

Privilege as Property

Bela August Walker*

I. INTRODUCTION

In 2008, after the election of President Barack Obama, voices throughout the nation rose up to declare the beginning of a new epoch in U.S. history: We have now moved beyond race.¹ The vocabulary of colorblindness dates back to at least the nineteenth century, when Justice John Marshall Harlan first declared, “[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.”² Entering the third millennium, rhetoric now focuses on our “post-racial America.”³ In the second term of our seemingly racially transcendental president, however, this symposium looks backwards, all the way to the distant 1990s, to revisit Stephanie M. Wildman’s *Privilege Revealed: How Invisible Preference Undermines America*.⁴

* Associate Professor, Roger Williams University School of Law; J.D. (2003), Columbia Law School; A.B. (1999), Bryn Mawr College. For their sage advice and discerning counsel, I am indebted to M.J. Durkee, Reena Vaidya Krishna, Gowri Ramachandran, Patricia Williams, and, above all, to Jennifer Flynn Walker, whose enduring insight and patience proved equally essential to this project. Greatest thanks to Jennifer Witt and the staff of the *Washington University Journal of Law & Policy* for their excellent editing.

1. See, e.g., Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 5, 2008, at A1 (“Barack Hussein Obama was elected the 44th president of the United States on Tuesday, sweeping away the last racial barrier in American politics with ease as the country chose him as its first black chief executive.”); Shelby Steele, Op-Ed., *Obama’s Post-Racial Promise*, L.A. TIMES, Nov. 5, 2008, at 31.

2. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In the same breath, however, he also underscored the dominance of the “white race . . . in prestige, in achievements, in education, in wealth, and in power . . .” and his expectation that such preeminence would “continue to be for all time . . .” *Id.*

3. See, e.g., Clarence Lusane, *Obama’s Victory and the Myth of Post-Racialism*, in APPLIED RESEARCH CTR., CHANGING THE RACE: RACIAL POLITICS AND THE ELECTION OF BARACK OBAMA 67, 68 (Linda Burnham ed., 2009), available at http://www.arc.org/downloads/RaceElections_1_R5.pdf. See also Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1597–98 (2009) (“[P]ost-racialism . . . signals a racially transcendent event that authorizes the retreat from race. Colorblindness, in comparison, offers a largely normative claim for a retreat from race that is aspirational in nature.”).

4. STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE*

In reassessing the continuing salience of these works, the nation appears not as “post” as some might like to imagine. To the contrary, the call to “move beyond race” highlights the materiality of Wildman’s demand that “privilege must be made visible.”⁵ Indeed, we must talk about privilege—in particular, about the law and privilege—if we are to ever halt its perpetuation.⁶ In this quest, my Essay employs Cheryl Harris’s *Whiteness as Property* alongside Wildman’s text. Written four years prior to *Privilege Revealed*, Harris’s germinal work exposes the tangible property implications of whiteness, ones created from legal texts and embedded in legal actions.⁷ The coupled insights of these two scholars illuminate the continued impact of discrimination and discriminatory privilege in the legal world.

II. PRIVILEGE AS PERSONAL

Both Wildman and Harris begin their explorations with the personal, recounting stories of privilege and detriment. As part of this historic foray, I looked into my own past as well. At the beginning of my legal career, on the precipice of entering law school, I observed:

My life has always been a study of race. You can’t grow up in an interracial family and ever believe that color does not matter. Race always matters. Regardless of the environment created within the confines of your own home, you always have to cross the threshold and face the world. Out there, the color of your skin comes first.

I cannot remember a time when I was not aware of my racial identity. Throughout my childhood, I watched myself constructed in the eyes of those around me, as I had to explain myself at every turn. Even a simple thing like placing my family photos in my junior high locker became a site of conflict as classmates bombarded me with comments.

UNDERMINES AMERICA (1996) [hereinafter PRIVILEGE REVEALED] (with contributions by Margalynne Armstrong, Adrienne D. Davis & Trina Grillo).

5. *Id.* at 13.

6. *Id.*

7. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1714 n.10 (1993).

“Who’s that?”

“But he’s so dark!”

