

The Persistence of White Privilege

Stephanie M. Wildman*

Barbara Flagg published her landmark article, *Was Blind, But Now I See*, in 1993.¹ The article, later developed into a book,² named the common white tendency not to think about whiteness as the “transparency phenomenon.” As Flagg explained, white people have an option, every day, not to think of themselves in racial terms.³ “In fact, whites appear to pursue that option so habitually that it may be a defining characteristic of whiteness: To be white is not to think about it.”⁴ Flagg identified this “tendency for whiteness to vanish from whites’ self-perception” as a transparency approach.⁵

Flagg’s essay, on the cutting edge of legal scholarship, contributed to the body of work that has developed into critical white studies. Indeed many of the authors in this symposium have contributed to expanding the knowledge and awareness about whiteness and the privileges associated with being white.⁶ Reflecting on the development of critical white studies, Eric Arnesen says that the influence of this scholarship has been profound, but he also faults

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1. Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

2. BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998).

3. Flagg, *supra* note 1, at 969.

4. *Id.*

5. *Id.*

6. The term “privilege” remains problematic, since privilege can connote a reward for an earned achievement. White privilege is not earned. Yet academic discourse has widely adopted the phrase “white privilege,” and, increasingly, more popular circles recognize it as well. An internet search of the phrase, conducted on April 13, 2005, yielded over 102,000 web sources.

critical white studies for creating a “moving target” as to the meaning of whiteness:⁷

Whiteness is, variously, a metaphor for power, a proxy for racially distributed material benefits, a synonym for “white supremacy,” an epistemological stance defined by power, a position of invisibility or ignorance, and a set of beliefs about racial “Others” and oneself that can be rejected through “treason” to a racial category.⁸

Arnesen characterizes the political drift of this work as defined by “the voluntary mass relinquishing of privilege and identity.”⁹ He fears that those skeptical of the persistence of privilege regard this prescription for change as “envisioning [that] the withering away of whiteness requires nothing but imagination.”¹⁰

Arnesen is correct that more than imagination will be necessary for any “withering away” of white privilege to occur. White privilege persists. Identifying the reasons for the persistence of white privilege is a necessary precursor to combating it. Both material conditions and socio-cultural factors contribute to the resilience of white privilege.

WHITE PRIVILEGE

Peggy McIntosh’s widely acknowledged definition of white privilege emphasizes the benefit that privilege bestows upon the individual holder. She explains that white privilege can be likened to “an invisible package of unearned assets.”¹¹ The holder of this package remains oblivious to its presence, yet can reliably depend on its contents. McIntosh continues: “White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps,

7. Eric Arnesen, *Whiteness and the Historians’ Imagination*, 60 INT’L LAB. & WORKING-CLASS HIST. 3 (2001) (emphasizing the impact of whiteness studies on labor history).

8. *Id.* at 9.

9. *Id.* at 8.

10. *Id.*

11. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 23 (1995).

guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.”¹²

The significance of white privilege, on a personal level, does not go far enough to explain why privilege persists. The systemic nature of white privilege beyond the individual also must be examined.¹³ The Latin root of the word privilege, “privilegium,” means a law affecting an individual.¹⁴ Thus, the core meaning of privilege encompasses both the individual beneficiary and the systemic nature of the benefit. While privilege serves the individual holder, it is the systemic nature of privilege, McIntosh’s “invisible knapsack” multiplied throughout the group of white people, that supplies its societal force. Characteristics of the privileged group define the societal norm. From “flesh-colored” bandages or crayons and “nude” hosiery that depict fair skin¹⁵ to standardized testing,¹⁶ individual members of society are judged against characteristics held by the privileged. Furthermore, privileged group members can rely on this privilege to avoid objecting to oppression or subordination.¹⁷ Those with privilege can afford to look away from mistreatment that does not affect them personally. The conflation of privilege with the societal norm and this option to ignore oppression contribute to the invisibility of that privilege both to its holder and to society.¹⁸

A body of scholarship has explored the privileging dynamic.¹⁹ Yet white privilege persists. Given this information and understanding

12. *Id.* McIntosh lists “special circumstances and conditions” that she did not earn but has been made to feel entitlement for. Her African American co-workers, friends and acquaintances cannot count on these same circumstances and conditions. *See also* Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307 (1997) (listing circumstances and conditions that Latina/os cannot count on).

