

Revealing Privilege—*Why Bother?*

Danielle Kie Hart*

ABSTRACT

Fifteen years ago, Stephanie Wildman wrote a provocative and compelling book entitled Privilege Revealed: How Invisible Preference Undermines America, with contributions by Margalynne J. Armstrong, Adrienne D. Davis, and Trina Grillo. In a thorough but concise examination of different and seemingly unrelated topics including, among others, housing, the workplace, and language, Wildman made visible what was and, unfortunately, remains the hidden but normative baseline of whiteness, maleness, and heterosexuality against which all “others” are judged. More than that, the book revealed that institutionalized but invisible systems of privilege define and continue to uphold the status quo. In this short Essay, I delineate what I perceive to be Wildman’s challenge to progressives to reveal privilege in the work we do. But I also question whether taking up Wildman’s call to arms is even worth doing. After all, as Derrick Bell told us, inequality is here to stay. So, why bother challenging it? The short, honest answer is that we challenge inequality because we must. I therefore take up Wildman’s challenge by revealing privilege in contract law in the form of class privilege and bargaining power.

* Professor of Law, Southwestern Law School; LL.M. Harvard Law School; J.D. William S. Richardson School of Law, University of Hawaii; B.A. Whitman College. Southwestern Law School provided generous research support for this Essay. My sincere thanks go to Gowri Ramachandran for reading and commenting on various drafts. I would also like to thank the editors at the *Washington University Journal of Law & Policy*.

TABLE OF CONTENTS

INTRODUCTION	132
I. REVEALING PRIVILEGE	133
II. DERRICK BELL— <i>WHY BOTHER?</i>	136
III. CLASS PRIVILEGE REVEALED IN CONTRACT LAW	141
CONCLUSION	147

INTRODUCTION

In 2011, the Law and Society annual meeting was held in San Francisco. I was lucky enough to be invited by my friend, Lisa Ikemoto, to attend a lunch following a panel. All the panelists attended the lunch, including another friend, Stephanie Wildman. At one point during the lunch, Stephanie said that she still used her book, *Privilege Revealed: How Invisible Preference Undermines America*,¹ in her teaching, but she was seriously considering whether she should discontinue doing so. Stephanie specifically wondered about the book's continuing relevance—or at least that is how I remember the conversation going.

My memory of the specifics of the conversation at that lunch may be a little sketchy. But I distinctly remember being struck dumb by Stephanie's comment. How could she possibly think that *Privilege Revealed* might no longer be relevant? Had she gone mad? I remember expressing my shock to Stephanie (though I probably kept my concern about her mental health to myself).

After the lunch was over, however, I started to think about Stephanie's book and the concept of "privilege" that she brought to light in it. I realized that I had not been focusing on privilege in my own work and instead focused on oppression. In fact, in talking to friends and colleagues and in taking a quick look at some of the anti-subordination literature, I realized that "privilege" was not being used (at least not regularly) in the discourses in which my friends, colleagues, and I participate. So, I am especially grateful for the

1. STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

opportunity to participate in this symposium, which explores the concept of privilege and attempts to revitalize the discussion of privilege in its many iterations (race, gender, class, sexual orientation, etc.) to better understand its role in reinforcing and reconstituting hierarchy.

In Part I of this Essay, I delineate what I perceive to be Wildman's challenge to progressives to reveal privilege in the work we do. Then, in Part II, I question whether taking up Wildman's call to arms is even worth doing. After all, as Derrick Bell told us, inequality is here to stay. So, why bother challenging it? The short, honest answer is that we challenge inequality because we must. In Part III, therefore, I take up Wildman's challenge by revealing privilege in contract law in the form of class privilege and bargaining power.

