Loneliness and the Law: Solitude Action and Power in Law and Literature

Marc L. Roark
How do our thoughts and attitudes impact the law? Is there a correlation between the way the law is decided and the way we as lawyers and scholars approach law?

These questions are the ultimate indicators of the direction of law. Traditionally, we assume that law develops artificially—that is, without direct correlation to any particular individual’s contribution thereto—with few exceptions. We attribute broader forces to the development of legal movements; social movements and historical moments that ascend to the law. In such scenarios, the individual is lost to the broader panoply of thought, rendered as little more than a potted plant upon the scenery of the law. This Article, in contrast, suggests an organic development of the law—a connectedness between individual ideas and their legal outcomes. As such, the Article values the autonomy of ideas and attempts to describe the process between those ideas and their manifestation in law.

One often sees the tension between ideas that are our own and ideas that are not in the communicability of the law. Said another way, the law is filled with empty spaces: what is not written, what is not said but meant, and what is unsayable or unprintable. Loneliness as a metaphor for contemplation describes the spaces that such emptiness creates in both

---

*Visiting Assistant Professor of Law, University of Missouri—Columbia. J.D. Loyola University New Orleans College of Law, L.L.M. Duke University School of Law. I want to thank the gracious and helpful comments from my friends and colleagues both in Tulsa and elsewhere, including: Al Brophy, Jeff Powell, James Boyd White, Johnny Parker, Marla Mansfield, Marianne Blair, Irma Russell, Marty Belsky, Russell Christopher, Linda Lacey, and Barbara Bucholtz. This Article is dedicated to my friend Linda Lacey (1945-2008), whom I knew only briefly, but is someone from whom I wish I could learn a great deal more.

1. But consider Charles Black’s words: “Generalities about injustices are mere evasions of the central truth about our injustice. Hamlet was not a philosophical tract on indecision; it was a play about a particular young Danish Prince. Injustice in America has not been an abstraction, or a miscellany without a theme.” Charles Black, Talismanic Names and Modern Justice, in THE HUMANE IMAGINATION 50, 53 (1986). In other words, ideas gain power in context through our perceptions of the material world.
individual lawyers and in the law. This Article begins by considering the elements of the legal idea: the action needed to move the idea into consciousness and the power of conveying the idea’s strength to the community. Proceeding from this framework, Part One focuses on the loneliness that fosters legal ideas. Describing three types of loneliness—indeterminacy, ressentiment, and contemplation—the Article considers how these types of loneliness are revealed in the jurisprudence surrounding the African-American (from *Plessy v. Ferguson* to *Brown v. Board of Education*) and Asian-American (*Yick Wo v. Hopkins* and *Korematsu v. United States*) equality lines of cases. The Article argues that the silent spaces of these opinions reveal as much as the written opinions.

Part Two considers the action of the idea—both the movement of the idea from the consciousness to the material world and the realization every lawyer comes to that his work is mere repetition. Focusing on the same line of cases, this part demonstrates how even the cases that suppose a positive change in the law are repetitious in some ways of the past. The Article suggests that the recognition of this repetition is not only necessary, but

---

2. In her book, *Mind of the Maker*, Dorothy Sayers describes the process in which a writer (and creator) assumes a single idea and introduces it to the action that the idea requires. Sayers tells us that there is a tripartite structure in the art of writing: the idea, the activity, and the power. Id. The idea underlies and bridges the physical revelation and is thrusted forth by the power, which sets the idea in motion. Id. In the power and activity is found the meaning of the work in the soul. Id. Such is the same in the development of legal ideas. Duncan Kennedy describes this moment where the idea, the activity, and the power are most recognizable in our culture of law as the opinion of first impression—a “kind of clearing of freedom in the endless forest of constraint.” Duncan Kennedy, *Freedom and Constraint in Adjudication: A Modern Phenomenology of Judging*, 36 J. LEGAL EDUC. 518, 539 (1986). Though such fresh ideas ultimately are absorbed into a part of the greater cultural law, the idea started out of silence and inactivity. As this Article describes, it is the activity and the power (both past and present) that help distinguish an idea as truly one’s own.

James Boyd White asks the same type of questions in evaluating the “Empire of Force”: “How, as individual minds and persons, might we come to understand the ways that the [E]mpire of [F]orce is always present in our thought and speech, and learn how to resist its power by refusing to respect it?” *James Boyd White, Living Speech: Resisting the Empire of Force* 10 (Princeton 2006). James Boyd White’s work reveals, in the nature of legal writing, the possibilities of the lawyer-scholar’s means of self-definition in the context of the idea, the activity, and the power. Specifically, this Article discusses three matters in conversation with Sayers, White, and others: (1) the tension between ideas that are “our own” and ideas that are not; (2) the way action in the law comes out of the idea, a regeneration as such, with a new form of action and a new catalyst that drives the idea toward meaning and makes the idea truly one’s own; and (3) the way the power operates in the places and spaces of the individual.

Loneliness and the Law

unavoidable for the lawyer-scholar to define himself.

Finally, Part Three describes the power of the idea, lifting it out of the constraints of the material and into the spaces of the normative. Utilizing the description of place and space, this Article captures the essence of grounding normative ideas in materiality and vice versa. The Article, however, also contains a cautionary tale in that certain ideas, when they become normative, can leave manifestations already materialized to wither alone with no normative identity (or an identity long passed).

The Article concludes by noting that all forms of literary loneliness—indeterminacy, ressentiment, and contemplation—end in some form of contemplation. The question now raised is whether the same holds true for contemplation in the law. Loneliness and the law is about striving toward the contemplative life and asking whether such contemplation in the law is possible under all circumstances.

I. THE REGENERATIVE PATH—THE SOUNDS OF SILENCE

There is a tension the lawyer-scholar feels when approached with the problem of law. On the one hand, there is a distinct community of voices, both past and present, that the scholar must hear when confronting the idea. At the same time, there is a tension of being alone, set aside, and adrift to find one’s own way. This is the tension that is between Holmes’s comments of “directors of a force” rather than the “mouthpieces of an infinity.” A mouthpiece of infinity might suggest that the lawyer-scholar has a vast range of resources, that the law is an open book, and that his sources are either innumerable or yet to be defined. But, it can also mean finding one’s own self-defining view amongst the ages.

That James Boyd White can conclude “that [J]ustices of the Supreme Court, and other [J]udges too, are under an ever greater temptation and pressure than the rest of us to speak in dead, mechanical, or bureaucratic ways” confirms the Holmesian thought that judges are bound to their

---

7. Letter from Oliver Wendell Holmes to Harold Laski (Jan. 29, 1926), in RICHARD A. POSNER, THE ESSENTIAL HOLMES 234, 235 (1996) (“It seems to me like shaking one’s fist at the sky when the sky furnishes the energy that enables one to raise his fist”—referring to a court’s allowing of the United States to be sued in distinction to sovereign immunity.). Consider Ralph Waldo Emerson’s description in his essay The Conservative:

Such an irreconcilable antagonism, of course, must have a correspondent depth of seal in the human construction. It is the opposition of Past and Future, of Memory and Hope, of the Understudy and the Reason. It is the primal antagonism, the appearance in trifles of the two roles of nature.

Ralph Waldo Emerson, The Conservative (Dec. 8, 1841), in 3 THE WORKS OF RALPH WALDO EMERSON 487 (George Bell & Sons 1904) (1844).