“Are they adopted?” I never came up with the right answer to the last one, only a resolute “no”, though it was always on the tip of my tongue to follow up with, “Why, are you?” I would mumble through the litany: No, that’s actually my half-brother/half-sister; no, we all have different fathers; you see, their fathers are black; no, I’m white. Those words framed my existence, my difference reinforced each time I explained yet again something that I had always taken as intrinsic and elemental.

My brother and sister often talk about finding their way between two worlds of color, the archetypal dilemma of biracial children who are never quite white and never quite black. I watched them do it, at times literally carried piggyback on these voyages. Trailing alongside my older siblings, I also learned to move between worlds. I had home, a domain controlled by my parents where our multiracial family was the norm and all of my cousins came in a different color. There no one asked questions or required justifications. In dissonance stood the outside world we confronted together, where walking down the street meant entering contested territory and waiters asked us if we wanted separate checks.

Each of us had our own worlds we maneuvered separately. My brother and sister navigated paths I could not follow, maturing as African-Americans in face of a hostile and overwhelmingly racist world. In the process, they passed on glimpses from the other side and various nuggets of wisdom. I struggled through my own questions of identity, learning how to frame myself as white, as Jewish, as queer, and, always, as part of an interracial family.

In the end, I do not carry the colors of their skin around with me; I only bring my own. Nonetheless, I always bear my family on my back as my brother and sister once did for me. Moreover, while my siblings undertake important work in fighting the racism they confront daily, my family taught me

that I have equally crucial obligations. Living as white in the United States, I benefit from the same system that discriminates against them, one with prejudices so insidious I even find them within myself. This privilege simultaneously bequeaths me with responsibility.

In the end, while it's a seemingly obvious conclusion—though perhaps one that felt more profound at the time—when I reflect on the nature of privilege today, particularly racial privilege, I remain alarmed at how unfamiliar the concept persists for many and how rarely it is discussed. Throughout my journeys, I saw the persistent effects of white privilege on my siblings and on myself. The recognition and analysis of these impacts, however, appeared far less frequently.

III. REVEALING PRIVILEGE

In *Privilege Revealed*, Wildman tackles this absence. Her work attempts to make the assumed explicit, thus exposing the invisible aspects of privilege. Whiteness is an integral part of life in the United States. We use it as a factor in daily conversation, a convenient shorthand for physical appearance, usually considered as uncomplicated a descriptor as tall or short. As children, we're taught to identify whiteness or lack thereof instantly, an instinctive line drawing which serves to shape social interactions and delineate one's relationship to others.⁸ While the exact socialization process differs depending on which community you grow up in and its ethnic composition, the skills of racial differentiation are always imparted before reaching adulthood.⁹

Lines of privilege need clear demarcations: people seek to know race and sex at first glance. Similarly, we expect everyone to fall promptly within the appropriate box of class and sexuality. Wildman illustrates, “[i]magine how long you could have a discussion with or

8. See, e.g., Robert Westley, *First-Time Encounters: “Passing” Revisited and Demystification as a Critical Practice*, 18 YALE L. & POL’Y REV. 297, 300 (2000) (“Americans are wont to surmise the racial identity of those persons with whom they come into contact. The criteria for making racial judgments are social and automatic.”).

9. *Id.*

about someone without knowing her or his gender.”¹⁰ As a parent, I can now confirm the inability of most individuals to address even a newborn baby without first clarifying, “Is it a girl or a boy?”¹¹

In *Privilege Revealed*, Stephanie Wildman exposes privilege as a “systemic conferral of benefit and advantage,” triggered not by merit but by “affiliation, conscious or not and chosen or not, to the dominant side of a power system.”¹² In this way, certain individuals actively acquire or passively absorb unmerited rewards solely based on their membership in a privileged group. The essential examples Wildman examines are race, class, gender, and sexuality. Further potential categories not explicitly engaged in the text include status based on citizenship, ethnicity, color, education, or language ability.

Wildman identifies two foundational elements of privilege: first, that “the characteristics of the privileged group define the societal norm” and second, that “privileged group members can rely on their privilege and avoid objecting to oppression” of others.¹³ As a result, this system of benefits is rendered invisible, making it all the more invidious. By accentuating advantages previously obscured, Wildman emphasizes discrimination not merely as a phenomenon that disadvantages certain unfortunate individuals, but also as a social force that actively advantages others. Such visibility, Wildman proposes, is one way to counter the destructive effects of privilege.