I. REVEALING PRIVILEGE²

In 1996, Stephanie Wildman (with contributions by Margalynne Armstrong, Adrienne D. Davis, and Trina Grillo) wrote a book called *Privilege Revealed: How Invisible Preference Undermines America*.³ As the title of the book indicates, Wildman calls specific attention to the idea of "privilege" and argues that this concept has not "found articulation in legal vocabulary."⁴ She argues further that until dominant culture recognizes both the concept of privilege and the fact that systems of domination are premised on it, justice and fairness in the rule of law is simply unachievable.⁵ One of the challenges for those of us committed to resisting oppression, therefore, is to reveal privilege.

2. Much of the discussion in this part of the Essay is taken from the first chapter of *Privilege Revealed*, entitled "Making Systems of Privilege Invisible." Wildman wrote this chapter with Adrienne D. Davis. I want to explicitly acknowledge Davis's contributions and express my gratitude to her for her work, because this first chapter in particular had and continues to have a profound impact on how I see the world. For ease of reference, however, and as a continuation of the lunch conversation I had with Stephanie, I refer in the text only to Wildman. In so doing, I do not mean to diminish Davis's contributions to the *Privilege Revealed* project.

3. WILDMAN, *supra* note 1, at 3.

4. *Id.* at 141.

5. *Id.* at 142.

According to Wildman, privilege is sometimes defined as “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste.”⁶ Alone, however, this definition is inadequate. Wildman claims that privilege also includes several other attributes. Specifically, members of privileged groups possess privilege, but their privilege is invisible to them.⁷ That privilege is invisible because the characteristics of the members of the privileged group itself define our social norms. Those norms then become part of the “common sense” of society—that is, they simply describe the way things are and define what is normal in society.⁸ Finally, because privilege is invisible and just part of the neutral and natural fabric of society, the holder of privilege is able to choose whether to object to oppression.⁹

But privilege is not just an individual phenomenon or the simple by-product of group membership. It is also the result of the power relationship that produces it.¹⁰ Thus, for example, Wildman argues, “White privilege derives from the race power system of white supremacy. Male privilege and heterosexual privilege result from gender hierarchy.”¹¹ Under this view, therefore, a “system of privilege” is one that distributes advantages to certain people based on a particular hierarchy.

By calling specific attention to privilege, Wildman thus brings into focus two different but related things: the role of language and the frame from which we view the world. Language, she argues, plays an important role in the regeneration of privilege.¹² We use language to help us understand the world around us. As such, we tend to classify the world by sorting things into categories, like race and gender.¹³

6. *Id.* at 13 (quoting the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978)).

7. *Id.* at 13–14.

8. *Id.* at 14.

9. *Id.* at 16.

10. *Id.* at 17.

11. *Id.*

12. *Id.* at 9–10, 178.

13. *Id.* at 9–10.

Categorization ultimately creates binary oppositions, like white/Black, man/woman, and straight/gay, because we cannot understand something without comparing it to something else.¹⁴ Thus when we think of gender, for example, we usually think of male/female. To talk about privilege, therefore, creates the binary opposition of privileged/unprivileged. Indeed, the classification “privileged” simply cannot exist absent its antagonistic opposite because one side of the pairing without the other is devoid of meaning.¹⁵

Despite the seeming neutrality of our linguistics (i.e., Black/white, male/female), our pairings are not neutral. Rather, the inherent logic of these paired oppositions is one of hierarchy—the dominant over the dominated¹⁶—though this is never explicitly stated. One side of the pairing is more valued and rightly belongs in the social world, while the other side of the pairing, less valued by comparison, does not. Language—the very words we use—therefore masks the privilege and power inherent in the dominant side of these oppositional pairings by making our categories and pairings seem neutral, natural, and unobjectionable.¹⁷

Hence, by challenging us to reveal privilege, Wildman is asking us to focus on the dominant side of the privileged/unprivileged pairing. This challenge is really a call to shift the frame from within which we both view the world and situate our work—not an insignificant undertaking.