8. WHITE, supra note 2, at 11.
community. In one sense, using the words, grammar, and structure of the ages can lead one to believe he is writing the meaning of the tradition. Ultimately, that community can overpower the lawyer-scholar’s voice so that the realization comes that his ideas are not his own ideas, but rather ideas that are mere repetitions of style. White continues “that they should resist these forces strenuously, seeking to attain in their own compositions the kind of life, the presence of mind and imagination, that can alone prevent the law from becoming a central actor in the [E]mpire of [F]orce.”

Indeed, the legal scholar must be willing to let the community (with all of its styles) infect his mind; but he cannot stop there. Rather, he must allow his mind to sort through the tangled web of conflict, chaos, and charisma to come to his own center of gravity in the law and his writing. He must avoid the community, for a time, so that his thoughts are truly his own and are expressed as such. As well stated by White, the idea is allowed to be the scholar’s own only when he allows the idea to “lie in his own struggle to come to terms with the systems of meaning . . . .”

Speaking in Judge-speak, Lawyer-Speak, or Scholar-speak deceives the person doing the speaking; it is a siren telling the person that one is doing something meaningful and timeless by conforming to what the expected style is. Whether it is Justice Blackmun’s opinion in Virginia Pharmacy Board v. Citizens’ Consumer Counsel or John Ashcroft’s

9. See, e.g., Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J. Dissenting) (Holmes’s opening line was: “This case is decided upon an economic theory which a large part of the country does not entertain.”); Traux v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., Dissenting). Justice Holmes stated:

There is nothing that I more depreciate than the use of the [Constitution] beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires . . . even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

Id. Perhaps then, one way of viewing Holmes’s pragmatism is as both a step towards self-limitation and towards self-expression, defining himself while not defining the community as judged by him. In so doing, it was perhaps necessary for the Court to remain silent, rather than speak towards communal defining. See Erin Rahne Kidwell, The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review, 62 ALB. L. REV. 91, 120 (1998); see also Thomas C. Grey, Molecular Motions: The Holmesian Judge in Theory and Practice, 37 WM. & MARY L. REV. 19, 38 (1995) (“while rule skepticism may have undermined the virtue of predictability based upon adherence to precedent . . . it served the other policy that dominates Holmes’ judicial philosophy – the policy of deference to the dominant forces in the community, most authoritatively represented by the legislature.”).

10. WHITE, supra note 2, at 11.

11. Id. at 7.

12. Id. at 40 (explaining that Dante’s poem teaches “the necessity of being on guard when the siren sings”).

13. Id. at 77 (citing Va. State Pharmacy Bd. v. Citizens Consumer Counsel, 425 U.S. 748 (1976)).
description of war tribunals,\textsuperscript{14} White describes the immaturity and lack of conscious reflection that plagues so much legal writing, leading to the more dire consequences of law becoming less attached to meaning and more attached to what was said about that meaning. Action for the legal scholar is the pinning of an idea to the conscious world in his own language, tone, rhythm, and beat. Thus, there are three alternative views of the legal idea: (1) an invention of infinity, (2) an exercise in repetition, or (3) a regeneration of thought. This Article is about the last of these three alternatives.

Regeneration requires contemplation and solitude to thrive. In as much as it needs the community of voices during the day, it also needs the quiet of the “good morning,” and the retreat of the “good night.”\textsuperscript{15} But silence can be positive, negative, or merely there. One way of considering the lawyer-scholar and the types of silence is to look at the models of silence in the literature that purports to be associated with the law. A second way is to consider the impact that solitude has upon the law.

A. MODELS OF LONELINESS

The lawyer-scholar might recall the loneliest characters in literature that either have been so consumed by their ordinary tasks that they forget the counsel of the ages, or that specifically refute the counsel of ages to be lonely in the face of the masses. On the one hand, there is Stevens from \textit{The Remains of the Day}\textsuperscript{16}: focused, steady, and dependable, yet also

\begin{itemize}
\item [14.\textsuperscript{16}] WHITE, supra note 2, at 65 (citing Statements by former Attorney General John Ashcroft, \textit{in Bush Plan Draws Criticism from Civil Libertarians}, ST. LOUIS POST-DISPATCH, Nov. 18, 2001, at B1).
\item [15.\textsuperscript{15}] W.H. AUDEN, \textit{Law like Love}, in \textbf{THE COLLECTED POETRY OF W.H. AUDEN} 74 (1945).
\item Yet, Law abiding Scholars write; Law is neither wrong nor right
\item Law is only crimes, Punished by places and by times;
\item Law is the clothes men wear, Any time anywhere;
\item Law is good morning and good night.
\item \textit{Id.} The invocation of W.H. Auden here is purposeful. Auden’s poetry, not only in \textit{Law like Love}, but elsewhere, attempts to imagine the world as an integration of life with the artist as hero at the center. \textit{See JOHN FULLER, A READER’S GUIDE TO W.H. AUDEN} 9 (1970). Auden believed ultimately that the law, like love, is concerned with personal uniqueness, not political generalization. \textit{See EDWARD MENDELSON, LATER AUDEN} 79 (1999). Notably, “unique persons fulfill the law by loving – which can be done by unique persons only – and they fail to understand the law when they fail to love.” \textit{Id.}
completely without the ability to think outside of the purpose and function that he performs—truly indeterminate of his own view of the social order. He is completely constrained by the task he performs: for example his relationship with his master, his father, his employee, and even the land reflect his view constrained by the empire. Stevens is a perfect servant of the empire; as one author said, Stevens’ words reveal a curious contradiction: although Stevens views the maintenance of the empire as central to the nation’s identity [an identity which Stevens possesses, as if his own, Stevens believes that such a people as he] must entrust their welfare into the hands of the ‘great gentlemen’ whom Stevens has served.

Thus, Stevens’s loneliness is role-centered—which has happened to

17. See Christine Brooke-Rose, *Exsul*, 17 POETICS TODAY 289, 294 (Fall 1996) (describing the book as portraying Stevens’s thoughts and emotions “through his pompously, distancing, alienating correct idiom!”). One might even suggest that Stevens’s views of the world correlate only to his status, which relieves him of the responsibility to form his own identity. See ISHIKURO, supra note 16, at 194 (Stevens speaking).

18. See ISHI KURO, supra note 16, at 74 (wherein Stevens only lightly chastises the memory of his former master).

19. Note how Stevens’s most intimate moments with his father relate to their shared status as butlers. See id. at 40-42 (describing his father’s butling courtesies to a General responsible for his son’s death). Yet this sentiment obviously clouded Stevens’s (and perhaps his father’s) view of the sentiment due between a father and a son. As Stevens tells his father that, because of age and illness, the older man’s duties were being limited, the reader gets the sense of such detachment that perhaps they were not even related, or that the only way they perceived of themselves was as butlers. See id. at 65. Finally, as Stevens’s father lies sick and dying, Stevens comforts his master first—even as his father dies. Id. at 104-06.

20. Stevens expresses distaste for those employees that engage in “liaisons with other staff members.” ISHIKURO, supra note 16, at 50-51. Though Stevens finds it rather “churlish” to appoint blame, he still views their commitment to the profession, the house, (and the empire) as should be their primary concern. Id. at 51. That Stevens would express such discontent suggests that he has bought in fully to the Empire around him and that Darlington Hall is necessary for the continued success of the moral empire. Perhaps the best irony of Remains of the Day is that the reader is led by the suspicion that an unresolved sexual tension exists between Ms. Kenton and him. See, e.g., id. at 244. If not for the Empire, then Stevens himself would also engage in the love he so much desires, something he realizes after the Empire is done and the relationship’s chances have long passed. Id. at 244-45.


The English landscape at its finest—such as I saw this morning—possesses a quality that the landscapes of other nations, however more superficially dramatic, inevitably fail to possess. It is, I believe, a quality that will mark out the English landscape to any objective observer as the most deeply satisfying in the world, and this quality is probably best summed up by the term ‘greatness.’