By shifting the focus from discrimination to privilege, Wildman fundamentally reorients the conversation: from oppressed to oppressor, from minority to majority. The discussion of prejudice no longer relies on the “victim.”¹⁴ Similarly, the conversation is no longer about the “racists”—and how to avoid being one of *those* people—but about white supremacy, which is systemic and systematic oppression that implicates society as a whole.¹⁵

The crucial distinction between privilege and racial discrimination, as Wildman so adroitly explains, is that privilege is institutional. As Harris had previously described, the term “white

10. PRIVILEGE REVEALED, *supra* note 4, at 9.

11. *Id.*

12. *Id.* at 29.

13. *Id.* at 13.

14. *See id.* at 5.

15. *Id.*

supremacy” referenced “a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”¹⁶ White supremacy touches all of us because it is embedded in society, not just in the psyches of certain individuals. Regardless of whether such benefits were unrequested or even unwanted, they ultimately affect everyone endowed with white skin.

IV. PROPERTIES OF WHITENESS

Cheryl Harris’s *Whiteness as Property*¹⁷ has framed the debate on race and property ever since its publication. Harris’s work exposes how whiteness has tangible property implications created out of legal text and legal action.¹⁸ In *Whiteness as Property*, Cheryl Harris characterizes whiteness “as the embodiment of white privilege [which] transcended mere belief or preference.”¹⁹ Whiteness is “usable property” enjoyed by a white person “whenever she [takes] advantage of the privileges accorded white people simply by virtue of their whiteness.”²⁰

As Harris recounts, Albion Tourgee, counsel for Homer Plessy in *Plessy v. Ferguson*, first advanced the legal theory of whiteness as property.²¹ Tourgee argued that when Plessy was ousted from a whites-only railway car despite outwardly appearing white, Plessy lost valuable reputational rights.²² Tourgee explained that “the reputation of belonging to the dominant race . . . is *property*, in the same sense that a right of action or of inheritance is *property*.”²³ He further submitted that “[p]robably most white persons if given a

16. Harris, *supra* note 7, at 1714 (quoting Frances L. Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989)).

17. Harris, *supra* note 7.

18. *Id.* at 1731–37.

19. *Id.* at 1734.

20. *Id.*

21. 163 U.S. 537, 549 (1896).

22. Brief of Plaintiff in Error at 8, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (No. 210).

23. *Id.*

choice, would prefer death to life in the United States *as colored persons*.”²⁴ Consequently, he asserted, “[u]nder these conditions, is it possible to conclude that the *reputation of being white* is not property? Indeed, is it not the most valuable sort of property, being the master-key that unlocks the golden door of opportunity?”²⁵

According to *Black’s Law Dictionary*, “property” is “[t]he right to possess, use, and enjoy a determinate thing”²⁶ or in the “widest sense . . . includes all a person’s legal rights”²⁷ Whiteness determined legal entitlements by delineating what rights one could obtain in property, such as limiting claims to possession instead of full ownership²⁸ or restricting leases under the Alien Land Laws.²⁹ During periods of slavery and state segregation, racial boundaries and legal rights were manipulated as the political economy required, such as through the installation of rigid Jim Crow regulations.

Whiteness and privilege are not within our normal conceptions of property: they are not real estate or goods sold on the open market, but human characteristics. My whiteness does not seem tangible: I can’t hold it, can’t eat it, can’t sell it, can’t even get rid of it. It’s simply there, an innate characteristic like the sound of my voice and the shape of my nose. As many scholars have detailed, however, there’s nothing particularly intrinsic about race.³⁰ Likewise, what constitutes property is hardly inborn. Property and property rights are legally constructed, created, and upheld by law and government coercion.

24. *Id.* at 9.

25. *Id.*

26. BLACK’S LAW DICTIONARY 1335 (9th ed. 2009) (citation omitted).

27. *Id.* at 1336 (quoting JOHN SALMOND, JURISPRUDENCE 423–24 (Glanville L. Williams ed., 10th ed. 1947)).