At its most basic level, a “frame” is a tool that enables people to make sense of the world around them.¹⁸ But the process of framing is an active one because the purpose of framing is to fashion specific and ultimately shared understandings of the world that not only legitimate the meaning(s) proffered but also the response(s) to those

14. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 3–7, 49–53 (1990).

15. See generally DAVID SWARTZ, CULTURE AND POWER—THE SOCIOLOGY OF PIERRE BOURDIEU 84–88 (1998); see also Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812 (1987).

16. SWARTZ, *supra* note 15, at 85–86.

17. WILDMAN, *supra* note 1, at 9–10.

18. See Danielle Kie Hart, *In a Word*, 41 SW. U. L. REV. 215, 217 (2012).

meanings.¹⁹ In this way—by influencing what people think and how they think about it—the frames we choose to use can help shape reality.²⁰ By challenging us to shift the frame to the privileged side of the privileged/unprivileged pairing, Wildman is challenging us to re-imagine the world.

But, practically speaking, what would shifting the frame in this fashion actually accomplish? To be entirely honest, I am not sure what the practical effects of revealing privilege will be because there is an endless list of “isms” to confront—racism, sexism, heterosexism, ableism, etc. So, the question that must be considered is whether we should even take up Wildman’s challenge to reveal privilege, which brings me to Derrick Bell.

II. DERRICK BELL—*WHY BOTHER?*

In his book, *Faces at the Bottom of the Well*,²¹ Derrick Bell tells a story about space traders that come to earth.²²

Briefly, the story goes like this: space traders come to earth from outer space and offer to give to the United States through its government everything needed to solve all of the major problems facing the country. In exchange, the United States has to agree to give the aliens *all* of its African American citizens to an uncertain future.²³

The space traders’ offer was debated. Business leaders, for example, recognized that African Americans were absolutely critical to maintaining social and economic stability and attempted to convince the American people to reject the trade.²⁴ Without Blacks, poor, working class, and middle-class whites would no longer have anyone below them in society and, as a result, they might “look upward toward the top of the societal well and realize that they as

19. *Id.* at 217–19.

20. *Id.* 219–20; *cf.* ANDREW EDGAR & PETER SEDGWICK, CULTURAL THEORY: THE KEY CONCEPTS 351 (1999) (arguing that language *is* reality rather than a frame through which we perceive reality: “. . . language . . . do[es] not merely correspond to a pre-existing . . . reality. Rather, language is seen as constituting the reality we experience.”).

21. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

22. *Id.* at 159–94.

23. *Id.* at 159–60.

24. *Id.* at 181.

well as the blacks below them suffered because of the gross disparities in opportunities and income.” But the government had a different view.²⁵

The question as to whether to accept the space traders’ offer was put to a vote. The American people ultimately and overwhelmingly agreed to the space traders’ terms—after those terms were amended to allow *some* African American “detainees” to remain on earth with drastically reduced citizenship privileges.²⁶

The story of the space traders illustrates one of the main themes in Bell’s work, namely, that racism is permanent.²⁷ As long as white people are in power, he argued, nothing will ever change.²⁸

The story, particularly the part where business leaders explicitly acknowledge the stabilizing/deflecting role African Americans play in American society, also illustrates that *they* need *us*. For any dominant/dominated pairing to work, *they* need *us*. They need us to be divided, fearful, suspicious of each other, complacent, and even complicit in our own oppression. What this tells us, then, is that it is not in *their* best interest to have *us* be otherwise. How do we or can we move forward under these circumstances?

This question leads to Frederick Douglass, the American abolitionist, author, and former slave. Douglass wrote more than a century ago that “[p]ower concedes nothing without demand. It never did and it never will.”²⁹ So, how do we move forward with this reality? The answer, sadly, is not very easily.

In *Whiteness as Property*,³⁰ for example, Cheryl Harris documents the transformation of the concept of “whiteness” from literally just a description of skin color to a property right with legal and social

25. *Id.* at 181–82.

26. *Id.* at 192–93.