Id.

Loneliness and the Law

also take over his personality. It is this aspect of his professional duty—the duty that shackles him to a lonely existence—that has been found to be a wonderful counter-example for legal ethics and professionalism thinkers. The hallmark of that loneliness is a lack of courage to define himself differently than his social world—the Empire of Force around him—dictates. Ultimately, an Empire of Force needs people like Stevens to quietly subsume the tenets proposed and therefore believe it is an Empire of virtue.

A second lonely character is one that chooses to be lonely because he rejects the status of everything around him—e.g. Raskolnikov from Crime and Punishment. This type of loneliness is closest to the term ressentiment, a condition of “rancorous envy by the naturally weak towards the naturally strong.”

As a chronic condition of lingering, unwanted dependence upon a person or a situation somehow seen as insulting, ressentiment finds fertile ground among reactive types with no firm sense of personal values. Envious of the graceful and harmonious existence of just individuals around him, the man of ressentiment at his most creative uses his gifts of pervasive observation and complex intellect to insinuate himself to power.

This theory of ressentiment reveals the character of the individuals more than it contemplates the problems in the law. Consider that Raskolnikov’s sickness is the product of self-inflicted withdrawal because of personal aggrandizement:

In short, I maintain that all great men or even men a little out of the common, that is to say capable of giving some new word, must from their very nature be criminals—more or less, of course. Otherwise it’s hard for them to get out of the common rut; and to remain in the common rut is what they can’t submit to, from their very nature again, and to my mind they ought not, indeed, to submit to it.

Robert Weisberg summarizes the shared experience of the moral ends of law with the ressentiment person: “[j]ustice and ressentiment are in every sense antipathetic. Yet reactive emotion threatens to emerge in any legal environment.” Raskolnikov deems personal morality to be far more

27. DOSTOYEVSKY, supra note 24, at 260.
28. WEISBERG, supra note 26, at 18-19 (citing FRIEDRICH NIETZSCHE, ON THE GENEEOLOGY
valued (and disconnected from) social morality. Thus, there is little choice but for great thinkers such as he to shun the social world, and even its laws, so that the new order can be created.  

In contrast to the loneliness that produces ressentiment man and indeterminate man is that which produces contemplative man. Consider Atticus Finch in *To Kill a Mockingbird* as perhaps the most idealized American vision of the law's righteousness at work. His noble ability to see past human imperfections—"to walk a while in another person's skin"—empowers him to understand his townspeople at face value—a virtue rather sparse in the community he dwells in daily. That isolation which emerges in *To Kill a Mockingbird* is depicted as self-reflection; Atticus's solitude is filled with personal inquiry. Atticus learns who he is and what the law is in times of silence and self-inspection. And in those moments of solitude, Atticus is able to understand how law works in the community. It is Atticus's ability to be lonely, to self-define himself, and therefore to engage the law with critical introspection, that makes Atticus the prominent model of legal contemplation and courage. Indeed, self-reflection is a necessary precursor to self-definition in the law.

A similar and helpful analogy to these descriptions is contained in the concepts of exile. Exile carries a double meaning: first as the "present sense of living elsewhere" and second "in its etymological sense of 'springing forth.'" We might say that the loneliness exuded in "indeterminate man" and "ressentiment man" represent only the former—a disconnection between the spaces of the mind and the places surrounding them. At the same time, "contemplative man" exudes both forms of exile—at one and the same time, he is both withdrawn and springing forth to become his own person in the law. Naturally, such loneliness ultimately impacts the law.

32. LEE, supra note 30, at 33.
33. See Brooke-Rose, supra note 17, at 289.
B. SOLITUDE UPON THE LAW

Loneliness not only impacts the lawyer-scholar’s view, but ultimately shapes law. Consider the three types of silence discussed above. Silence that is indeterminate leads to law that carries no real basis in the values of the social order. Similarly, law that arises from ressentiment norms is reactionary and rarely survives longer than the reaction is valued by society. On the other hand, law that is contemplative offers the paradigmatic benefit of being grounded in the historical and normative basis that is the law’s foundation, while not being swallowed by it at the same time.

Consider Jeb Rubenfeld’s theory of the Paradigm case and the enigma that is Brown v. Board of Education. Within our common law tradition of respecting precedents, there is a force that advises judges and lawmakers against paradigm shifts in the law. This was not, as we know, the force that steered the Brown decision. Instead, according to Rubenfeld, Brown followed an enduring interpretive structure prevalent in all of Constitutional law: that cases involving non-application restrictions (i.e., involving something the Constitution does not forbid) are not reflective of social commitments, but are temporary placeholders for social construction. In contrast, the paradigm case—such as Brown—emerges from beneath the immediate social construction (i.e., the status quo of racial relations) and reclaims a part of historical understanding previously absent in the law (i.e., that all men are created equal); it regenerates the norms and values present in the Constitutional order.

Consider now the loneliness that we have discussed before—all within the African-American and Asian-American Civil Rights liturgy. One is the silence that simply watches the Empire of Force move at will throughout the social order so as to not disturb the social order (the indeterminacy effect). This type of silence fosters inaction in the face of the suggestion that action should be taken. Consider the precedent set by Plessy v. Ferguson and the shifting of that idea in Brown v. Board of Education. At core in those decisions is the recognition that a disruption of the Empire of Force comes at great social cost: “In determining the question of reasonableness, [the legislature] is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and

34. JEB RUBENFELD, REVOLUTION BY JUDICIARY (2005).
36. RUBENFELD, supra note 34, at 17.
In stating the problem as one of social order and not Constitutional mandate, the Court curried the analysis through law toward a neutral posture at rest with winds of majoritarian demand. In Plessy, Justice Brown, writing for the majority, stated the proposition this way:

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each others’ merits and a voluntary consent of individuals. As was said by the court of appeals of New York:

'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.'

The Plessy court’s silence before a social problem is one that avoids conflict and seeks to preserve peace. In contrast, the Brown court, in setting forth the remedies for the Brown class plaintiffs, noted the social disturbance the Brown decision caused. Nevertheless, the Court stated:

At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, [sic] decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

And as if the Brown idea was not already attentive to the importance of action, the Court noted that its decision should be carried out “with all

40. Id. at 551-52.
42. Id. at 300.
deliberate speed to the parties in the case," a phrase that gained new meaning by the Court's deliberate application (an aspect this Article considers in Parts Two and Three).

For now, consider how Plessy went silent before the idea and how Brown's silence led to action. Plessy narrowed the question from one of law to one of social choice. Justice Brown even suggested that the failure of equality may be the fault of African-Americans and not the social or legal framework. In so doing, the Court was not inclined to recognize a right different from that which the Empire of Force already assumed to be correct. One of the arguments that Plessy made before the court was that the status of race was a "property right" that African-Americans were being deprived of before the law. Plessy's argument—"that in any mixed community, the reputation belonging to the dominant race is 'property'"—ultimately was rejected by the Court as a product of social distinctions, not Constitutional status. The Court's rejection of this property argument becomes, however, prophetic toward the ultimate decision in Brown and subsequent legislation as a result of Brown. Indeed, in Brown's companion case, Bolling v. Sharpe, the Court aligned social equality with the traditional adherents of freedom in the Fifth Amendment:

Although the Court has not assumed to define liberty with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

One might even consider that the Civil Rights Act of 1964 is an acknowledgement by Congress that fundamental social status, at the very least, affects property rights, or that the Act is a recognition that equality is a property right, and in either case, is actionable under the Fifth and Fourteenth Amendments.