28. *See Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) (“[T]he Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.”).

29. The various Alien Land Laws denied the right to purchase real property to persons unable to obtain citizenship in the United States, which in practice meant the Japanese and other Asian groups. ALFRED L. BROPHY, ALBERTO LOPEZ & KALI N. MURRAY, INTEGRATING SPACES: PROPERTY LAW AND RACE 89–98 (2010).

30. The tremendous amount of work describing the development of racial ideology would take volumes to detail. *See, e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); F. JAMES DAVIS, WHO IS BLACK?: ONE NATION’S DEFINITION 82 (1993); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997).

Not all such goods are tangible: Property can exist in a pension fund, the ability to walk on a path or a dance sequence.

Property is ultimately a social category, describing neither the bare ownership of things nor the relationship between owners and things but a set of legal relationships among people.³¹ In property class, I often employ that foundational notion of property termed the “bundle of sticks.”³² The sticks of a property entitlement generally include: (a) the right of disposition—the ability to buy or sell; (b) the right of possession—to own or occupy; (c) the right of control—to be able to control the use; (d) the right of enjoyment—to be able to use and profit from the property in any legal manner; and lastly, (e) the right of exclusion—the ability to deny others access to your particular good.

Most of our notions of privilege seem to lack the first quality: the right of disposition. Privilege is typically nontransferable: an individual cannot assign her race or sex to someone else. As Margaret Radin and others have shown, however, alienability is not a necessary condition for property.³³ A person owns his prescription drugs even though he can’t sell them to another. No one else can take title to your law degree, but courts have nonetheless recognized it as property with clear cognizable value.³⁴ The majority of one’s body parts are inalienable, but we designate them as property in a myriad of circumstances.³⁵ For Harris, the inalienability of whiteness does not remove it from the realm of property, but merely enhances its worth.³⁶

31. See, e.g., THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES*, at v (2007) (“[P]roperty at its core entails the right to exclude others from some discrete thing.”).

32. The rights bundle is a long established property trope. See, e.g., JOHN LEWIS, *A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* § 55, at 43 (1888) (“The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights.”).

33. Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

34. See, e.g., *O’Brien v. O’Brien*, 489 N.E.2d 712 (N.Y. 1985) (holding that a medical license constitutes marital property subject to equitable distribution); *Woodworth v. Woodworth*, 337 N.W.2d 332, 334 (Mich. Ct. App. 1983) (holding that a law degree constitutes marital property subject to distribution upon the dissolution of the marriage).

35. See Lyria Bennett Moses, *The Applicability of Property Law in New Contexts: From Cells to Cyberspace*, 30 SYDNEY L. REV. 639, 643–45 (2008).

36. Harris, *supra* note 7, at 1734.

Taking away this first right of alienability as not essential to property, the last right is where Harris and others focus: the right to exclude. Described by the Supreme Court as “one of the most essential sticks in the bundle of rights,”³⁷ the right to exclude has long been considered a core value of property. The maintenance of privilege necessitates the ability to exclude others from access. If all can freely obtain the advantages of the privileged group, the now unrestricted benefit correspondingly depreciates.³⁸

In the United States, whiteness “entails the right to use and enjoyment, manifests as reputation and status, and entails an absolute right to exclude.”³⁹ Whiteness continues to confer “tangible and economically valuable benefits” as Harris originally discussed.⁴⁰ In one experiment, Andrew Hacker asked a group of white students how much money they would seek if they were changed from white to black in their sleep. They estimated about “\$50 million, or \$1 million for each coming black year.”⁴¹ While hardly a scientific estimate of the value of whiteness, Hacker’s figure illustrates some of the perceived benefit of whiteness.

V. REVEALING PRIVILEGE AS PROPERTY

Struggles over the status of persons of African descent have been a central feature in the United States narrative since its inception. These concepts provide more than mere historical background: Recognition as a white person has been, and continues to be, a highly significant and contested category. Notwithstanding the existence of civil rights legislation and significant changes in social practice, white racial identity persists as a valued state.

37. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (citation omitted); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731 (1998) (“[T]he right to exclude others is a necessary and sufficient condition of identifying the existence of property.”).