27. See generally Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 *HOW. L.J.* 79 (1991).

28. *Id.* at 79–80.

29. TWO SPEECHES, BY FREDERICK DOUGLASS; ONE ON WEST INDIA EMANCIPATION, DELIVERED AT CANANDAIGUA, AUG. 4TH, AND THE OTHER ON THE DRED SCOTT DECISION, DELIVERED IN NEW YORK ON THE OCCASION OF THE ANNIVERSARY OF THE AMERICAN ABOLITION SOCIETY, MAY, 1857, at 22 (C.P. Dewey, Printer, American Office 1857), available at <http://www.loc.gov/resource/mfd.49004/#seq-1>.

30. Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709 (1993).

value and consequences.³¹ And in her article, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*,³² Angela Harris shows that the story of race in this country has been an effort, at least in part, to reconcile our desire to pursue equality norms in the face of the white race's desire to remain dominant.³³ Both of these articles document the reinstatement of hierarchies, specifically of whites over Blacks, consistently and over time.³⁴

Embedded in all of the discussions above but overlooked until now is a question: who is the "us" and the "them" being referenced? As Kimberle Crenshaw tells us, and Wildman echoes, there are so many intersections and strata within us.³⁵ We can be and often are simultaneously oppressors and oppressed. Wildman writes, "there is no purely privileged or unprivileged person."³⁶ A rich, white woman, for example, is privileged by her race and class but could very well be oppressed by her sex. This idea of "intersectionality," therefore, adds complexity and confusion to what is already a seemingly intractable problem.

So, why bother with Wildman's challenge to reveal privilege when this undertaking is so daunting? Before answering this question, I want to acknowledge the privilege inherent in it because it is breathtaking. Unlike so many others, including members of my own family, I can choose not to struggle against oppression³⁷ because oppression is not something I have to contend with on a daily basis. It is not part of my lived experience. I look white and straight; I have never had to go hungry; I have health insurance; I am well educated; I hold a position of authority and power. I am basically insulated from many forms of oppression by my class and skin color.

31. *Id.* at 1715–77.

32. Angela Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923 (2000).

33. *Id.* at 1929.

34. Cheryl Harris, *supra* note 30 *passim*; Angela Harris, *supra* note 32 *passim*.

35. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); *see also* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex*, U. CHI. LEGAL F. 139 (1989); WILDMAN, *supra* note 1, at 20–24.

36. WILDMAN, *supra* note 1, at 21.

37. Wildman argues that one attribute of privilege is the ability of the person with privilege to choose whether to struggle against oppression. *See id.* at 16–17.

So, why bother revealing privilege? Why not just focus on oppression or discrimination? In other words, what does privilege add to anti-subordination theory and discourse? The short answer, according to Wildman and Adrienne Davis, is that focusing only on the subordinated characteristic overlooks the other essential links in the power system, namely domination and the privilege that results from it.³⁸ Davis reiterates, “Like a mythic multi-headed hydra, which will inevitably grow another head if all heads are not slain, discrimination cannot be ended by focusing only on . . . subordination and domination.”³⁹ To overcome oppression, therefore, privilege must be revealed.

But what if oppression cannot be overcome? What if, as Derrick Bell has argued, inequality and racism are here to stay? What difference does it make to reveal privilege then? The answer to this question brings me back to Derrick Bell.

Bell recounts meeting a Mrs. Biona MacDonald in 1964.⁴⁰ Mrs. MacDonald was already a long-time civil rights activist when she and Bell met. At that time, Mrs. MacDonald was working with others in her community near the Mississippi Delta to ensure that a court order mandating desegregation would be implemented. Bell asked “where she found the courage to continue working for civil rights in the face of intimidation that included her son losing his job in town, the local bank trying to foreclose on her mortgage, and shots fired through her living room window.”⁴¹ Mrs. MacDonald replied, “‘Derrick,’ she said slowly, seriously, ‘I am an old woman. I lives to harass white folks.’”⁴² Bell then writes:

Mrs. MacDonald did not say she risked everything because she hoped or expected to win out over the whites who, as she well knew, held all the economic and political power, and the guns as well. Rather, she recognized that—powerless as she was—she had and intended to use courage and determination as weapons “to harass white folks.” Her fight, in itself, gave

38. *Id.* at 19.