The second dangerous loneliness, the social ressentiment, is best depicted in the aggressive legislation at issue in Yick Wo v. Hopkins and the military orders of Korematsu v. United States. Recall that the definition of ressentiment is the condition of rancorous envy by the

44. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
45. Id. at 549.
46. Id.
naturally weak toward the naturally strong. Yet, when ressentiment moves from personality to law, it gains a retributive formula that reorients the social malaise toward a new concept of justice—a lens by which the Empire of Force qualifies previously held truths:

Ressentiment, unlike hatred, which can be resolved in a single decision or gesture, is a full-blown intellectual malaise, inclined to take institutional and formal, rather than personal, spontaneous, revenge. It emerges only subtly and gradually from an unresolved sense of insult. The "insult"—real, imagined, or provoked by the desire to possess an inaccessible object or trait—grates on the intellect as much as on the emotions . . . . The rage which should theoretically be directed [elsewhere, even toward himself], he venomously misapplies to innocent third parties. If unchecked by a major effort of will, this process continues to pollute the victim's relationships until his values are overturned utterly.52

Consider then, how the legal enforcement of the San Francisco ordinance in Yick Wo embodies this framework. The ordinances, which restricted certain types of laundry houses, were deemed unconstitutional based on the hostile way such ordinances were enforced toward the Chinese class.53 As the Court noted:

No reason whatever, except the will of the supervisors, is assigned

51. Recall the background to both the Yick Wo and Korematsu matters. In Yick Wo, the ordinance at issue stemmed from a long line of exclusion laws directed at Chinese immigrant workers. See Thomas Wuil Joo, New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence, 29 U.S.F. L. REV. 353, 358-59 (1995). Thus, "all of the fears and prejudices associated with African Americans were easily transferred to the Chinese, a racially distinct class comprised mainly of menial laborers." Id. at 359 (citing ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 260 (1971)).

Similarly, the Korematsu internment orders cannot be disassociated with the entry of the United States into World War II, precipitated by the Japanese bombing of Pearl Harbor, and all of the anti-Japanese feelings in America at the time. Indeed, during World War II, the internment of over 120,000 Americans was a direct result of political power supported by public opinion that clearly swayed against Japanese-Americans. See ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 98 (2001); ERIC K. YAMAMOTO & LIANN EBEHUGAWA, U.S. COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 67-78 (1997). Based on this fear, Japanese language schools were attacked as informing young Japanese that "theirs was the superior race, [that] the Japanese Emperor [was divine], [and] . . . that every Japanese, wherever born or residing, owes [loyalty to] his Emperor and Japan." Id. More importantly, the mass internment of all Japanese persons was ordered as a military necessity. Id.

52. WEISBERG, supra note 26, at 19-20.

why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation in which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except for hostility to the race and nationality to which the petitioners belong.\(^{54}\)

This reading of the law in ressentiment form led the Court to reject laws, like in *Yick Wo*, that, though facially neutral, were clearly aimed toward certain classes of individuals. Such moments reflect times when the court refuses to engage the Empire, and instead averts its gaze toward the greater social narrative reflected in the Constitution.\(^{55}\)

But, then there are times the Court merely condones ressentiment, and allows for laws that appear designed for retribution. This combination of ressentiment and indeterminacy reflects a Court unwilling to resist the Empire and thereby empowers the laws that are egregious toward our Constitutional values. Consider the orders and outcome in *Korematsu*.\(^{56}\) In *Korematsu*, the Court addressed the forced relocation of Japanese-, German-, and Italian-Americans located on the West Coast.\(^{57}\) It is important to understand the nature of the Black majority opinion in *Korematsu*; what Justice Black does, and how the majority avoided the real issue of individual rights.\(^{58}\) The majority emphasized the need to defer to the powers of Congress and the executive branch over the individual. Though, in doing so, the Court skillfully used the art of double negation and deferment. Notably, the Court phrased its central holding as such: “In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”\(^{59}\) Notice where the silence and indeterminacy lie in this statement; the unspoken words by the Court are: “We approve of the executive exclusion of persons based on race and ancestry.” Thus, by being indeterminate, the court allowed the Empire of Force to not only cower to

\(^{54}\) Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).
\(^{56}\) Korematsu v. United States, 323 U.S. 214, 217 (1944).
\(^{57}\) Id.
\(^{58}\) Id.
\(^{59}\) Id. at 217-18 (emphasis added).
the fears of the Empire, but also to intellectually remain true to its normative values of equality under the Constitution.

Perhaps then, it is not quite so odd to talk about the virtues of loneliness in the law—we merely need to qualify whether that loneliness is one that helps understand social mores or is a reaction to social mores. Indeed, the classical virtue of loneliness was once seen as being imperative toward the reflection and understanding of the law. As Ralph Waldo Emerson quoted in his speech celebrating the emancipation of the West Indian slave: "Whilst I have meditated in my solitary walks on the magnanimity of the English Bench and Senate, reaching out the benefit of the law to the most helpless citizen in her world-wide realm [the West Indian slave], I have found myself oppressed by other thoughts." Contemplation affords the scholar both inward and outward eye from which to view the law; it forces the scholar to take stock of the ways that law impacts "the most helpless citizen." As Charles Black contemplated: "a concern for the practice of law," what we will call "the action to the idea," requires first, a perspective from "the inside." As he further stated, "visible legitimacy on the intellectual level," informs the good of what is the law. When we reflect as Emerson and Black, we cannot help but view the law as it contradicts our shared values. If allowed by solitude—not indeterminacy or ressentiment—to achieve intellectual honesty, we begin thinking in greater narratives—toward the good, the individual, and the idea.

Such a comprehensive view of loneliness infers two primary implications of silence. First, the scholar must allow himself to quiet the voices all around him (and the text) in order to engage the text and power of that which he is trying to comprehend—to allow himself to put aside the commentaries that purport to answer the meaning behind the text and himself hear the words that are spoken and those that are not. Dealing with each on their own terms affords the scholar a cognitive distance to find his own voice in the text. James Boyd White describes this process in the context of reading Dante's Inferno:

The reader of this poem is thus not simply put in a position in which he must exercise independence of judgment, finally on his own; the


62. Id. at 20.

reader is compelled at the same time to establish a responsible relationship with an intellectual and juristic structure that is represented as having real authority. He is not pushed off, that is, to make his own way in a world of radical existential uncertainty, but, far more maturely and significantly, he is presented with the inescapable problem of reading, understanding, learning from, disagreeing with, and reimagining the reigning modes of thought of the time — of Dante's time — as they are represented in the theological world of the poem. It is not right answers that Dante offers us in the end, but a special kind of silence, the silence that follows posed but unanswered questions.  

That responsible relationship that White infers is an ability to hear one's own questions coming from the text, despite the answers that the Empire of Force might suggest.

Next, the lawyer-scholar must find a way to express the legal idea in the terms of silence. Indeed, Jim Chen describes how Justice Holmes assumed the poetic phrase "all deliberate speed" and formulated a legal idea. That idea was acquired by Justice Frankfurter, who lent it to Justice Warren. In each case, though, the phrase takes a new meaning as the idea is defined by the holder. The answer of how Holmes's "all deliberate speed" was transformed from a quickened heat to a slow, ameliorative process is one that silence best answers. The perception of the racial dynamics and the social change both convict and confirm Warren's new reading of the phrase; like in Dante (and Job), as White suggests, reading through silence sometimes offers the best answer—no answer—to the problems speech presents.

