asserting that the Bicentennial Celebration should not forget the stain of racism and sexism that flawed the original document; recalling the tragic consequences of this exclusion; and terming the anniversary a "commemoration," not a celebration.); see also Reverend Martin Luther King, Jr., *I Have A Dream, Address at the Lincoln Memorial*, Washington, D.C. (Aug. 28, 1963), quoted in DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* vi (1991):

When the architects of our republic wrote the Declaration of Independence and the Constitution, they were signing a promissory note to which every American was to fall heir. This note was a promise that all men [sic] would be guaranteed the unalienable rights of life, liberty, and the pursuit of happiness.

It is obvious today that America has defaulted on this promissory note so far as citizens of color are concerned. Instead of honoring this obligation, America has given the Negro people a bad check; a check which has come back marked "insufficient funds." But we refuse to believe that the bank of justice is bankrupt. . . . So we have come to cash this check — which will give us riches of freedom and the security of justice.

12. Marshall, *supra* note 11, at 2.

would one day be construed by a Supreme Court to which had been appointed a woman and a descendant of an African slave.¹³

Blacks and women are now, at least formally, included within the American constitutional system and the moral community.¹⁴

Despite this formal inclusion, we continue to live a constant struggle with the lies and myths that were necessary to turn color and sex against human beings and turn human beings out of the moral community.¹⁵ Law has failed to redress the lingering and profound effects and implications of this historical exclusion, in part, because law has employed the flawed moral principles that sanctioned exclusion.

Some might argue that this makes morality irrelevant, that power is the better lens through which to view the history of exclusion and the work of inclusion. I look through the lens of morality because I cannot look at the world without reference to good and evil; because of the moral confusion surrounding issues of inclusion, such as hate speech and affirmative action, pornography and abortion; and, most importantly, because there are moral principles available to law that will not perpetuate exclusion.¹⁶

I. THE GARDEN: GOOD, EVIL, AND THE LOSS OF INNOCENCE

A good place to begin is Eden.¹⁷ The story of Adam and Eve is a tale of good and evil, of shame and the loss of innocence. When Eve eats the fruit from the tree of knowledge of good and evil, when she "succumbs to temptation and Adam joins in disobedience,"¹⁸ they acquire the knowledge of good and evil and grasp that they are naked. With this enlightenment, they lose their innocence and experi-

13. Marshall, *supra* note 11, at 5.

14. See *supra* text accompanying note 12. But see Patricia Williams, *Legal Storytelling: The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2142 (1989) (arguing that the formal eradication of racism and sexism has failed to eradicate them in the actual, everyday lives of real people).

15. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (alleging that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman"). Justice Bradley went on to assert, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Id.* See generally Kate Nace Day, *The Moral Confusion of Affirmative Action Jurisprudence or When Will We Learn to Bear the Shame of Guilt?*, 16 VT. L. REV. 777, 785 (1992) (contending that in political systems committed to equality, the exclusion of certain groups of people from the moral community required a justification that in some way blamed the excluded for their exclusion).

16. See generally *infra* notes 20-29 and accompanying text.

17. For the original story of Adam and Eve in the Garden of Eden, see THE BIBLE, Genesis 2:4-3:24.

18. HERBERT MORRIS, *GUILT AND INNOCENCE* 140 (1976).

ence shame before one another.¹⁹

The light from the garden reveals shame and the loss of innocence. Shame is often confused or merged with guilt. Shame, however, is a distinct moral feeling that is stirred not by wrongdoing, as is guilt, but by the failure to live up to a moral ideal.²⁰ Theologian Dietrich Bonhoeffer offered one of the most eloquent definitions of shame:

Shame is man's inefaceable 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 . . .²¹

Shame implies a positive attachment that is threatened by the failure to live up to some moral ideal. Shame, then, is relational, the consequence of a failure to be human as one aspires to being human. In shame, one's own human self is exposed: Adam and Eve see they are naked and cover themselves.

In guilt, Adam and Eve might atone for their wrongdoing. In shame, on the other hand, they must transcend the shame by achieving the moral ideal. The difficulty of the garden is that the moral ideal we must aspire to is the very thing that was lost in the garden: innocence.

Moral philosopher Herbert Morris wrote about the loss of innocence. He argued that innocence is lost of an instant, much as a liability to shame is acquired, because of an insight into the nature of human beings: "The objects of the knowledge embodied in lost innocence are human beings."²² In coming to know about human beings, we come to know of the presence in the world of good and evil. In fact, Morris argued that the loss of innocence necessarily involves the painful experience of evil.²³

Evil, as Morris defined it, is

anything for which human beings are believed responsible that in some way is destructive of what is of relatively great value. [Evil]

19. *Id.*

20. I have adopted Gerhart Piers's psychoanalytic formulation of the distinction between shame and guilt:

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.