39. *Id.* at 20 (quoting Adrienne D. Davis; internal citations omitted).

40. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 378 (1992).

41. *Id.*

42. *Id.*

her strength and empowerment in a society that relentlessly attempted to wear her down. Mrs. MacDonald did not even hint that her harassment would topple whites' well-entrenched power. Rather, her goal was defiance and its harassing effect was more potent precisely because she placed herself in confrontation with her oppressors with full knowledge of their power and willingness to use it.

Mrs. MacDonald avoided discouragement and defeat because at the point that she determined to resist her oppression, she was triumphant.⁴³

I am not an old woman, nor am I Black. So I cannot and do not lay claim to Mrs. MacDonald's story or her history.⁴⁴ But I can learn from it.

I agree with Bell that inequality is here to stay. I do not know if we will make it to the Promised Land envisioned by Dr. Martin Luther King, Jr.⁴⁵ and so many others. But I do know this—like Mrs. MacDonald, I can be defiant. And I will use my defiance “as a weapon, [as] a form of self-expression regardless of any likelihood of success[.]” In short, and specifically because I acknowledge and recognize my own privilege, I choose to struggle against oppression.

So, *why bother?* I bother because it is my fervent hope that by confronting oppression, regardless of whether oppression is ever fully eradicated, we progressives will actually make a difference for the better in the lived experiences of oppressed people. And, at the end of the day, I bother because I believe that challenging oppression is the right and just thing to do. This may not be a completely satisfactory answer to the question, but it is the answer that works for me.

43. *Id.* at 379.

44. In a *Privilege Revealed* chapter written with Trina Grillo, Wildman and Grillo discuss at length the harms caused by drawing analogies to race/racism, such as the appropriation of pain or the rejection of its existence. WILDMAN, *supra* note 1, at 85–102.

45. See Martin Luther King, Jr., *I See the Promised Land*, in THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE 409–19 (Clayborne Carson et al. eds., 1991).

III. CLASS PRIVILEGE REVEALED IN CONTRACT LAW

In this last and final part of this Essay, therefore, I take up Wildman's challenge and reveal privilege in contract law. My main focus here is to establish that the contract law system is premised on class privilege. And to understand class privilege within the contract law system, one must understand what bargaining power is. Thus, I will also sketch the rough outline of an aspect of bargaining power—what I am calling here “embodied” bargaining power—that is overlooked in contract law.

The first part of my argument bears repeating—contract law is a system premised on class privilege.⁴⁶ Here's why: class is embedded in contract law by virtue of the fact that the level playing field is a myth. That is, pre-existing and unequal distributions of property (i.e., land, money, and other resources) are taken as a given and never questioned.⁴⁷ Indeed, unequal distributions are deemed to be natural, apolitical rights that individuals sort out by competing in a free market. But the reality is quite different. Property rights are actually state-conferred rights⁴⁸ that are literally premised on racial and gender subordination because property rights were originally limited to white men.⁴⁹ The truth, therefore, is that the state did not distribute property rights equally from the very beginning.

46. See generally Danielle Kie Hart, *Cross-Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 NEV. L.J. 54 (2011).

47. See generally Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1928) (highlighting the role of the state in creating property rights and critiquing the consequences that directly flow from that role—that power is delegated by the state to owners of private property, which then enables such owners to compel their fellow human beings to do what the owners want, ultimately leading to the unequal distribution of material benefits); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 603–04 (1943) [hereinafter Hale, *Duress*] (discussing and critiquing the unquestioned nature and existence of property ownership (land, labor, etc.) and its relationship to coercion).