II. THE ROLE OF THE IMAGINATION, REGENERATION, AND THE LAW

When lawyer-scholars engage loneliness, ideas begin to flood the mind. The three types of lonely thinkers described in Part One each find different manifestations of ideas. For the indeterminate man, the ideas are mere excursions into the thoughts and norms of those around him; he has failed to define his own self within the law and, therefore, his own ideas become dominated by the ones he deems "master" or great. Simply said, he has no imagination.

Imagination itself, however, does not make the lawyer-scholar

64. WHITE, supra note 2, at 22.
65. Chen, supra note 63, at 584.
66. WHITE, supra note 2, at 24.
contemplative. Indeed, the failure to bound one's imagination by the historical and institutional experience renders the thinker's mind untrustworthy. That is not to say that the thinker is bound to always respect those institutions; rather, he must recognize them, understand them, and even at times honor them before his ideas generate autonomy from them. This, in essence, is the problem with ressentiment man. His ideas have become so reactionary—his imagination so unbounded—that he can hardly be defined separately from the institutions to which he reacts. Instead, he is inevitably linked to those institutions.

The contemplative man, in contrast, does not react or just absorb. Rather, as a studious observer of the forces around him, he makes deliberate use of his imagination to find his own mind in the law. The contemplative man makes decisions similar to the way Judge Hutchenson described his decision-making process in cases that were "difficult or involved [or that turn on] a hairsbreadth of law or of fact":

I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch — that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for judicial feet, sheds its light along the way.67

While some might hear Judge Hutchenson's description of the hunch as an uncontrolled guessing game, that was certainly not the imaginational ploy that Judge Hutchenson infers. Rather, it is the searching of law and institutions, and when no clear answer is available, finding the answer in one's own self-defined view of the law.

The question then arises: how does the lawyer-scholar segregate the ideas that have become self-defined, those that are due to no self-sustaining presence in the law, and those that are bound by no view of institutions? Subpart A of this section considers the strains of the imagination upon all three models of loneliness. Subpart B then considers how the civil-rights liturgy, described in Part One, reacts to the different forms of imagination.

A. **REGENERATING THE IDEA: DISCOVERING THAT ALL MY BEST IS DRESSING OLD WORDS NEW**

In times of quiet, the lawyer-scholar is able to contemplate the past, consider the present, and imagine the future. The contradictions between legal values and social norms is less apparent before solitude allows the scholar to engage his own mind. Yet, the revelation also bears upon the legal mind that his contemplation is not new. It is, as Shakespeare confessed in his sonnets, a condition of repetition reborn into the scholars mind, for:

```
What's in the brain that ink may character
Which hath not figured to thee my true spirit?
What's new to speak, what new to register,
That may express my love or thy dear merit?
Nothing, sweet boy; but yet, like prayers divine,
I must each day say o'er the very same,
Counting no old thing old, thou mine, I thine,
Even as when first I hallow'd thy fair name
So that eternal love in love's fresh case
Weighs not the dust and injury of the age
Nor gives to necessary wrinkles place
But makes antiquity for aye his page,
Finding the first conceit of love there bred
Where time and outward form would show it dead.68
```

And then, finding the words to express your disappointment at a lack of ingenuity:

```
Why is my verse so barren of new pride,
So far from variation or quick change?
Why with the time do I not glance aside
To new-found methods, and to compounds strange?
Why write I still all one, ever the same,
And keep invention in a noted weed,
That every word doth almost tell my name,
Showing their birth, and where they did proceed?
O! know sweet love I always write of you,
And you and love are still my argument,
So all my best is dressing old words new,
Spending again what is already spent:
For as the sun is daily new and old,
```

68. **WILLIAM SHAKESPEARE, SONNETS, CVIII.**
So is my still telling what is told.\footnote{69} Shakespeare's Sonnets exemplify the disappointment that lawyer-scholars experience when they realize that their ideas are not their own.

A lawyer-scholar's search for "innovation" in the law is a constant refrain of repetition combined with unique perspective, which can lead the scholar to the conclusion that his ideas are not his own. In some ways, innovation can be seen as one of two alternatives proffered by Stephen Winter: "it is either manipulation of the law to accomplish an extralegal, social or political goal;" or it is an orderly and systematic expression of imagination bounded by social and legal contexts.\footnote{70} Indeed, assuming the latter of Winter's categorization as the loneliness this essay seeks to provoke, a certain delineation must be made between those whose imaginations have no constraint in the law and those who have no imagination.

Of those whose ideas are bound by neither social nor legal contexts, they run the risk of making their scholarship relevant to them only. In seeking their own ways, and their own approval, the "spirit of their writing and conversation is lonely; . . . they shun general society; they incline to shut themselves in their chamber in the house, to live in the country rather than in the town, and to find their tasks and amusements in solitude."\footnote{71} Indeed, the scholar that chooses to venture alone, simply to be alone, runs the risk of exiling himself (in the abandonment sense) and forfeiting all common sense for the sake of being unique. As Emerson said, "[w]hoso goes to walk alone, accuses the whole world."\footnote{72} One relevant example is the criticism that the Critical Legal Studies Movement in the Legal Academy had too much imagination.\footnote{73} Imagination, however, was not the problem with the Crits. Rather, their problem was the consistent pessimism in viewing the law and the world—a view that ultimately became prophetic of their own existence.\footnote{74} Such pessimism inhibited the Crits' ability to communicate their imagination so that those outside their knowledge could understand and contemplate. In doing so, the Crits primarily failed to

\footnotesize{\begin{itemize}
\item \footnote{69}{\textit{William Shakespeare}, \textit{Sonnets}, LXXVI.}
\item \footnote{70}{\textit{Stephen L. Winter}, \textit{A Clearing in the Forest: Law, Life and Mind} 259-260 (2001).}
\item \footnote{71}{\textit{Ralph Waldo Emerson}, \textit{The Transcendentalist} (1842), \textit{in Nature, Addresses, and Lectures} 208 (1979).}
\item \footnote{72}{\textit{Id.}}
\end{itemize}}
understand themselves, which rendered them to be by themselves. Perhaps that is one reason that Crit theory has never really been expressed in judicial opinion, though the ground was fertile for its application.

Such is not the loneliness this Article suggests. Rather, the solitude is one of quiet contemplation in the face of social communication. It is the scholar’s ability to turn away from the voices of the day and to the quiet of the morning and evening that gives him room to think, expound, contemplate, and move his thoughts from the community of voices to a self-defined voice among the many; such as in Justice Harlan’s dissent in *Plessy v. Ferguson*:

> In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation as that here in question is inconsistent not only with that equality of rights which pertains to citizenship, national and state, but with the personal liberty enjoyed by everyone within the United States.  

The solace and silence that Harlan allows himself is not only toward the socially acceptable place of African-Americans in the late nineteenth century, but also to the procedural and jurisprudential urges of the day.

The second group that emerges consists of those that are bound by no imagination. They are like the Priest and the Judge in Auden’s poem, *Law like love*:

```
Law say the Priest with a priestly look,
Expounding to an unpriestly people,
Law is the words in my priestly book,
Law is my pulpit and my steeple.
Law says the Judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I’ve told you before
```

Law is as you Know I suppose,  
Law is but let me explain it once more  
Law is the LAW.\textsuperscript{76}

Both the Priest and the Judge are eerily similar: their interpretations of law are static. They derive meaning from Place (steeple and courthouse); from source (priestly book and judges look); and from disposition. Both the Priest and Judge hold the keys to understanding "Law" and those understandings are immutable by the individual.