GERHART PIERS & MILTON B. SINGER, *SHAME AND GUILT* 24 (1971). See Day, *supra* note 15, at 809-16 (explicating the distinction between shame and guilt).

21. DIETRICH BONHOEFFER, *ETHICS* 20 (Eberhard Bethge ed. & Neville Horton Smith trans., The MacMillan Co. 6th ed. 1963) (1955).

22. MORRIS, *supra* note 18, at 147.

23. MORRIS, *supra* note 18, at 156-57.

includes . . . failing to promote what is of value, preventing its promotion and actually destroying what is of value. What would then account for some conduct being wrong would be the evil that it causes.²⁴

Shame, then, is a moral feeling prompted by the loss of innocence and can be understood as an experience of evil. Evil, the loss of innocence, and shame involve the painful recognition in ourselves of this capacity, this something we do not love but hate, and the recognition in others of the same capacity in relation to us that we hate and do not love.²⁵ The end result is that

[L]oss of innocence gives us a knowledge, then, not of what is right and wrong or the set of dispositions to act and feel in certain ways connected with this knowledge, but a knowledge of evil and the set of dispositions to act and feel that are connected with this knowledge.²⁶

With the loss of innocence, we become conscious of our vulnerabilities. We guard ourselves against the pain of the evil we believe we may do or may be done us, and, like Adam and Eve, in shame, we cover ourselves.

When Adam and Eve lost their innocence to the experience of evil, they also acquired knowledge of the good. Knowledge of the good would ensure that innocence was always remembered and could be counted upon, as shame requires, to transcend evil. Morris made a similar point:

To appreciate that there is evil in the world, to hold no illusions about it, to be serious about it, to have experienced its many manifestations, to have seen as well as evil what allows for its being overcome, to see all that makes for the good and to give it due weight - these seem among the essential components of moral wisdom.²⁷

Thus, moral wisdom involves not accepting the legacy of exile from the garden as written, but finding the way to transcend evil.

Law could, of course, embody the light from the garden and the understanding of how lost innocence can help us transcend the evils of racism and misogyny.²⁸ The story of Eden continues, however. Immediately after the fall, after Adam and Eve are expelled from the

24. MORRIS, *supra* note 18, at 153.

25. MORRIS, *supra* note 18, at 157.

26. MORRIS, *supra* note 18, at 154.

27. MORRIS, *supra* note 18, at 161.

28. See, e.g., NIEMAN, *supra* note 11, at vi ("In the state of nature, men [sic] are in fact born equal; but they cannot remain so. Society deprives them of equality, and they only became equal again because of the laws." (quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748))).

garden, "comes the story of jealousy and rivalry, of rage and sin - the murder of Abel by Cain. Here emphasis is not on opening eyes, exposure, and hiding, but on sin[,] . . . on controlling the aggressive drive . . . and on being overwhelmed by it, on murder, blood, and retaliation."²⁹

The moral foundation of this part of the story is not shame and the loss of innocence, but, rather, guilt and the transgression of prohibitions. In guilt, innocence does not speak to some inherent human quality that might be lost in an instant, but rather simply to one's not being responsible for a particular wrongdoing. Shame and the loss of innocence are about relational aspects of being human which prompt transformation of the self to transcend evil. Guilt, on the other hand, is about punishment or, at its very best, compensation for a wrong. Guilt is not only the language of the story of Cain and Abel. Interestingly, guilt is also the moral language and principle most often associated with law.

II. THE GARDEN, THE MORALITY OF ASPIRATION, AND LAW

The relationship between the garden and law can be drawn with the language and principles of morality. While many legal philosophers address the relationship between morality and law,³⁰ Lon Fuller spoke directly to the task of "writing beyond the ending"³¹ of

29. LÉON WURMSER, *THE MASK OF SHAME* 58 (1981). For the original story of Cain and Abel, sons of Adam and Eve, see *THE BIBLE*, Genesis 4:1-16.

30. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (discussing moral principles, psychology, reasons, sentiments, theory, worth of persons, association, authority, and principles as a means of developing a theory of justice as fairness that is a sensible alternative to the classical utilitarian and intuitionist conceptions of justice). Rawls warns his readers that "[w]e should view a theory of justice as a guiding framework designed to focus our moral sensibilities and to put before our intuitive capacities more limited and manageable questions for judgment." *Id.* at 53. See STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 40 (1991) (arguing that "[l]iberalism stands for peace through toleration, law-bound liberty, and a rights-oriented conception of justice," and that this concept of political virtue is not antithetical to liberal regimes); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (stating that a respect for individuals and property entitlements makes wealth redistributing actions of the government illegitimate or immoral). *But see* MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (asserting that the "unencumbered self" portrayed in the liberal theory by John Rawls is implausible and fails to yield the protected rights and proper wealth distribution suggested by Rawls); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986) (criticizing Rawls's theory of justice as making false assumptions about human nature and suggesting equally feasible theories obtained from feminist thought). See generally SIMON LEE, *LAW AND MORALS: WARNOCK, GILLOCK AND BEYOND* (1986) (placing a great value on the religious perspective and arguing that by distinguishing between predictions as to the consequences of legal action and moral values, academics will be better able to frame issues and the processes of resolving dilemmas); *MORALITY AND THE LAW* (Robert M. Baird & Stuart E. Rosenbaum eds., 1988) (including well-known essays addressing the enforcement of morals and the conflict between law and conscience).

31. RACHEL BLAU DU PLESSIS, *WRITING BEYOND THE ENDING: NARRATIVE STRATEGIES OF TWENTIETH-CENTURY WOMEN WRITERS* (1985). Du Plessis uses the term "writing beyond the

our history of exclusion through law.³² Fuller presented his theory on the relation between morality and law in a series of essays, two of which are particularly pertinent: *The Two Moralities*³³ and *The Substantive Aims of Law*.³⁴ In *The Two Moralities*, Fuller examined the relationship between law and morality and argued that we are governed by two moralities that bear directly on law: the morality of duty and the morality of aspiration.³⁵

The morality of duty 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, of "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.³⁶

The morality of duty, then, is the morality of guilt and sin, the morality of the story of Cain and Abel.

The morality of aspiration, on the other hand, is more closely linked to lost innocence. It is "the morality of the Good Life, of excellence, of the fullest realization of human powers."³⁷ It is most plainly exemplified in Greek philosophy:

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.³⁸

Thus, the morality of aspiration involves conceptions of human good, not wrongdoing, and shame, not guilt. Moralists of aspiration find particular actions unworthy of beings with human capacities. Moralists of duty, on the other hand, ask whether an action is "so harmful that we ought to consider that there is a general moral duty,

ending" to mean the ways in which writers refuse to follow the patterns of conventional narratives, especially those that require either death or domesticity for their female characters. For a discussion of the ways certain contemporary black women writers "write beyond the ending," see BLACK-EYED SUSANS/MIDNIGHT BIRDS: STORIES BY AND ABOUT BLACK WOMEN (Mary Helen Washington ed., 1990).

32. LON FULLER, *THE MORALITY OF LAW* (1964).

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

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

35. FULLER, *supra* note 33, at 5.

36. FULLER, *supra* note 33, at 6.

37. FULLER, *supra* note 33, at 5.

38. FULLER, *supra* note 33, at 5.

incumbent on all, to refrain from engaging in it."³⁹

Fuller differentiated between these two moralities when defining their relationship to law. He noted that the morality of duty finds a natural role in law, and reasoned that both 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."⁴⁰ 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.

However, the morality of aspiration — at least at first look — finds no such natural role in law. Fuller explained that "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."⁴¹ Thus, even if we are capable of moral wisdom, capable of transcending evil, the law cannot compel us to do so.

When we examine the history of exclusion in American law in light of the two moralities, we see the moral failure of law. In fact, because of the absence of aspiration, society used moral principles to develop law in the service of evil. The laws of slavery⁴² and segregation⁴³ served racism; the laws of dominance and domesticity⁴⁴

39. FULLER, *supra* note 33, at 7.

40. FULLER, *supra* note 33, at 21.

41. FULLER, *supra* note 33, at 9.

42. See generally NIEMAN, *supra* note 11 (tracing the ambivalent relationship between African-Americans and the Constitution from the birth of the Republic to current battles over school segregation, voting rights, and affirmative action, and showing how the current debates often ignore the history of law and race in America); PAUL FINKELMAN, *SLAVERY IN THE COURTROOM* (1985) (presenting an annotated bibliography of predominately American cases pertaining to slavery); A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS* (1978) (setting forth how colonial American courts, legislatures, and public servants vacillated in their treatment of blacks).

43. See generally C. Vann Woodward, *THE STRANGE CAREER OF JIM CROW* (3d ed. 1974) (providing the history and effect of American laws concerning race).

44. In many ways, it is impossible to separate discussion of the dominance theory from the legal and social domestication of women. In an early discussion of the law of dominance, John Stuart Mill recognized the relationship between domestication and dominance:

Men do not want solely the obedience of women, they want their sentiments. All men, except the most brutish, desire to have, in the women most nearly connected to them, not a forced slave but a willing one; not a slave merely, but a favourite. They have therefore put everything in practice to enslave their minds. The masters of slaves rely, for maintaining obedience, on fear; either of themselves, or religious fears. The masters of women wanted more than simple obedience, and they turned the whole force of education to effect their purpose

JOHN STUART MILL, *The Subjection of Women* (1869), reprinted in *THREE ESSAYS BY JOHN STUART MILL* 443-44 (The World's Classics ed. 1912). Mill concluded,

served sexism. Thus, the morality of duty in the law of exclusion sanctioned the evils of racism and misogyny.