48. See generally Cohen, *supra* note 47; Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

49. See, e.g., Cheryl Harris, *supra* note 30, at 1715–77 (discussing the racialized nature of property rights in general and documenting in detail the way in which whiteness was constructed as a property right from slavery through the affirmative action cases of the 1980s); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2122 (1996) (husbands acquired the rights to most of their wives' property upon marriage).

This unequal distribution is then perpetuated and exacerbated over time because one's property rights determine one's bargaining power in the market,⁵⁰ and one's bargaining power ultimately determines what and how much one will be able to acquire.⁵¹ A vicious cycle is thus created because the party with more bargaining power can usually dictate contract terms, which means that the stronger party is able to reap more gains from each contract than it would with less bargaining power.⁵² Given that contracts formed via mutual assent and consideration are generally going to be enforceable,⁵³ the stronger contracting party will also be able to retain the benefits from each of its contracts. Over time, and as a direct result, the stronger party will acquire more resources (money, property, labor, etc.), which thereby increase that party's bargaining power and so on, ad infinitum.⁵⁴

So, to summarize, the contract law system is premised on class privilege because class is a structural feature of that system. Class inequality is then perpetuated or at least facilitated because of the way contract law addresses (or fails to address) bargaining power because most contracts will be enforced regardless of any bargaining power issues.⁵⁵ Thus, class privilege is both obscured (i.e., made invisible) and protected under the rubric of bargaining power. Consequently, to understand class privilege within the contract law system, one must understand what comprises bargaining power—the second step in my argument.

My working definition of bargaining power is that bargaining power consists of anything and everything that gives one party the ability to obtain a greater share of the contract surplus vis-à-vis the other party in a contract setting.⁵⁶ Bargaining power, therefore,

50. Hale, *Duress*, *supra* note 47, at 627–28.

51. Cohen, *supra* note 47, at 13.

52. See generally Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 66 (2011) [hereinafter Hart, *Reality*].

53. See generally Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 198–216 (2009) [hereinafter Hart, *Formation*].

54. Hart, *Reality*, *supra* note 52, at 66.

55. *Id.* at 59–65; Hart, *Formation*, *supra* note 53, at 204–16.

56. Cf. generally Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 150–56 (2005) (an analysis of more traditional bargaining power concepts, arguing that current legal bargaining power doctrine fails to adequately address actual bargaining power

consists of many different components,⁵⁷ including probably the most obvious one, a party's economic assets—money and property. But there is an unfamiliar and overlooked component of bargaining power that I will focus on here. Specifically, *embodied* bargaining power is bargaining power that moves through and with a body. Consider the following:

Home Seeking: Studies show that subprime mortgage loans—an integral part of the Great Recession—were predominantly made to younger, single, or divorced women of color living in minority neighborhoods.⁵⁸ Even amongst this demographic, African American women were disproportionately represented.⁵⁹ Similarly, a housing discrimination study sponsored by the department of U. S. Housing and Urban Development (HUD) and conducted by the Urban Institute in 2000 reconfirmed what earlier HUD studies had found: African American and Hispanic homebuyers *and* renters experienced more housing discrimination in the real estate market than white homebuyers.⁶⁰ The same study also documented housing discrimination in both the sales and rentals markets against Asians, Pacific Islanders, and Native Americans vis-à-vis their white

disparities); Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 974–75 (1984) (arguing that “contract at will” is the most efficient solution in many employment relations, regardless of hypothetical bargaining power disparities).

57. Barnhizer, *supra* note 56, at 153–92.

58. See, e.g., Allen J. Fishbein & Patrick Woodall, *Women Are Prime Targets For Subprime Lending: Women Are Disproportionately Represented In High-Cost Mortgage Market*, CONSUMER FED'N OF AM., Dec. 2006, at 6–11, 15, available at <http://www.consumerfed.org/pdfs/WomenPrimeTargetsStudy120606.pdf> (finding that women, particularly African American and Latino women, were more likely to receive subprime mortgages than men); *Women In The Subprime Market*, CONSUMERS UNION SWRO, Oct. 2002, at 1–4, available at <http://www.consumersunion.org/pdf/women-sub.pdf> (identifying weaknesses in Texas consumer protections that leave women, minorities, and elders vulnerable to predatory mortgage lending practices).