This second group falls into White's description of the Empire of Force:

The Empire of Force is at work not only in those who are engaged in the actual practices of war, but in others as well. Behind the men and women at the front are other people, all of us, committing ourselves to this activity, and necessarily engaging in our own ways of constructing those on the other side as things or animals or monsters, not people. Beyond even that, . . . the Empire exists in other forms, in ordinary life and politics, throughout our lives in fact—whenever we find ourselves denying each other's full humanity in the way we speak and think. . . . For the “force” of the Empire [is] psychological, emotional and ideological.\textsuperscript{77}

Indeed, the manifestations of the Empire of Force come not from our own ideas, made separate and individual; rather, they are a product of past social behavior—behavior that has been approved by history and over time, but behavior which we ultimately must reject.

**B. IMAGINATION AND THE LAW**

Before \textit{Plessy}'s "separate but equal" decision, the Empire of Force set the imagination for the Court. As discussed in Part I, the Empire of Force reinforced that imagination in \textit{Plessy}. And, after \textit{Plessy}, the Empire of Force continued to reinforce the notion that racial equality could be enforced under a "separate but equal basis." Not until \textit{Brown v. Board of Education}, does the Court's imagination spread beyond \textit{Plessy}; though even then, the Court demonstrates that in some means its imagination is still constrained.

\textsuperscript{76} See \textsc{Auden}, \textit{supra} note 15, at 74.  
\textsuperscript{77} \textsc{White}, \textit{supra} note 2, at 5.
1. **Before Plessy—The Civil Rights Cases**

Following the Civil War, the move toward integrating African-Americans fully into the social make-up of the Constitutional republic began to take shape. Over the five years following the Civil War, three Constitutional amendments and several legislative acts attempted to transform the American Constitution from one that primarily imposed "a system of negatives" to one that "imposed duties on the national government to 'act positively, as an instrument, to realize purposes that had inspired the creation of the nation.'" Namely, in 1865, the Thirteenth Amendment was ratified, ending slavery in the United States; in 1868, the Fourteenth Amendment’s extension of due process was ratified; and in 1870, the Fifteenth Amendment’s prohibition of laws abridging or denying the right to vote based on race, color, or previous condition of servitude was ratified. In 1866, Congress passed the Civil Rights Act of 1866 which, among other things, entitled all persons to the full and equal enjoyment of inns, land sales, and admissions to theatres and public amusement venues, "regardless of race, color or any previous condition of servitude."

In 1883, six cases came before the Supreme Court by individuals challenging prosecutions under the 1866 law for failure to admit African-American persons into various venues. The decision, as framed by Justice Bradley, "is the Constitutionality of the law, for if the law [was] unconstitutional, none of the prosecutions could stand." In determining the question, Justice Bradley considered each of the three Constitutional amendments individually. As to the Fourteenth Amendment, Bradley found that no Congressional authority could be found since the Amendment was one of prohibition aimed at the States— "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." Indeed, Justice Bradley states the issue succinctly:

[U]ntil some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the [F]ourteenth [A]mendment, no legislation of the United States under said amendment, nor any

---

79. Id.
80. Id. at 145.
81. Id. at 144.
83. See The Civil Rights Cases, 109 U.S. 3 (1883).
84. Id. at 9.
85. Id.
proceeding under such legislation, can be called into activity, for the prohibitions of the amendment are against [S]tate laws and acts done under [S]tate authority.\textsuperscript{86}

Thus, according to Justice Bradley, the Fourteenth Amendment could never be read as doing anything more than serving as a shield against discriminatory conduct; it could be no sword for Congress to utilize.

Similarly, Justice Bradley did not find the Congressional authority in the Thirteenth Amendment either. While the Thirteenth Amendment was a Constitutional sword that eradicated slavery,\textsuperscript{87} the narrow question that the majority settled upon was whether the exclusion from venues by virtue of race or color was an incident of slavery.\textsuperscript{88} The majority concluded it was not.\textsuperscript{89} In so concluding, Bradley, writing for the majority, noted this interesting connection:

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses.\textsuperscript{90}

The Court noted that these incidents were ultimately eradicated by a combination of the Thirteenth and Fourteenth Amendments; but any power of Congress to act is not found in the amendments' "corrective character."\textsuperscript{91}

Perhaps most significant in the Court's decision in \textit{The Civil Rights Cases} is the emergence of political choice as the fire brand of change. Implicitly, the Court recognizes that decisions such as were made are of a political character:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be

\textsuperscript{86} The Civil Rights Cases, 109 U.S. 3, 13 (1883).
\textsuperscript{87} See id.
\textsuperscript{88} The Civil Rights Cases, 109 U.S. 3, 23 (1883).
\textsuperscript{89} Id. at 25.
\textsuperscript{90} Id. at 22.
\textsuperscript{91} Id.
the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty, and property the same as white citizens; yet no one, at that time, thought that it was any invasion of their personal status as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the thirteenth amendment, (which merely abolishes slavery,) but by force of the fourteenth and fifteenth amendments.92

Justice Bradley's call for the African-American to now cease as a "special favorite" and instead to find his place in the political process (the reference toward the Fifteenth Amendment) is interesting in the least, given that the law in question was a direct result of the political process.

Justice Harlan seems to recognize that the Civil War Amendments, together with the legislation derived—not from a single act of emancipation, but as a whole—were designed to initiate the black man wholly into society. Harlan begins with a strong assertion: "the substance and the spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism.”93 That verbal criticism rejected a holistic view of the amendments; that the Thirteenth, Fourteenth, and Fifteenth Amendments were "adopted in the interest of liberty and for the purpose of securing through national legislation . . . rights inhering in a state of freedom, and belonging to American citizenship.”94 For Harlan, the Civil War Amendments and their reference to "badges of slavery and servitude" could not be interpreted away from either the prior history of slavery in America nor the prior legislation by Congress that made such history possible. Therefore, as Harlan suggests, the same powers which Congress used to enforce the fugitive slave acts in the early nineteenth century should also stand under the Thirteenth and

93. The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J., Dissenting). Harlan quoted the previous Supreme Court decision Oldfield v. Marriott, 51 U.S. 146, 156 (1850): "It is not the words of the law, but the internal sense of it that makes the law. The letter of the law is the body; the sense and reason of the law is the soul.” Id.
94. Id.
Fourteenth Amendments to provide federal enforcement here.

What is more, the Supreme Court seems to recognize that the powers of the Fourteenth Amendment certainly encompass distinctions based on status. In *Yick Wo*, the Court decided the case as falling within the "broad and benign provisions of the Fourteenth Amendment." Yet, such conclusions were found to be more aberrational than reflective of the equalizing power of the Fourteenth Amendment. In the words of one scholar, despite the fact that the *Yick Wo* opinion seemed to put some "teeth into the equal protection mandate [of the Fourteenth Amendment] . . . these early hopes were dashed just ten years later when the court upheld so-called separate but equal racially segregated train accommodations in *Plessy v. Ferguson*.

*Plessy v. Ferguson* was ultimately decided in the shadow of this debate. The question of whether a state could designate "separate but equal" provisions was certainly a question of tolerable prohibition—but as the Court in *Plessy* decided, such a law was not prohibited by the Fourteenth Amendment. The Court never broadened its opinion, (in *Plessy* or after) that such acts did not violate the Thirteenth Amendment. The imagination of the Court in deciding *The Civil Rights Cases* is virtually indeterminate—bound to the prior social view of the Constitution as an instrument primarily designed to not interfere with the social relationships. The Court’s finding that the Fourteenth Amendment did not create a requirement that African-Americans be placed on the same social plane as whites is eerily similar to Justice Bradley’s opinion sixteen years earlier, stating that the Fourteenth Amendment did not equip Congress with the power to enforce equality. Not only was Congress without power to prevent the continued class segregation, the Constitution supposedly did not even try to address the question. The Court rather reverted to its previous system of negatives instead of looking at the purpose—the normative narrative for which the Amendments were intended.