38. *See* Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood through Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1, 5 (2008) (“Within the ideology of white supremacy, . . . [t]he sanctity of the privileges endowed by whiteness required the same degree of certitude as embodied in other property rights.”).

39. e. christi cunningham, *Identity Markets*, 45 HOW. L.J. 491, 530 (2002).

40. Harris, *supra* note 7, at 1726.

41. ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 32 (1992).

Whiteness retains a corporeal presence through its material impact on daily life. Harris characterizes whiteness as a concrete entity that one can “use and enjoy[.]”⁴² The analysis of whiteness as property implicates the nature of white privilege. Under this lens, whiteness ceases to be an immutable biological trait but instead a social construction that provides power and can be used to further oppression. This understanding of race requires acknowledgment that “recognizing oneself as ‘white’ necessarily assumes premises based on white supremacy” and that white skin implicitly deploys white privilege and racial subjugation.⁴³

In contrast with Wildman’s formulation of covert privilege, the nature of property is to be conspicuous. Nonetheless, the language of property may be an apt way to discuss racial advantage; recent studies show that people may be more aware of their whiteness than we expect.⁴⁴ Even when whiteness is concrete and visible, however, the existence of the advantages that adhere to it are often ignored.

Harris and Wildman both “seek[] to develop the vocabulary needed for an understanding of the interlocking systems of privilege that serve to perpetuate the status quo of privilege and subordination.”⁴⁵ Their work provides merely a starting point; as Wildman reflects, “[o]nce the hierarchy is made visible, the problems remain no less complex, but it becomes possible to discuss them in a more revealing and useful fashion.”⁴⁶ Harris utilizes property as her theoretical building block.

The legalized racial segregation that Harris references is no longer germane. While systematic property dispossession has occurred repeatedly in the nation’s history—from slavery and the Alien Land Acts to redlining and racial covenants⁴⁷—race is no longer the legal determinative for who can be bought or sold or may contract for

42. Harris, *supra* note 7, at 1734.

43. *Id.* at 1737.

44. See, e.g., Paul R. Croll, *Explanations for Racial Disadvantage and Racial Advantage: Beliefs About Both Sides of Inequality in America*, 36 ETHNIC & RACIAL STUD. 47 (2013); Paul R. Croll, *Modeling Determinants of White Racial Identity: Results from a New National Survey*, 86 SOC. FORCES 614 (2007).

45. PRIVILEGE REVEALED, *supra* note 4, at 5.

46. *Id.* at 24.

47. For an extensive, albeit not exhaustive, history of racial restrictions and property, see generally BROPHY ET AL., *supra* note 29, *passim*.

property. At the same time, variations of these racially based property restrictions persist.

Local zoning regulations, for example, have served for decades to exclude groups and “keep social and fiscal undesirables out of [] communities.”⁴⁸ The first racially restrictive zoning ordinances appeared in San Francisco in the 1880s;⁴⁹ while outlawed by the Supreme Court in 1917, the full impact of the ruling took several decades to wind its way through the state courts.⁵⁰ A newer incarnation of racial zoning restrictions bars residents from renting property to undocumented immigrants within the proscribed town limits.⁵¹ Once in court, these ordinances have not withstood legal challenge, but on the ground, they proliferate.⁵² Similarly, while an open market in people no longer exists, race determines the placement of children through adoption. For those seeking to adopt, a white baby generally requires greater financial expenditures than a baby with black ancestry.⁵³ Reduced market demand for children deemed less desirable—i.e., older or disabled or of color—has lowered the asking price.⁵⁴ The influence of white privilege and the property of whiteness perserveres.

48. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993).

49. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding the law unconstitutional).

50. See EDWARD M. BASSET, ZONING: THE LAWS, ADMINISTRATION AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 49–50 (1940); Dubin, *supra* note 48, at 750 n.49; A. Leon Higginbotham, Jr. et al., *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763, 856–62 (1990).