59. See Fishbein & Woodall, *supra* note 58; *Women In The Subprime Market*, *supra* note 58.

60. See *Discrimination in Metropolitan Housing Markets: National Results from Phase 1, Phase 2, and Phase 3 of the Housing Discrimination Study (HDS)*, U.S. DEP'T OF HOUS. & URBAN DEV. (Mar. 30, 2005), <http://www.huduser.org/portal/publications/hsgfin/hds.html> (summarizing the study's findings and linking to the actual study components); see also Julia Reade, *Testing for Housing Discrimination: Findings from a HUD Study of Real Estate Agents*, FED. RES. BANK OF BOS. CMTYS. & BANKING, Spring 2003, at 10, available at <http://www.bos.frb.org/commdev/c&b/2003/spring/testing.pdf>.

counterparts.⁶¹ Another more recent study containing over 400,000 observations finds that African American households “pay on average 3 percent more for [rental] housing than their white counterparts.”⁶² Finally, a 2005 HUD study conducted by the Urban Institute measured discrimination in the rental market against persons with disabilities and concluded that people with disabilities suffered significant levels of adverse treatment compared to home-seekers without disabilities.⁶³ In fact, the study found that adverse treatment of people with disabilities occurred even more frequently than adverse treatment of African American or Hispanic renters in the same housing market.

Car Buying: Professor Ian Ayres conducted a well-known study of car dealerships in Chicago to determine whether race and gender discrimination were present in new car negotiations.⁶⁴ He found that white males were offered better prices on new cars than African Americans and women. More specifically, white women testers had to pay 40 percent higher mark-ups than white men, Black men had to pay two times the mark-up, and Black women had to pay more than three times the mark-up of white men.⁶⁵ A subsequent study by Ayres confirmed the finding that car dealers routinely offered lower prices to white men and offered all Black testers significantly higher prices than white males.⁶⁶ But, unlike the original study, the subsequent study found that Black males were charged higher prices than Black females.⁶⁷

Job Seeking: There is a stark gender disparity within academic science. A recent study conducted by scientists at Yale attempted to

61. See *Discrimination in Metropolitan Housing Markets*, *supra* note 60.

62. Dirk W. Early et al., *Do Blacks Pay More for Identical Rental Housing and Do Whites Pay a Premium to Live in Predominantly White Areas? Evidence from HUD's Housing Voucher Program* (paper presented at the Am. Real Estate & Urban Econ. Ass'n Meeting in Denver, Colo., Jan. 6–9, 2011, on file with author).

63. See MARGERY AUSTIN TURNER ET AL., URB. INST., *DISCRIMINATION AGAINST PERSONS WITH DISABILITIES: BARRIERS AT EVERY STEP* (2005), available at <http://www.hud.gov/offices/fheo/library/dss-download.pdf>.

64. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817 (1991).

65. *Id.* at 819.

66. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 110 (1995).

67. *Id.*

explain this disparity by examining the hiring practices of established scientists at some of the top research universities in the country.⁶⁸ The study found that established scientists, both male and female, unconsciously rated female scientists lower than similarly credentialed male scientists. Established scientists also assumed that women in scientific disciplines were less competent, less employable, and less deserving of mentoring. On average, proposed starting salaries were 14 percent higher for male applicants than female applicants.⁶⁹

Each of the studies discussed above obviously tracks the presence of discrimination based on race, gender, and/or disability in different settings, clearly raising issues of civil rights.⁷⁰ But each of these settings also has a contractual element—they involve contract negotiations to buy or rent a home, to purchase a new car, or to obtain employment.

