

Epilogue: Autonomy as Privilege

Barbara J. Flagg*

Privilege Revealed reflects a paradigm shift in American jurisprudence, from a conception of law and society built upon the classical liberal notion of unfettered individualism to an understanding based on the ways differential burdens and advantages impact individuals' lives and thus ought to play a role in the development and implementation of the law. At first, this may appear to be a case of competing conceptual frameworks—one constructed around a notion of the individual actor abstracted from any social circumstances, the other taking social context to be central to any and every analysis. But I would like to suggest that this is not a competition in which equilibrium has been reached. Taking privilege seriously, as *Privilege Revealed* urges us to do, leads to the conclusion that classical liberal autonomy simply does not exist, and therefore, no just legal system can be built upon that foundation. In this Epilogue, I sketch the outlines of that argument.

“Privilege” is an unusual term in that it’s clearly relational but has no obvious converse. *Privilege Revealed* accepts a definition set forth in the *American Heritage Dictionary of the English Language*: “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste.”¹ Because positions of privilege are “special,” one might infer that there is some implied position of neutrality or normality against which privilege should be measured. Of course, identifying such positions is not the objective of

* Professor of Law, Washington University School of Law. I think I may have been afforded the honor of having the last word in this symposium because I can claim a connection with three of the four authors of *Privilege Revealed*. Though I never knew Trina Grillo, I have enjoyed the friendship of Stephanie Wildman for nearly two decades. Margalynne Armstrong was once my “boss” when she was Director of Academic Support at Boalt Hall School of Law and I was a student tutor in that program. And I now have the pleasure of naming Adrienne Davis as a colleague at Washington University.

1. STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 13 (1996).

Privilege Revealed, but there is a sort of “normality shift” at work. The book seeks to displace a discourse in which positions of relative advantage are themselves normalized: “The characteristics and attributes of those who are privileged group members are described as societal norms—as the way things are and as what is normal in society. . . . The privileged characteristic is the norm; those who stand outside are the aberrant or ‘alternative.’”² Making systems of privilege visible disrupts that process of normalization and so fosters more just assessments, legal and otherwise, of social processes and the individual acts that take place within them.

Privilege Revealed has made an enduring contribution to the project of making specific systems of privilege visible. One could name any of the book’s chapters as exemplars, but for present purposes, I’d highlight “Privilege in the Workplace: The Missing Element in Antidiscrimination Law”³ and “Privilege in Residential Housing.”⁴ The former looks at ways workplace norms, expectations, and practices are built upon unstated male models and so operate to disadvantage women. The latter examines the operation of race privilege and economic privilege in constructing and maintaining patterns of residential housing segregation. The work continues in the present symposium: Professor Hart takes a look at bargaining power privilege in contract negotiations,⁵ and Professor Ikemoto examines what she terms “BioPrivilege”—differential access to various dimensions of medical care.⁶

I select these examples because they show that systems of privilege affect both what happens to the individual—matters entirely outside her control—and the choices she can or cannot make—matters often thought to be within her control. Of course, those aspects of life are intertwined—the circumstances in which one acts affects the choices one can make, and at least some of the time, the

2. *Id.* at 14.

3. *Id.* at 25–41.

4. *Id.* at 43–65.

5. Danielle Kie Hart, *Revealing Privilege—Why Bother?*, 42 WASH. U. J.L. & POL’Y 131 (2013).

6. Lisa C. Ikemoto, *BioPrivilege*, 42 WASH. U. J.L. & POL’Y 61, 74–76 (2013). Again, these examples are not exhaustive.

choices one makes can affect one's larger circumstances.⁷ But whether one considers them jointly or separately, making privilege visible sheds light on both agency and person-as-object, in the sense that one can be a passive recipient or target of external acts and events. Privilege analysis is not merely (as if "merely" was the appropriate term here) a structural perspective; it reaches human agency itself.

Consider John Stuart Mill's classic formulation:

[T]he appropriate region of human liberty . . . comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects . . . Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.⁸

Mill's subsequent discussion focuses on the obligation of government not to interfere with individual liberty so defined, though also recognizing that government does have a role in preventing interference by others.⁹ Throughout, his description of liberty clearly assumes an underlying, absolute human agency: the individual has a pre-social capacity to identify his own "tastes and pursuits" and "plan of life" and to act upon them if not interfered with through the (intentional) acts of government or other individuals.

7. See, e.g., Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

8. JOHN STUART MILL, ON LIBERTY 17–18 (Gateway 1955) (1859).

9. See *id.* at 109–37.

One contrast with privilege analysis is immediately apparent: there is no place in Mill's scheme for the burdens and constraints on individual choice imposed by social structures that are the product of neither governmental nor other individuals' actions. For example, the work of caring for others in the workplace is a burden more likely to be imposed on women than on men because of broader social conceptions of gender, and thus, a woman worker may have a longer and more disparate list of tasks to perform than would a male hired to fill the same position.¹⁰ Women are disadvantaged in the realm of medical care by the normalization of the male body.¹¹ Along similar lines, a person of color demonstrably does not have unfettered freedom of choice in selecting where to live.¹² Privilege analysis illuminates the ways in which social structures—the absence of privilege—operate to limit one's ability to “frame one's life plan”; Mill's approach does not.

But, one might argue, that really is just a matter of inappropriate social norms. If we did not construct the normative world on a male model or assume that whiteness includes an entitlement to white homogeneity in residential neighborhoods, we would not see the scenarios just described. Women would have the same opportunities as men in the workplace and in medical care, and people of color would have the same housing options as do whites. I suggest that this is the point at which it appears that we have competing paradigms for law—should we proceed on the assumption of perfect Millsian autonomy or the premises of imperfect social structures of hierarchy and privilege? But I also suggest that the picture is not yet complete, in that privilege does not involve solely the absence of burdens and constraints. As Martha Fineman has pointed out, autonomy often requires subsidy.

Fineman associates ideals of independence and self-sufficiency with the notion of autonomy.¹³ She makes a very persuasive case that, as she defines those concepts, we do not structure legal policy in such

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

11. Ikemoto, *supra* note 6, at 71–76.

12. *See generally* Haney-López, *supra* note 7, at 48–50.

13. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 7 (2004).

a way as to foster or reward independence; rather, we are “a nation where some individuals are subsidized and supported in their ‘independence’ while others are left mired in their poverty or burdened by responsibilities not equitably shared.”¹⁴ Fineman’s focus is on the ways autonomy conflicts with equality ideals, which is not central here. But the insight that independence requires subsidy, that very few if any individuals are truly self-sufficient, is quite to the point. For example, men are not merely unconstrained in the workplace by models that assume no responsibility for childcare—they are affirmatively subsidized by the care work of others (usually women). Whites do not simply have unfettered choice in regard to housing; we also enjoy racially differential access to mortgage lending, a prerequisite for home ownership, and so are subsidized in our choices by those institutional arrangements. As Professor Hart notes, “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.”¹⁵ The industry in effect subsidizes white mortgagees.

One can elaborate this analysis almost endlessly. The point is that privilege often is exactly what the dictionary definition says it is: a special set of advantages not enjoyed by others. That is, it is an affirmative benefit and not only the absence of burdens and constraints. And if autonomy often (always?) requires subsidy—the work of others, in one form or another—then what remains of the notion of independence? In reality, for human beings there is no such thing; we are all interdependent. Exploration of privilege exposes the ways in which interdependence flows (justly and unjustly), and it obliterates the ideology of abstract autonomy. Such autonomy *is* privilege.

14. *Id.* at 3.

15. Hart, *supra* note 5, at 143.