13. STEPHANIE M. WILDMAN WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS, & TRINA GRILLO, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) [hereinafter *PRIVILEGE REVEALED*].

14. *Id.* at 13.

15. *Id.* at 29.

16. *See, e.g.*, NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997).

17. *PRIVILEGE REVEALED*, *supra* note 13, at 16–17.

18. *Id.* at 13–14.

19. *See* MAURICE BERGER, *WHITE LIES: RACE AND THE MYTHS OF WHITENESS* (1999); FLAGG, *supra* note 2; RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1997); GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN*

about privilege, why does it remain so easy for white people to move through the world and not be aware of the presence and operation of their privilege? The transparency phenomenon that Flagg identified certainly contributes to the persistence of white privilege. After all, if whites do not see whiteness, they cannot see the privileges associated with it. But other dynamics join with transparency to create a reinforcing structure for the perpetuation of white privilege.

MATERIAL CONDITIONS AND SOCIO-CULTURAL FACTORS REINFORCE WHITE PRIVILEGE

Both material and socio-cultural factors combine to entrench white privilege. Material forces rooted in the physical world, such as the distribution of societal goods and resources, the division of labor, and immigration policies, create a world that privileges whiteness.²⁰ Socio-cultural factors, including discursive practices, patterns of behavior, and the thinking patterns that language creates, further strengthen white privilege, contributing to its endurance.²¹

WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS (1998); THOMAS ROSS, *JUST STORIES: HOW THE LAW EMBODIES RACISM AND BIAS* (1996); PRIVILEGE REVEALED, *supra* note 13; Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603 (1999); McIntosh, *supra* note 11; Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995); Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309 (2000); Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217 (1993).

20. See Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279, 2280 (2001) (urging consideration of the material factors that contribute to race and racism, including socioeconomic competition, immigration pressures, the search for profits, and changes in the labor pool).

21. Socio-cultural forces may operate indirectly. Political scientist Steven Lukes articulates mechanisms through which dominant forces maintain political power. STEVEN LUKES, *POWER: A RADICAL VIEW* (1974). Lukes' second dimension of power includes social values and institutional practices that suppress conflict, keeping "certain interests and issues out of the political sphere altogether." Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 748. Lukes' third dimension also involves more subtle mechanisms "that place individuals and communities in circumstances where they are constrained from clearly asserting their own interests." *Id.* at 751. This constraint is accomplished by socializing subordinated groups into "the norms and practices of the dominant culture. . . . They [subordinated groups] are taught to perceive, remember, imagine the world as though things cannot—and should not—change." *Id.* at 751–52. See also LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING*

Commentators have expressed concern about the focus in recent scholarship on identity politics at the expense of analysis of those material conditions.²² Yet those material conditions and socio-cultural patterns of behavior work in tandem to reinforce white privilege.

Material forces that privilege whiteness permeate society,²³ but remain largely unknown and invisible. A detailed exposition of these material forces requires book-length treatment, but a few examples illustrate the scope and power of these material conditions. Scholars

POWER, TRANSFORMING DEMOCRACY 109–11 (2002) (discussing Lukes' dimensions of power and the role of cultural mythology in maintaining domination).

22. See Delgado, *supra* note 20; Nancy Fraser, *Recognition or Redistribution? A Critical Reading of Iris Young's*, JUSTICE AND THE POLITICS OF DIFFERENCE, 3 J. OF POL. PHIL. 166 (1995); Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68. *But see* Iris Marion Young, *Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory*, 222 NEW LEFT REV. 147 (Mar./Apr. 1997) (discussing Nancy Fraser's critique of Young's work for focusing on identity politics and failing to address the political economy). This article sides with Young in refusing to accept the dichotomization of culture and economy. Young observes:

From Zapatista challengers to the Mexican government, to Ojibwa defenders of fishing rights, to African-American leaders demanding that banks invest in their neighbourhoods, to unions trying to organize a Labor Party, to those sheltering battered women, resistance has many sites and is often specific to a group without naming or affirming a group essence. Most of these struggles self-consciously involve issues of cultural recognition and economic deprivation, but not constituted as totalizing ends. None of them alone is 'transformative,' but, if linked together, they can be deeply subversive. Coalition politics can only be built and sustained if each grouping recognizes and respects the specific perspective and circumstances of the others

Id. at 160.