51. Marisa Bono, *Don't You Be My Neighbor: Restrictive Housing Ordinances as the New Jim Crow*, 3 MOD. AM. 29, 29 (2007). For a review of current legislation, see NATIONAL CONFERENCE OF STATE LEGISLATURES, 2012 IMMIGRATION-RELATED LAWS AND RESOLUTIONS IN THE STATES (JAN. 1–JUNE 30, 2012) (Aug. 6, 2012), available at <http://www.ncsl.org/Portals/1/Documents/immig/2012ImmigrationReportJuly.pdf>; ALA. CODE § 31-13-33 (LexisNexis Supp. 2012) (criminalizing “entering into a rental agreement . . . with an alien to provide accommodations, if the person knows or recklessly disregards the fact that the alien is unlawfully present in the United States”).

52. See also Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race, and Citizenship*, 87 WASH. U. L. REV. 979, 982–84 (2010); Bono, *supra* note 51, at 35.

53. See Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 66–69 (2006).

54. David Dante Troutt, *A Portrait of the Trademark as a Black Man: Intellectual Property, Commodification, and Redescription*, 38 U.C. DAVIS L. REV. 1141, 1197 (2005) (describing “‘standard’ and ‘special’ prices reflected the premiums paid for white and other

VI. CONCLUSION—MOVING PAST PRIVILEGE?

In our current “post-racial America” (exemplified for some by the election of an African-American president), an ever-widening racial economic divide continues. Access to education, employment, and income remain racially differentiated.⁵⁵ Even as income disparities decline, contemporary wealth differentials demonstrate the tenacious legacy of white supremacy, which limited access to property for generations, such that the median net worth of white households is eighteen times greater than that of Latino households and twenty times greater than that of black households.⁵⁶ The historical legacy is clear: the current wealthiest African-American families trace back to the most moneyed families at the turn of the twentieth century.⁵⁷ For the rest of the population, things have only deteriorated in the twenty-first century: due to the concentration of minority assets in the family home, the wealth gap has doubled since the recession began.⁵⁸

As it turns out, we’ve been in this place before in centuries past.⁵⁹ A mere eighteen years after slavery, the United States Supreme Court proclaimed racial discrimination to be no longer a pressing legal concern.⁶⁰ Luckily, subsequent courts disagreed. Similarly, the

desirable children and the discount available for ‘older, black and other handicapped children’” (quoting Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 919 (1994)).

55. Spencer Overton, *Racial Disparities and the Political Function of Property*, 49 UCLA L. REV. 1553, 1554 n.3 (2002) (“[T]ypical white households control an income stream that is about 156 percent of that controlled by African American and Latino households.” (citations omitted)).

56. Miriam Jordan, *White-Minority Wealth Gulf Widens*, WALL ST. J., July 26, 2011.

57. Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 457 (2010).

58. Jordan, *supra* note 56. Because of this concentration of capital, the “financial wealth (net worth minus equity in owner-occupied housing)” of white households was ninety times greater than that of African-American households. CHUCK COLLINS ET AL., *SHIFTING FORTUNES: THE PERILS OF THE GROWING AMERICAN WEALTH GAP* 57 (1999).

59. Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 972 (2010) (“Professing American society to be post-racial is not new. Almost from the moment the Civil War ended and the Thirteenth Amendment abolished slavery, there were declarations that the United States had moved beyond race.”).

60. See *United States v. Stanley*, 109 U.S. 3, 25 (1883) (“When a man has emerged from slavery, and . . . 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 the special favorite of the laws . . .”).

contemporary push to deemphasize race highlights the continued need to reveal privilege and engage the role it plays in society—and renders the Harris and Wildman accounts all the more relevant today. Wildman initially urged attention to privilege, since “[a]ttacking discrimination alone cannot result in an end to subordination, because systems of privilege regenerate the discriminatory patterns that maintain existing hierarchies of oppression.”⁶¹ The greater the invisibility of privilege, the harder it is to fight these regenerated discriminatory patterns. In the end, this may be all talk, but even talk, as Wildman has shown us, is nevertheless urgent and critical as “[l]aw plays an important role in the perpetuation of privilege by ignoring that privilege exists. And by ignoring its existence, law, with help from our language, ensures the perpetuation of privilege.”⁶²

61. PRIVILEGE REVEALED, *supra* note 4, at 5.

62. *Id.* at 13.