2. AFTER PLESSY—SEPARATE IS STILL EQUAL

*Plessy* does not stray from the sense of dominant community expectations. Rather, those expectations influenced the Court’s decision to avoid its legal imagination. *Plessy’s* constraint is tied to more than the social expectations surrounding segregation; it is also tied to the legal expectations of what the Fourteenth Amendment could do and what it could

not. Bound in thought with Justice Bradley in *The Civil Rights Cases*, the Court reinforced the idea that the Constitution demanded nothing in the order of social re-engineering during the years following the Civil War.

Consider that one way of explaining the Court’s treatment of race-based rights cases after *Plessy v. Ferguson* to *Brown v. Board of Education* was to read the issues of the case in a way to leave intact, as much as possible, the prohibitive view of the Fourteenth Amendment. The Court’s expansion and then retraction, and ultimate dismantling of the standard of “separate but equal,” is a primary demonstration of the Court’s recognition that its old ideas continue to pervade new issues. For example, the Court in *Guinn v. United States* considered whether an Oklahoma amendment to its state constitution—allowing a literacy test excluding certain African-American citizens from voting—violated the Fifteenth Amendment’s grant of suffrage. This question was posed by the Court not as a question of African-American suffrage—the issue that spawned the dispute—but rather as suffrage *qua* suffrage. Thus, by avoiding the real issue at stake, the Court reiterated the idea that the classes could have separate rights, as long as they were equal. Similarly, the Court in *Buchanan v. Warley* addresses the issue of whether a white person could be prohibited from selling a house to an African-American in the face of city zoning segregationist requirements. The Court posed the question not for what it was—legislation that sought to deprive African-Americans from certain real-estate markets—but rather for what was least corrosive of the *Plessy* Doctrine—whether the law stripped the seller of a property right by restricting the persons to whom he could sell to.

In another example, the Court appears to chip away at the *Plessy v. Ferguson* holding by implicitly stating that its holding is still valid. Indeed, in *Missouri v. Gaines*, the Court considered whether the State of Missouri’s failure to provide equivalent graduate education violated the Fourteenth Amendment. The Court, noting that the right pursued was a personal right, stated:

It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

98. 238 U.S. 347, 349 (1915).
100. *Id.*
102. *Id.* at 351.
In doing so, the Court avoided the *Plessy v. Ferguson* question, while at the same time using the *Plessy* reasoning as its basis for decision. As it turns out, separate was not equal, nor could it have been in that case. Therefore, in a discreet tweak of language, the court ignored the *Plessy* problem and at the same time reiterated its presence in the law.

**C. BROWN v. BOARD OF EDUCATION—NEW IMAGINATION, OLD PROBLEMS**

Even when the Court finally decided, in *Brown v. Board of Education*, to dismantle the *Plessy* construction, it can be argued that the ghosts of *Plessy*'s fruits found their way into the construct the Court used to phrase its expectation of relief. Consider that the Warren approach of “deliberate speed” (i.e. meaningful, slower, processed speed) was a rational means of confronting the empire of racial segregation laws. Complaints about what *Brown II* does not contain (silence in the face of speech) seems to ignore the broader problem in the Empire—one of the idea of equality. That is, in one sense, *Plessy v. Ferguson* was exactly correct—the law could order that blacks and whites be treated on equal ground, a super-*Plessy v. Ferguson* decision that could have spelled out how equality would be shaped,

103 but law could never change the minds of individuals who had been immersed in racism and rhetoric of inequality for their entire lives. The only hope for defeating the Empire of Force of racial superiority—the thing that could bring the legal idea of complete integration to action—was time: the time to be silent before the idea; time to contemplate its nature; time to reflect on how to oppose racial ignorance diligently, intellectually, and consistently; and frankly, time for old ideas and generations to expire. The *Brown* phrasing then carries the double exilic meaning: on the one hand, *Brown* springs forth and represents the start of a new period of meaning; at the same time, *Brown* is an exile—abandoned recognition that the law can go only so far.

This is exactly the loneliness that White envisions as a “discreet quiet”—the purposeful silencing of voices that renders one a responsible member of the polity both by expressing the idea in his own self-defining way and gaining the sympathy to hear others in the same way. In one sense, White’s framework suggests that the lawyer-scholar be distinct enough from his community so that he can gain his voice in the law; in another sense, White recognizes that the lawyer-scholar never completely removes himself from the past imperfections of ideas that we do not completely embrace. By recognizing that our ideas (both of our mind and in the law) are both products of ingenuity and repetition, we free ourselves

Loneliness and the Law

to be self-defining and, thus, stand the best opportunity for finding our own voice in the law.

III. UNCOVERING THE POWER OF MEANING

Ultimately, White's work on self-definition describes an innate desire among humans to seek meaning and not just shallow, baseless answers. White says that the search for meaning by imagining the world is "perhaps the most fundamental of all [desires]" and necessarily includes the ability of the scholar to perceive himself in that world, rather than just around it. This Article suggests that law-minded people have great difficulty doing this, while those of the literary mind seem to find contemplation in all phases of loneliness. Our ability to imagine the world requires not only a picture from the Ivory Tower, the bench, or the law firm skyscraper, but also must include those perspectives necessarily excluded from our ordinary perception. As White points out, the virtue of Dante for the legal mind, is the ability to picture the "whole universe."

Literary characters, perhaps because their creators strive to create contemplative persons, tend to end their struggles in contemplation. Stephens, though meshed in a world of indeterminacy and isolation, finds at the end of The Remains of the Day a view both backwards and forwards:

It is now some twenty minutes since the man left, but I have remained on this bench to await the event that has just taken place—namely the switching on of the pier lights. As I say, the happiness with which the pleasure seekers gathering on this pier greeted this small event would tend to vouch for the correctness of my companion's words; for a great many people, the evening is the most enjoyable part of the day. Perhaps, then, there is something to his advice that I should cease looking back so much, that I should adopt a more positive outlook and try to make the best of what remains of my day . . . . Surely it is enough that the likes of you and I at least try to make our small contribution count for something true and worthy. And if some of us are prepared to sacrifice much in life in order to pursue such aspirations, surely that is in itself, whatever the outcome, cause for pride and contentment.

Raskolnikov's tale ends in similar contemplative satisfaction, despite beginning in unbalanced ressentiment. As Dostoyevsky tells of Rodia's transformation in the prison:

104. WHITE, supra note 2, at 101.
105. Id. at 102.
106. ISHIURO, supra note 16, at 244.
The evening of that very day, with the barracks locked, Raskolnikov lay on his bunk and thought of [Sonia]... Everything had changed now.

He thought of her. He recalled how he had constantly caused her pain; he recalled her pale, skinny little face. These memories did not grieve him now; he knew the infinite love with which he would redeem her suffering.

What did they amount to, all those torments! Everything—even his crime, even sentence and exile—seemed to him now, in his first outburst of feeling, strange and superficial, as though it had not actually happened to him. He could not think very long or steadily about anything that evening or focus his mind on anything; nor did he come to any conscious decision; he had merely become aware. Life replaced logic, and in his consciousness something quite different now had to elaborate and articulate itself.107

Thus, with both Raskolnikov and Stephens, loneliness ultimately leads to contemplation of life over form.