23. For a breathtaking summary of "the way things are" that privilege maleness, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989).

Men's physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.

Id. Male privilege defines these vital aspects of American culture from a male point of view, which then becomes the measure for all of society. See PRIVILEGE REVEALED, *supra* note 13, at 15. The breadth of male privilege, illustrated by this quotation explaining the manner in which it defines societal norms, is a useful reference point for beginning to analyze the scope of white privilege. McIntosh, *supra* note 11.

have documented the construction of white suburbs, explaining that federal policy excluded African Americans from the opportunity to buy housing even as these policies subsidized white buyers.²⁴ The building of the interstate highway system had a “dramatic and lasting impact on the late twentieth-century urban United States.”²⁵ While the highway project assisted suburban growth, it also decimated inner-city housing.²⁶ According to Raymond Mohl, “[P]ostwar policymakers and highway builders used Interstate construction to destroy low-income and especially black neighborhoods in an effort to reshape the racial landscapes of the U.S. city.”²⁷ Educational policies in the United States, from segregation in education²⁸ to exclusion from the legal profession,²⁹ have constructed and reinforced white privilege. The repercussions of these policies continue today, manifested by the increase of white wealth³⁰ and well-being.³¹

Socio-cultural factors, such as societal practices and thinking patterns, including language itself, operate in conjunction with

24. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051 (1999); Mahoney, *Segregation, Whiteness, and Transformation*, *supra* note 19; Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665 (2002).

25. Raymond A. Mohl, *Planned Destruction: The Interstates and Central City Housing*, in *FROM TENEMENTS TO THE TAYLOR HOMES: IN SEARCH OF AN URBAN HOUSING POLICY IN TWENTIETH-CENTURY AMERICA* 226, 226 (John F. Bauman et al. eds., 2000).

26. *Id.*

27. *Id.*

28. Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996); Bryan K. Fair, *Taking Educational Caste Seriously*, 78 TUL. L. REV. 1843 (2004).

29. William C. Kidder, *The Bar Examination and the Dream Deferred*, 29 LAW & SOC. INQUIRY 547 (2004); Daria Roithmayr, *Barriers to Entry Entry: A Market Lock-in Model of Discrimination*, 86 VA. L. REV. 727 (2000); Roithmayr, *supra* note 16.

30. See OLIVER & SHAPIRO, *supra* note 24; Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001); *Study Says White Families' Wealth Advantage Has Grown*, N. Y. TIMES, Oct. 18, 2004, at A13 (net worth of white households eleven times greater than Latino households and over fourteen times greater than Black households).

31. See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003); LIPSITZ, *supra* note 19.

material forces to reinforce white privilege, enabling whites to self-perpetuate as a dominant racialized identity, albeit a transparent one. This article focuses on four of these socio-cultural factors: (1) the contemporary cultural push to colorblindness; (2) the sleight of mind³² that typifies the relation between an individual and groups in American culture; (3) a comfort zone in whiteness, which includes whiteness as the fabric of daily life for whites and white participation in the construction of race from a white-privileged viewpoint; and (4) the tendency for holders of white privilege to “take back the center” in discourse, turning attention away from potentially uncomfortable conversations about race toward an emphasis on white concerns and issues.³³ These dynamics support the persistence of privilege.

THE CONTEMPORARY PUSH TO COLORBLINDNESS

Michael Omi recounts a conversation between Oakland, California, mayor Jerry Brown³⁴ and two newspaper columnists about race.³⁵ The reporters question Brown, asking whether his proposed redevelopment plan would predominantly benefit whites. Brown responds that race is “silly” because people have 99 percent the same DNA. Brown, who is white, acknowledges “a tradition and a history of racism and disadvantage and oppression,” but he asks, “when do you move on?”³⁶

32. Sleight of hand is a conjuring trick that requires manual dexterity, whereas the individual-group dynamic, see *infra* notes 41–49 and accompanying text, is a mental trick. The phrase “sleight of mind” better captures the mental process that weaves between individuals and groups, occurring unnoticed. Thank you to Patricia Leary for suggesting this phrase.

33. See PRIVILEGE REVEALED, *supra* note 13, at 90–93, for a discussion of “taking back the center,” explaining how the use of analogies in reasoning and conversation fuels that sense of entitlement.