Fuller addressed this point in his essay, *The Substantive Aims of Law*,⁴⁵ in which he argued that the morality of aspiration finds a natural role in law when confronting the problem of defining the moral community. This situation is exemplified by our history of exclusion. He posed the question:

Who are embraced in the moral community, the community within which men [sic] 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?⁴⁶

The morality of duty cannot provide rational principles for defining who should be included or excluded within the moral community. The morality of duty is the moral code of those already included within the moral community, the morality of the "in-group."

The morality of aspiration, on the other hand, requires that we aspire to enlarge the moral community at every opportunity.⁴⁷ Fuller argued that the morality of aspiration provides the moral principle that "imperatively condemn[s] drawing a line between [people], and denying to one group access to the essentials on which a satisfactory and dignified life can be built . . ."⁴⁸ The morality of aspiration provides the impetus to mandate inclusion:

The morality of aspiration is after all a morality of *human* aspiration. It cannot refuse the human quality to human beings without repudiating itself. . . . [W]e are above all else human beings. If we have to qualify our answer [to the question, "If we are for ourselves alone, what are we?"] 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.⁴⁹

The imperative of the morality of aspiration is *not* to exclude. Rather, it is to include all human beings within the moral community.

The social domination of women thus stands out as an isolated fact in modern institutions; a solitary breach of what has become fundamental law; a single relic of an old world of thought and practice exploded in everything else, but retained in the one thing of most universal interest . . .

Id. at 449-50. In contemporary feminist discourse, Catharine MacKinnon developed the "dominance theory" that focuses on ending male legal and social dominance over women rather than on achieving some vision of equality between the sexes. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 2.

45. FULLER, *supra* note 34, at 152.

46. FULLER, *supra* note 34, at 181.

47. FULLER, *supra* note 34, at 183.

48. FULLER, *supra* note 34, at 183.

49. FULLER, *supra* note 34, at 183-84.

To my knowledge, Fuller never returned to his theory of the two moralities and law. Therefore, we do not know his thoughts on the further implications of his theory or the substance of the principles of the morality of aspiration. Fuller did, however, offer a clue on how to proceed. He concluded that we can derive from the morality of aspiration a substantive proposition of natural law: "[T]he principle that supports and infuses all human aspiration [is] . . . the objective of maintaining communication with our fellows."⁵⁰ By seeking open channels of communication,

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 [sic] 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 [sic] from one another.⁵¹

Thus, the imperative of the morality of aspiration imposes on all a moral duty to listen.

III. VOICES FROM THE GARDEN AND "WRITING BEYOND THE ENDING"⁵²

Years ago, when I began a study of racism and constitutional law, I listened to voices: the voices of Sojourner Truth,⁵³ Zora Neale Hurston,⁵⁴ and W.E.B. Du Bois,⁵⁵ the voices of Toni Morrison's

50. FULLER, *supra* note 34, at 185.

51. FULLER, *supra* note 34, at 186.

52. See *supra* note 31.

53. See *infra* note 85.

54. See, e.g., ZORA NEALE HURSTON, *THEIR EYES WERE WATCHING GOD* (Harper & Row 1990) (1937) (relating the story of Janie Crawford, a young black woman living in the rural South, and her search for self-expression and fulfillment); ZORA NEALE HURSTON, *DUST TRACKS ON A ROAD; AN AUTOBIOGRAPHY* (U. Ill. Press 1984) (1970) (describing the author's life growing up in an all-black town in Florida, her college experiences, her travels and research, and her views on racism and segregation); ZORA NEALE HURSTON, *MOSES, MAN OF THE MOUNTAIN* (U. Ill. Press 1984) (1939) (using the Biblical story of Moses and the release of the Jews from Egypt as an allegory for the state of black America and subjugation by whites); ZORA NEALE HURSTON, *MULES & MEN* (Ind. U. Press 1978) (1935) (recounting folk tales, poems and stories of rural southern blacks); ZORA NEALE HURSTON, *SERAPH ON THE SUWANEE* (AMS Press 1974) (1948) (telling the story of Arvay, a young white woman living in Florida after the Reconstruction, and her life and quest to find herself).