But, not so in the law. Indeed, ressentiment very rarely leads to contemplation. Indeterminacy rarely becomes contemplative. Rather, they tend to remain static and unmoved despite the compelling forces around them. To prove this assertion, this Article turns to the latest Supreme Court case taking up the American racial conundrum—Parents Involved in Community Schools v. Seattle School District No. 1.108 Recall that Parents Involved decided two public school desegregation cases—one originating in the Seattle, Washington school district and one originating in Jefferson County, Kentucky.109 In each case, the desegregation plan at issue was designed with the end of promoting racial inclusion.110 Nevertheless, the majority struck down the plans, stating that racial inclusion in the classroom was not a compelling enough government interest to support government-coerced desegregation.111 This Article raises two primary concerns with the Parents Involved majority (or plurality—however one sees fit to view Justice Kennedy’s proper place): the majority’s use of procedural reach to block the imaginative meaning of the law, and second, the misinterpretation of meaning.

First, the majority separated the applicability of a desegregation plan

107. DOSTOYVSKY, supra note 24, at 521-22.
109. Id. at 2741.
110. Id.
111. Id. at 2752.
based on whether the school district was under a desegregation decree in the first place, and whether the district was still subject to that decree.\footnote{112} Justice Roberts, writing for the plurality, noted that:

[T]he Seattle Public Schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. [But], in 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had “eliminated the vestiges associated with the former policy of segregation and its pernicious effects,” and thus had achieved “unitary” status.\footnote{113}

The end that the Roberts plurality seems to cling to is that some sort of legal order of desegregation would be necessary to satisfy the compelling interest of righting past wrongs.

Justice Breyer, in his dissent, demonstrated the backward nature of such an inquiry. After detailing the histories of both school districts, Breyer summarized the questions raised about the type of historical desegregation at issue:

Was it \textit{de facto}? \textit{De jure}? A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? . . . Are courts really to treat as merely \textit{de facto} segregated those school districts that avoided a federal order by voluntarily complying with \textit{Brown}'s requirements.\footnote{114}

Justice Breyer’s ringing questions point to the fact that the majority uses law to block the imagination of law from being fulfilled. In essence, the indeterminate position that the majority takes rejects the grander vision of law’s integration for a narrow purpose—to remedy past segregation.

Justice Kennedy’s opinion (arguably the controlling opinion of the

\begin{small}
\footnotesize
114. Id. at 2810-11. De facto segregation did not, under Constitutional precedent, raise the impetus to desegregate; on the other hand, de jure segregation did create an affirmative duty on behalf of the state. \textit{Compare} Green v. Sch. Bd. of New Kent County, 391 U.S. 430, 437-38 (1968) (“School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”), \textit{with} Milliken v. Bradley, 418 U.S. 717, 745 (1974) (“[A]n interdistrict remedy would be appropriate to eliminate interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”).
\end{small}
case) sides with the majority on its reading of de jure and de facto segregation, but attempts to do so in a narrative distinct from the other members of the majority. After describing the interchangeable effects of culturally imposed segregation and legal segregation, Kennedy argues for a race-less narrative to the Constitutional order:

The distinction [between de jure and de facto segregation] ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government’s systematic classification of each individual by race. There, too, the distinction serves as a limit on the exercise of a power that reaches to the very verge of Constitutional authority. Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. \(^{115}\)

For those stated reasons, Kennedy was not willing to depart from the traditional standard of allowing race to be used as a sole measure only where the government engages in some form of segregation. \(^{116}\) But, Kennedy’s narrative is broader than just government-action oriented. Consider the following at the end of the Kennedy concurrence:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, and interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another school’s demand. \(^{117}\)

For Kennedy, the question was not whether the schools at issue were ever subject to a desegregation order or whether they, having once been segregated, have come out of segregation. Rather, the question was whether the segregation plan at issue turned solely on the racial

\(^{116}\) Id.
\(^{117}\) Id. at 2797.
Loneliness and the Law

composition of the individual, which would tend to create a "stigmatizing" fate. One scholar identifies this as the domain-centered awareness of Kennedy—realizing the "dawning awareness of the relationship" between "associational and expressive dimensions of race identity."\(^\text{118}\)

Second, and perhaps more alarming, is the way the majority distorted the clear meaning of \textit{Brown} and reassigned it new meaning. The plurality did so in three discreet ways. The first way was by over-inclusion. As Justice Stephens noted in his dissent, the Roberts opinion, by characterizing the \textit{Brown} opinion toward \textit{all} school children, omitted the real impetus—creating equality for \textit{black} school children.\(^\text{119}\) As Stephens noted, "the Chief Justice fails to note that it was only black school children who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools."\(^\text{120}\) By retracting \textit{Brown} from the context of curing the immediate problem of racial exclusion, the Court was able to create a broader principle (which perhaps is true) but which rendered \textit{Brown} virtually meaningless in today's world.

The second way was by disassociation. That is, the plurality confined the imaginative breadth of \textit{Brown} by removing the possibility that the Constitution has anything to say about race and racial balance. In what can only be called a strange and ironic passage, Thomas stated:

In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to "solve the problems at hand," the Constitution enshrines principles independent of social theories. Can we really be sure that the racial theories that motivated \textit{Dred Scott} and \textit{Plessy} are a relic of the past, or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow.\(^\text{121}\)

In other words, Justice Thomas and the plurality want to cast the Constitution as a document that says little to nothing about race and how we as different races get along. That vision is perhaps just too inimical to


\(^{120}\) \textit{Id.}

\(^{121}\) \textit{Id.} at 2787-88.
effectively tell us anything about the Constitution and its values—besides ignoring, among other things, the Constitutional provisions relating to the slave trade, fugitive slave laws, and the Thirteenth, Fourteenth, and Fifteenth Amendments. If anything, Justice Thomas's disassociation is another example of indeterminacy. Contemplation would suggest that the Constitution has an incredible amount to say about race—namely how the different races live in harmony with one another.

The third problem that we in the law face in attempting to configure this approach is the necessity to picture ourselves not in the places of the material, but in the spaces of the imagination—and the results of so doing. A place/space orientation describes the differences between being bound by the physically present and choosing to allow our imaginations to release those bonds.122

On the one hand, law seeks out silent spaces and those spaces tend to juxtapose against its noises. Often, the noises we hear remind us of former spaces in which we lived. When the law is spoken for, it defines a place—a certainty by which it incorporates the unspoken silence into the material world. That silence—the space of the law—might be said to be the underlying norms of what the law aspires to be. For example, consider that the silence left by Brown might be the loss of important structures of black culture that arose as a result of Plessy's separate but equal language. One such ill of desegregation is the remnant of historically black colleges and universities that remain under-funded and, for the most part, out of the consciousness of the American political voice.123 One might suggest that these universities are left in the places of Plessy—a stark reminder that equality has not been achieved—while the social structure tries to reconcile the spaces of Brown.124 Thus, in the resurrecting of ideas into space, we must be careful that we do not leave vestiges of the old stuck in places that no longer correlate to their spaces—therefore challenging us morally regarding the idea shift in the first place.


124. Another example of this deals with those historic African-American communities, which once thrived as a center for both arts and commerce, but now seem to whither away. For a challenging treatment of the effects of racial resentment, and the subsequent response, see generally ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002).
Loneliness is a virtue. It reminds us that we are individuals that live in a community. It embraces the individual’s coming into contact with an idea that is outside the social norm, reconciling his own insecurities about the idea, and channeling the power into its most visible form. It is also about the rewriting of stories, so that, like Stephens and Raskolnikov, we may tells stories of "rebirth, of [our] gradual transition from one world to another, [our] acquaintance with a new reality of which [we] had been completely ignorant."¹²５ Brown v. Board of Education in its best light, transitions us from one world to another, where we imagine anew the community in which we dwell.

¹²５ DOSTOYVSKY, supra note 24, at 522.