34. Edmund G. (“Jerry”) Brown Jr. served as governor of California for eight years beginning in 1975. “He appointed an extraordinary number of women and minorities to high government positions, including the first woman, African-American and Latino to the California Supreme Court.” *Jerry Brown*, at <http://oaklandnet.com/government/mayor/biography.html> (last visited Apr. 13, 2005). In 1998, he was elected mayor of Oakland. *Id.*

35. Michael Omi, *Rethinking the Language of Race and Racism*, 8 ASIAN L.J. 161, 161–62 (2001).

36. *Id.* at 161–62 (quoting Philip Matier & Andrew Ross, *Long March*, S.F. CHRON., Jan. 10, 2000, at A17). Here is Omi’s description of the conversation and its context:

Omi recounts this story as emblematic of a new racial “common sense,” based on the premise that race is unimportant as a social category, because it lacks any biological basis.³⁷ This racial “common sense” further assumes that the time has come to move beyond race and to emphasize colorblindness.³⁸ Brown typifies the politician trying to be on the cutting edge of contemporary thought by tapping into an attitude that has intellectual currency. He is striving to demonstrate that he is “in vogue.” Unfortunately, behind the style points lies a serious wrongheadedness. Critiquing this colorblind view as failing to see racial inequality as structured, Omi urges particular attention to the use of terms like “race” and “racism.”³⁹ The idea of colorblindness pushes any discussion toward a narrow view of discrimination, privilege, and subordination. It promotes an attitude that since society should not notice race, “we don’t have a problem” anymore.⁴⁰

In January of 2000, Oakland Mayor Jerry Brown was asked by *San Francisco Chronicle* political columnists Phillip Matier and Andrew Ross about his downtown revitalization plans.

The following dialogue ensued:

Matier & Ross: Some people say you’re just trying to bring 10,000 white people into the downtown with all these high-priced live-work lofts.

Brown: How do you know what color they are going to be?

Matier & Ross: Come on, who do you think lives in these lofts?

Brown: Well, that’s kind of a stigmatization of nonwhite people. There are African Americans, Chinese, Filipinos and there are white people—and by the way, race is just kind of silly anyway because 99 percent of our DNA is the same.

Matier & Ross: Maybe, but race is still a part of politics—especially local politics.

Brown: It’s a fact that is often manipulated and used. Yes, there is a tradition and a history of racism and disadvantage and oppression. But having said all that, when do you move on? And when do you try and pull it all together?

Id.

37. *Id.* at 162.

38. *Id.* Omi comments, “Any hints of race consciousness are now suspiciously viewed as racist and impermissible in a good, just, and supposedly color-blind society.” *Id.* at 163.

39. *Id.* at 163. His essay concludes by discussing racial classification, the notion of racism as hate, and conflicts between communities of color. *Id.* at 163–67.

40. For additional critiques of the notion of colorblindness, see BROWN ET AL., *supra* note 31; PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE* (1997); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1 (1991).

INDIVIDUAL-GROUPS SLEIGHT OF MIND⁴¹

Descartes' famous quote, "I think therefore I am" epitomizes the individuality of Western liberal ideology.⁴² The individual is the center of that world. David Wilkins, reflecting on his visit to aboriginal peoples in Australia, suggests "I experience therefore I am" as a phrase more descriptive of the constitutive process that humans undergo in reacting to and learning from each other and the world around them.⁴³ "I experience therefore I am" portrays the relational nature of individuals, who do not become who they are in isolation from each other or solely within the confines of the thinking brain.

Understanding the persistence of privilege requires recognizing the sleight of mind that occurs on the subject of individuals as members of groups.⁴⁴ We are each individuals, assured of individual rights. But sometimes we are group members, acting relationally. Understanding privilege requires conceptualizing individuals as part of groups.⁴⁵ As John Powell explains, "our personal relationships are mediated through power and institutional structures; privilege cannot be addressed at only the personal level."⁴⁶ Considering only the personal, individual holder of the knapsack of privilege results in missing a significant part of how privilege operates. The systemic, group aspect of privilege fortifies and maintains the societal advantage it bestows. The group "white" and individuals within it benefit from the normalization of these advantages in the material

41. See *supra* note 32 (explaining this phrase).

42. See ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 110 (1999) (musing about Descartes' phrase in relation to affirmative action).