55. See, e.g., W.E.B. DU BOIS, *THE GIFT OF BLACK FOLK; THE NEGROES IN THE MAKING OF AMERICA* (AMS Press 1971) (1924) (describing the important role that African-Americans have played in the history and formation of American society and culture); W.E.B. DU BOIS, *BLACK FOLK THEN & NOW* (Kraus-Thomson Org. 1975) (1939) (examining the history and culture of black people in Africa, Egypt, the United States, and Europe); W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK; ESSAYS AND SKETCHES* (Buccaneer Books 1976) (1903) (using short essays and stories to challenge white hatred and racism toward blacks, and to discuss "the problem of the color line"); W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870* (Russell & Russell 1965) (1898) (recounting a history of slave trade in the United States, from its English origins through the Civil War). For the story of W.E.B. Du Bois's life, see his three autobiographies: *DARKWATER VOICES*

Sethe⁵⁶ and Ralph Ellison's invisible man.⁵⁷ And from these voices, I learned new language and new principles. In an earlier article, I argued that shame provides moral principles to support affirmative action measures as moral action aimed to transform racism and exclusion.⁵⁸ Thus, I attempted to provide new language and new moral principles to guide issues of inclusion.

Today, legal scholarship is filled with the voices from the garden telling stories of the experience of exclusion. As Richard Delgado has noted, "[E]veryone has been writing stories these days."⁵⁹ Feminists,⁶⁰ as well as critical race theorists,⁶¹ use narrative, and narra-

FROM WITHIN THE VEIL (AMS Press 1969) (1920); DUSK OF DAWN; AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT (Schocken Books 1968) (1940); AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY (1968).

56. TONI MORRISON, *BELOVED* (1987) (describing the life of Sethe, a black woman who escaped from slavery, and the challenges she faced in rural Ohio after the Civil War).

57. RALPH ELLISON, *INVISIBLE MAN* (Vintage Books 1989) (1947) (relating the story of a black man made invisible by the white people who refused to see him or recognize his equality).

58. Day, *supra* note 15.

59. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2411 (1989).

60. See, e.g., Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (using narrative to discuss medical terminology and legal discourse concerning women's reproductive experiences); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WISC. WOMEN'S L.J. 81 (1987) (arguing that feminist legal theorists neglect the distinctiveness of women's lives and the relevance to legal criticism of women's difference, and that expressing the author's contention via narrative is the only way to convey this feature of women's hedonic lives and reflect the importance of narrative expression as a feminist method of moral argument); Abrams, *supra* note 8 (discussing responses to feminist narrative scholarship); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990) ("In order to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, and the hitherto silenced."); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (using stories and meditations to explore her life as an African-American woman); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990) (employing journal entries and stories to combine two statuses in society: black and white); Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296 (examining the debates over sameness and difference that have split feminists and African-Americans, and recognizing the value of narrative).

61. The "Racial Critiques Debate" focuses in part on the role of narrative in legal theory. See generally Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (examining the racial critique literature of Derrick Bell, Richard Delgado, and Mari Matsuda that employs narrative, and evaluating some of the normative premises underlying these authors' writings as they relate to white academics); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter*, 76 VA. L. REV. 95 (1990) (responding to Randall Kennedy's critique of Critical Race Theory, and explaining the difference between Kennedy's and the author's works as a result of their different views regarding legal language and the nature of racism); Scott Brewer, *Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844 (1990) (focusing on various critiques of Randall Kennedy's commentary on Critical Race Theory and asking what might keep the various critics from realizing they have a common goal); Miller S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990) (defending the narrative works of Richard Delgado, Derrick Bell, and Mari Matsuda as taking responsibility for the legal academy by creating change in what others view as scholarship); Robin D.

tive itself has become an important and recurring theme in legal scholarship.⁶² When we listen to these voices in light of the garden and the morality of aspiration, several implications are clear.

The first implication is that Fuller's basic theory of the two moralities remains intact even after we invoke the imperative of aspiration to formally include all human beings. This formal inclusion of historically excluded groups has not made morality irrelevant. There remains a distinction between moral duty and moral ideals:

[T]here 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 [will continue to be] dominated by a great undeclared war over the location of this pointer.⁶³

Professor Catharine MacKinnon argues that power and not morality is the proper lens through which we must examine women's lives.⁶⁴ At one point, MacKinnon appears willing to grant some role to morality:

Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864 (1990) (arguing that Randall Kennedy confuses the rationale for advocating the value of diversity in legal education and explaining how sensitivity to diversity is developed without claiming a privileged status for the minority experience); Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872 (1990) (examining the differences in Randall Kennedy's work and that of Critical Race Theorists and encouraging academics to discuss the standards of argument and scholarship and the power of metaphors); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990) (claiming that Randall Kennedy's critique of Critical Race Theory fails because it assumes the validity of the status quo and that the strength of Critical Race Theory is the way it allows individuals to identify with the commonality of minority experience); Delgado, *supra* note 59 (explaining how storytelling creates a shared understanding among those groups who have been marginalized from mainstream legal culture, and examining the use of stories in the battle for racial reform which benefits all individuals); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (discussing the similar agendas and viewpoints of critical legal scholars and people of color and maintaining that by listening to the narratives of people of color, critical scholars may better criticize the law and define the elements of justice); Jane B. Brown, *The Many Promises of Storytelling in Law*, 23 RUTGERS L.J. 79 (1991) (reviewing DAVID R. PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1990)) (suggesting that the storytelling or narrative movement expresses a concern about the law's ability to confront legal problems and asking whether there exist too many perspectives encompassed by narrative and whether too many assertions are being made on its behalf); Thomas Patrick Gannon & Jay A. Ziemer, *Narrative and the Legal Neighborhood*, 25 IND. L. REV. 289 (1991) (reviewing DAVID R. PAPKE, *NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW* (1990)) (declaring that based on Papke's collection, narrative jurisprudence has only just begun as a mode of legal criticism and expression).

62. For an example of legal scholarship on the merits of feminist narratives, see Abrams, *supra* note 8, at 971 (developing responses to criticisms of feminist narrative scholarship by examining recent narrative works, which may lead to a better evaluation and understanding of the narrative form). See generally *supra* notes 60, 61 and accompanying text.

63. FULLER, *supra* note 33, at 10.

64. James McCormick Mitchell Lecture, *Feminist Discourse, Moral Values, and the Law - A Conversation*, 34 BUFF. L. REV. 11, 27-28 (1985) (transcribing an interactive discussion among Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow).

I think that women's silence . . . goes deeper than the absence of words; it is the absence of life, of the ability to live in security or wholeness - hence, the inability to articulate or to express. This prior absence does affect questions of morality.⁶⁵

Yet, then she makes it clear that power, not morality, is the basis for her argument. She asserts that, if inequality stems from the subordination of women, and not from inaccurate differentiations based on sex, then "it is inappropriate to discuss the reality of treating women as sub-human as a matter of good versus evil. Appropriate, instead, is an argument and a discussion about empowerment, about power."⁶⁶

I disagree. While power is not irrelevant, neither is morality. The law of exclusion and its morality of duty did perpetuate evil. The law of exclusion and its morality of duty, however, also have begun to respond to the morality of aspiration and its imperative of inclusion. I believe that this response was initiated as a moral response to the evil of racism exposed in the Holocaust. For example, after World War II, the United Nations began efforts to establish worldwide consensus on human rights standards.⁶⁷ That was moral action, action stirred by shame and the experience of evil.

Having heard the command of the imperative of aspiration, we then must determine what is duty and what is aspiration for all human beings, including those who once were formally excluded from the principles of the morality of duty. The morality of duty was like a garden wall, shutting out with the force of law and lies human beings whose humanity could never be denied. This image raises the questions whether women are "basically the same or basically different than men,"⁶⁸ and whether "African-Americans are

65. *Id.* at 27.

66. *Id.* at 27-28.

67. In 1948, the United Nations adopted the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Article 2 states in part:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Id. Additionally, on March 7, 1966, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352. Article 2 states in part:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races . . .

Id.

68. Joan Williams, *supra* note 60, at 296. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 7 (1982) (arguing that women are caring and strive to preserve ongoing relationships, while men are autonomous and independent); Nancy Chodorow, *Family Structure and Feminine Personality*, in *WOMEN, CULTURE, AND SOCIETY* 43 (M. Rosaldo & L. Lamphere eds., 1974) (asserting that because women raise children, for the most part, women's and men's personalities are very different; and because women must be "other" than mother, men have to push their

basically the same or basically different from European-Americans."⁶⁹ This is the sameness/difference debate in both feminist and critical race theory.

The morality of aspiration holds two implications here. First, whether we are the same or different, we have a moral duty to listen to and understand all experiences of exclusion. Professor Mari Matsuda has eloquently argued this point throughout her scholarship:

"Lift every voice," Paul Robeson sang, and I believe he meant even lawyer-intellectuals who struggle with pen and paper. The doctrine we construct, the better world we imagine, are acts of solidarity with those who "have come over the way [t]hat with tears hath been watered." By listening to those who have paid the greater price for their commitment to a just world, we can move forward with them, closer to the place of peace.⁷⁰

The second implication of the morality of aspiration is pointed out by Professor Joan Williams: that the sameness/difference debate can divert attention away from issues of inclusion "into bitter fights" among those arguing against exclusion.⁷¹ Williams notes that the sameness/difference arguments can be reformulated "to capture their potential for transformation . . ."⁷² While she rejects any essentialist notions of gender or race, her reformulation of the debate acknowledges "the existence of shared patterns of experience (often linked to oppression)."⁷³