So, what is it about these *bodies* in these studies that result in better deals for whites in general, and white men in particular, and worse deals for women, people of color, and disabled people? Think apartment hunting for a white, able-bodied man with no apparent disability versus apartment hunting for a disabled, African American woman. Is it enough to talk about what is going on in these contracting situations in terms of discrimination or prejudice? I am not eschewing anti-subordination arguments, but I want to explore this contract question from within the contract law system itself.

Hence, my argument is that there is a type of bargaining power that is literally inscribed on our bodies. And *this type* of bargaining power matters—it must be accounted for, explored, explained, and theorized—because, for reasons already discussed, bargaining power matters in contract law. For example, is the concept of embodied bargaining power that I am describing different from Michel

68. Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. OF AM. 16474, 16479 (2012), available at <http://www.pnas.org/content/109/41/16474.full.pdf+html>.

69. *Id.* at 16475 (“The mean starting salary offered the female student, \$26,507.94, was significantly lower than that of \$30,238.10 to the male student.”).

70. *See, e.g.*, Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e–2000h (1991); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (1990).

Foucault's,⁷¹ Judith Butler's,⁷² Robert Post's,⁷³ or Harlan Hahn's⁷⁴ conceptualizations of the body—and if so, how? In other words, does the concept of *embodied* bargaining power add anything to the theoretical discussions that have already taken place about the social construction of the body? Assuming the concept does add something new or at least different, what, if anything, can contract law do about embodied bargaining power when embodied bargaining power is invisible to contract law?⁷⁵

Answers to these questions are beyond the scope of this Essay. But at least one of them (the last one) brings things full circle. Privilege and inequality exist, even in that ostensible bastion of private law known as contract law, and embodied bargaining power serves as part of the link in the contract law context that enables us to understand the relationship between privilege and oppression. To begin to address privilege and the hierarchy it inevitably masks, Wildman tells us, we must reveal it.⁷⁶ This Essay is therefore a first, small step in that direction.

71. Foucault argued the body itself is a state-created social construct by virtue of the fact that “sex” was a regulatory ideal that functioned not just as a norm, but also as a regulatory practice that produced the very bodies it governed. *See generally* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, AN INTRODUCTION* (1990).

72. Butler argues that subjects are formed through performance. Therefore, understanding how and why bodies are constructed is critical to her theory. *See generally* JUDITH BUTLER, *BODIES THAT MATTER* (1993).

73. Post explores the concept of “lookism” in the context of American antidiscrimination laws. *See generally* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000). Post argues that, under a sociological approach, antidiscrimination laws transform “preexisting social practices, such as race or gender, by reconstructing the social identities of persons.” *Id.* at 31.

74. Within disability studies, disability is understood to be socially constructed, meaning that people’s perceptions of bodily difference create “disabling” conditions that really reflect the interaction of bodies and society’s response to those bodies. *See generally, e.g.*, Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87 (1985); Harlan Hahn, *Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective*, 14 BEHAV. SCI. & L. 41, 45 (1996); Anita Silvers, *Formal Justice, in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13 (Anita Silvers et al. eds., 1998).

75. I plan to take up these questions in a forthcoming article entitled “Bio-Capital.”

76. WILDMAN, *supra* note 1, at 24.

CONCLUSION

So, where do we go from here? Next steps are often difficult to imagine. I, for one, have already included parts of Stephanie's book in the reading materials for my seminar. But more than that, this project to re-examine privilege has given me another tool with which to not only interrogate the workings of the contract law system but also to *reveal* the role that contract law plays in helping to create and perpetuate inequality in American society. Though this realist perspective of contract law is by no means established, the next step is to re-imagine contract law in ways that will reduce contract law's complicity in reproducing and magnifying privilege. But if nothing else comes of this symposium, I really hope Stephanie decides to continue teaching from *Privilege Revealed*. Her lamentation at a lunch, after all, is what prompted this entire project.