43. David E. Wilkins, *Keynote Address: A Constitutional Confession*, 37 *NEW ENG. L. REV.* 473, 475 (2003).

44. See John A. Powell, *Whites Will Be Whites: The Failure to Interrogate Racial Privilege*, 34 *U.S.F. L. REV.* 419, 422 (2000); Stephanie M. Wildman, *Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws*, 13 *TEMP. POL. & CIV. RTS. L. REV.* 709 (2004) (describing clash between individuals and groups in equal protection jurisprudence).

45. Powell, *supra* note 44, at 449 (criticizing court decisions that "decontextualiz[e] people and groups of people, portraying them as self-created individuals who live outside of any social, historical, or political context"). See also Wildman, *supra* note 44.

46. Powell, *supra* note 44, at 444 (citing IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990)).

conditions of society. So, for example, “white” neighborhoods feature good schools, transportation, and commercial services that make it easier to negotiate life’s daily chores.

This failure to engage the individual-group dynamic in relation to the notion of equality, generally, and the Fourteenth Amendment, in particular, has strengthened the likelihood that white privilege will flourish. The language of the Fourteenth Amendment does use the word “person”; it says: “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁴⁷ This language indicates the primacy of equal protection to individuals.

But the Supreme Court’s development of equal protection jurisprudence, while seeking to retain that primacy, has ignored the relationship of that individual person to the significant identity groups in which that individual might be a member. This failure to recognize the individual-group interrelation has resulted in a jurisprudence that makes no sense. It has created a body of decisional law resulting in whites suing with impunity as their charge of race discrimination finds ready remedy. Yet people of color claiming race discrimination, in a society that systemically privileges whiteness, find their pleas unheard.⁴⁸

Challenges to material conditions that facilitate the persistence of white privilege fail when legal analysis focuses solely on individuals and ignores group advantage.

The ability to choose whether to focus on ourselves as individuals or as group members reinforces white privilege. Antidiscrimination laws, like Title VII, do recognize group membership, prohibiting discrimination against an individual because of that group identification. But the focus in antidiscrimination doctrine upon

47. U.S. CONST. amend. XIV, § 1.

48. Mahoney, *Whiteness and Remedy*, *supra* note 19; Wildman, *supra* note 44, at 711–12; *see also* Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002) (suggesting viewing equal protection in terms of group status and competition).

individuals makes subordination and discrimination seem like anecdotal problems, veiling their systemic nature.⁴⁹

COMFORT ZONE IN WHITENESS

Charles Lawrence described the existence of this comfort zone in whiteness from the position of an outsider, viewing it in a dream he had.⁵⁰ In the dream two white colleagues are discussing his teaching future. Even though he is present, he is not visible to them; they speak as though he were not there.⁵¹ The two white colleagues create a community, sharing a comfort level in their interaction that is evident to him, even though they seem to be unaware of it as they converse.

Martha Mahoney illustrates the manner in which this phenomenon operates from a white perspective in the context of residential segregation:

[W]hen you wake up in the morning and go to the kitchen for coffee, you do not feel as if you hold partial interests or particular sticks in a bundle of rights in the structure you inhabit, nor does it feel as if land-use regulation shaped your structure, street, and community. This is *home*, where you roll out of bed, smell the coffee, reach for clothing, and inhabit the “reality” of the house. The physicality of home and community . . . tends to make our lived experience appear natural.⁵²

The white person’s lived experience, the fabric of daily life, emphasizes—and minute to minute recreates—the whiteness of the world. This whiteness is just normal—“the way things are.”⁵³ But as

49. See PRIVILEGE REVEALED, *supra* note 13 at 25–41, for further discussion of antidiscrimination law, especially in the workplace context.

50. Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2231 (1992).

51. *Id.* at 2231–32.

52. Mahoney, *Segregation, Whiteness, and Transformation*, *supra* note 19, at 1661–62.

53. *Id.* at 1662. John O. Calmore emphasizes the segregation that created this white world: “[I]t is difficult for whites to appreciate the dehumanizing constraints and isolation of imposed segregation The compoundedness of race and space . . . for whites [is] taken for granted; white space is not problematic and black space is somewhere else.” John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233, 1234 (1995).