In the language of the garden, the shared pattern of experience is the shared experience of exclusion. A further implication, then, is

mothers away and devalue women); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982) (focusing on courts and the legislative process where women seek change, and arguing that, for strategic purposes, women should be treated the same as men); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (" 'Sameness' feminists usually have responded to the feminists of difference by reiterating their basic insight that individual men and women can be very similar. While true, this is not an adequate response to the basic insight of 'difference' feminists: that gender exists, that men and women differ as groups . . ."); Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987) (contending that equal or special treatment for women uses a male norm, and arguing that a norm should be reconstructed so that what is male is not the pattern); Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 U.C.L.A. L. REV. 581 (1977) (clarifying thinking about racism, sexism, and affirmative action by using the perspectives of what is true of cultural or social realities, and by what means the ideal may be achieved).

69. Joan Williams, *supra* note 60, at 296. See generally Wasserstrom, *supra* note 68 (discussing the practices of discrimination in American society, and the political and philosophical differences between sexual and racial discrimination).

70. Matsuda, *supra* note 61, at 398-99 (citations omitted).

71. Joan Williams, *supra* note 60, at 298.

72. Joan Williams, *supra* note 60, at 299. Williams also discusses the changes needed in the sameness and difference arguments to give them the potential to transform. Williams, *supra* note 60, at 306-22.

73. Joan Williams, *supra* note 60, at 299.

that, having heard the general command of the imperative of the morality of aspiration, we face not only the inclusion of human beings within the moral community, but also the inclusion of new moral issues within the whole range of moral issues we face.

The experience of exclusion itself poses moral issues. For example, one experience of exclusion is the experience of racism. Racism always violated the morality of aspiration; racism was always evil. Professor Patricia Williams writes of racism as the evil that shatters innocence:

I remember with great clarity the moment I discovered that I was "colored." I was three. I already knew that I was a "negro"; my parents had told me to be proud of that. But "colored" was something else; it was the totemic evil I had heard my little white friends talking about for several weeks before I finally realized that I was one of *them*. I still remember the crash of that devastating moment of union, the union of my joyful body and the terrible power-life of that devouring symbol of negritude. I have spent the rest of my life recovering from the degradation of being divided against myself⁷⁴

Prior to formal inclusion, however, racism posed no moral issue for the morality of duty and thus, in turn, no moral issue for law. In fact, racism as an ideology was the required justification for using the force of law to exclude. Now, the imperative of the morality of aspiration has included Patricia Williams's experience of evil within the debate about what is not just evil but what is morally wrong as well. Here, we face moral issues of enormous complexity. Racist speech is a fine example of the moral difficulty. The imperative of the morality of aspiration requires that we listen. Racist speech, however, when heard, may well be the experience of evil that shatters innocence.⁷⁵

If we identify certain issues as issues of inclusion, we must address those issues with the insight from the garden to determine what we owe all human beings and what we aspire to give. Because this process of inclusion occurs over time, embracing as it does a wide range of moral issues, at each step the imperative of the morality of aspiration must be heard again as a responsibility urged upon us by the

74. Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2140 (1989).

75. Professors Richard Delgado and Mari Matsuda have argued that the law can reach racist speech. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (discussing the applicability of tort actions to racial insults); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (rejecting an absolutist First Amendment position to defend racist speech and suggesting that public law should provide a cause of action for victims of such speech).

call of our own humanity. At each step, the moral duty to include is upon us. We must address all issues of inclusion from a developing understanding of the relationship of evil and wrong, of moral duty and moral ideal. For example, the current failure of affirmative action jurisprudence is a failure to recognize such measures as moral action designed to ensure inclusion.⁷⁶

Many of the voices that speak and write about color and sex write about evil. In these narratives and scholarship is the new language that emerges from exclusion. There is the loss of innocence and the pain of evil, the shame of being victim. In many, if not most, there is also anger. For example, the voice of Audre Lorde vibrates with anger:

Every Black woman in America lives her life somewhere along a wide curve of ancient and unexpressed angers.

My Black woman's anger is a molten pond at the core of me, my most fiercely guarded secret. I know how much of my life as a powerful feeling woman is laced through with this net of rage. It is an electric thread woven into every emotional tapestry upon which I set the essentials of my life - a boiling hot spring likely to erupt at any point, leaping out of my consciousness like a fire on the landscape.⁷⁷

There is anger in the debate between cultural feminists and radical feminists.⁷⁸ There is anger in the debate between radical white feminists and black feminists regarding racism and essentialism,⁷⁹ as is seen in the recent exchange of articles between Angela Harris and

76. Day, *supra* note 15, at 835-54.

77. AUDRE LORDE, *Eye to Eye: Black Women, Hatred, and Anger*, in *SISTER OUTSIDER* 145 (1984).

78. See, e.g., James McCormick Mitchell Lecture, *supra* note 64, at 73-76 (reprinting the conversation between Catharine MacKinnon and Carol Gilligan expressing different viewpoints on the feminine voice and the positively valued feminine stereotype).

79. See Toni Cade Bambara, *Foreward* to *THIS BRIDGE CALLED MY BACK* vi (Cherrie Moraga & Gloria Anzaldúa eds., 1981) (discussing the issue that lies at the center of the essentialism/diversity debate within feminist jurisprudence). Novelist Bambara articulates the issue as follows:

[T]hough the initial motive of several siter/riters here may have been to protest, complain or explain to white feminist would-be allies that there are other ties and visions that bind, prior allegiances and priorities that supersede their invitation to coalesce on their terms ("Assimilation within a solely western-european herstory is not acceptable" - Lorde), the process of examining the would-be alliance awakens us to new tasks ("We have a lot more to concentrate on beside the pathology of white wimmin" - davenport).

Id. Audre Lorde also poignantly expresses her anger towards white feminists:

Within the community of women, racism is a reality force within my life as it is not within yours. The white women with hoods on in Ohio handing out KKK literature on the street may not like what you have to say, but they will shoot me on sight. . . .

The oppression of women knows no ethnic nor racial boundaries, true, but that does not mean it is identical within those boundaries. Nor do the reservoirs of our

Catherine MacKinnon.⁸⁰ There is anger between Randall Kennedy and Richard Delgado in the Race Critiques Debate.⁸¹

This anger can forge the new language and the new principles for addressing issues of inclusion. The anger also can generate evil. As Morris put it:

[O]nce it enters our lives, [evil] has a generative power, and there are forces at work toward deceiving oneself and others as to its existence. All of this is nicely reflected in the tale by the serpent's duping Eve and Eve blaming the serpent and Adam blaming Eve.⁸²

There is the moral duty upon all to listen; there is the moral ideal that we will. The struggle is to remember innocence, to listen from within that memory, and to transcend evil.

CONCLUSION

I close with the voices of two women who speak very differently, but both from deep within the garden. ntozake shange describes the struggle to remember innocence in her play, *a photograph: lovers in motion*.⁸³ In one scene, a photographer is showing a series of slides to a woman dancer. The woman is upset by a photograph of a violent scene, violence directed against women, and she reacts by saying "there's more . . . there's gotta be more,"⁸⁴ and she begins to dance. She speaks again as she dances:

i am space & winds
like a soft rain or a torrent of dust/ i can move
be free in time/ a moment is mine always
i am not like a flower at all
tho i can bloom & be a wisp of sunlight

ancient power know these boundaries. To deal with one without alluding to the other is to distort our commonality as well as our difference.

For then beyond sisterhood, is still racism.

LORDE, *supra* note 5, at 97.

80. See Harris, *supra* note 60, at 585 (arguing against MacKinnon's use of essentialism, which silences the voice of black women); Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 20 (1991) (taking the essentialist position that "'sex' is made up of the reality of experiences of all women, including African-American women"); see also Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or other -isms)*, 1991 DUKE L.J. 397 (noting that race is often omitted from discourse on sexism and even racism, which tends to marginalize the relevance of race to these issues).

81. See Kennedy, *supra* note 61, at 1749 (stating that authors of color do not need to establish a "racially distinctive brand of valuable scholarship"); Delgado, *supra* note 59 (challenging Kennedy's position and asserting the importance of the minority voice in legal scholarship). For further criticisms and comments regarding Kennedy's argument, see *supra* note 61.

82. MORRIS, *supra* note 18, at 160.

83. NTOZAKE SHANGE, *a photograph: lovers in motion*, in THREE PIECES 53 (1981).

84. *Id.* at 77.

i'm a rustling of dead leaves
 collections of ol women by the weddin
 the legs of a cotton club queen
 & so familiar with tears
 alla this is mine/ so long as i breathe/ i'm gonna dance
 for all of us/ everybody dead/ everybody busy
 everybody too burdened to jump thru a nite
 a hot & bluesy jump in the guts of ourselves
 a dance is like a dream/ i can always remember
 make it come again . . . i can make it come again⁸⁵

We can always remember innocence; we can make it come again.

And the voice of Sojourner Truth gives us the heart to keep trying, to believe we can "write beyond the ending":⁸⁶

If the first woman God ever made
 was strong enough to turn the world
 upside down, all alone
 together women ought to be able to turn it
 rightside up again.⁸⁷

85. *Id.*

86. *See supra* note 31.

87. Sojourner Truth, *Ain't I A Woman*, in *BLACK SISTER* 25 (E. Stetson ed., 1981).