Mahoney explains, “the way things are . . . tends to make prevailing patterns of race, ethnicity, power, and the distribution of privilege appear as features of the natural world.”⁵⁴ The maintenance of whiteness, the re-creation of that community, remains unseen.

Mahoney’s illustration of the white person waking up and smelling the coffee serves as an important reminder of the role we each play in constructing race from the world around us. Amy Kastely further elaborates on white participation in racial construction, using the example of Toni Morrison’s story *Recitatif*.⁵⁵ As Kastely explains:

Recitatif draws attention to ways that race functions for informative purposes in contemporary written texts, as readers give significance to racial identification in matters of character, situation, and narrative movement and as they unconsciously or uncritically locate themselves in relation to race consciousness in the text.⁵⁶

In *Recitatif*, Morrison never identifies the characters’ races. Where racial ambiguity exists, the human mind makes its own assumptions, based on cues, categories, and stereotypes.⁵⁷ The fabric of daily life for most whites, coupled with colorblindness and a focus on the individual, tilts white participation in the construction of race toward utilizing cues, categories, and stereotypes that maintain the privileged comfort zone.

TAKING BACK THE CENTER

Meetings, colloquies, and classrooms usually convene with an agenda that defines the purpose or center of discourse. White

54. Mahoney, *Segregation, Whiteness, and Transformation*, *supra* note 19, at 1661–62.

55. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269 (1994); *see also* Toni Morrison, *Recitatif*, in CONFIRMATION 243–61 (Amiri Baraka & Amina Baraka eds., 1983).

56. Kastely, *supra* note 55, at 270–71.

57. *Id.* at 271 (“*Recitatif* invites readers to pay attention to the complex arrangements of raced and gendered tropes and codes that are, or are expected to be, quite clear to contemporary readers and to look closely at the construction of race we bring or perform as readers.”).

privilege has promoted a white sense of entitlement to place white concerns at the center of most agendas.⁵⁸

Members of dominant groups assume that their perceptions are the pertinent perceptions, that their problems are the problems that need to be addressed, and that in discourse they should be the speaker rather than the listener. . . .

So strong is this expectation of holding center stage that even when a time and place are specifically designated for members of a nonprivileged group to be central, members of the dominant group will often attempt to take back the pivotal focus. They are stealing the center—usually with a complete lack of self-consciousness.⁵⁹

This dominant white perspective, monopolizing the center of discourse, manifests itself in judicial form, when legal analysis takes the focus away from outrageous injustice. Decisions that parse an unjust situation to show how it differs from other cases that have found injustice resonate as a form of “taking back the center.” Minimizing or rejecting claims of racial injustice reinforces a white comfort zone.

PRIVILEGE AND LAW

Audiences at presentations and lectures about privilege frequently ask, “What does privilege have to do with law?” The fact that any analysis of privilege has been omitted historically from legal reasoning does not mean it could not be a useful lens, perhaps more useful than discrimination, for viewing fact patterns. The socio-cultural factors, discursive practices, patterns of behavior, and thinking patterns created by language have resulted in an absence of an awareness of privilege in legal arguments. Courts’ failure to

58. One recent, well-publicized example of the battle to control the education agenda has been dubbed the “culture wars” that arose with introduction of non-white-centered history and literature on college campuses. *See, e.g.*, HENRY L. GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* (1992); TODD GITLIN, *THE TWILIGHT OF COMMON DREAMS: WHY AMERICA IS WRACKED BY CULTURE WARS* (1995).

59. *PRIVILEGE REVEALED*, *supra* note 13, at 91.

recognize the privileging dynamic and to include it in legal analysis further perpetuates that privilege.

Court decisions have recognized privilege without naming it as such. For example, in *Sweatt v. Painter*,⁶⁰ one of the legal building blocks that led to the decision in *Brown v. Board of Education*,⁶¹ Thurgood Marshall and the lawyers who worked with him tackled inequality and segregation in legal education. Heman Marion Sweatt, who was African American, applied for admission to the University of Texas Law School. The school denied his application because it admitted only white students.⁶² The Court acknowledged the potential argument that no denial of equal protection had occurred because, just as Texas excluded African-American students from the University of Texas, it excluded white students from the School of Law of the Texas State University for Negroes, a black law school created in response to the litigation.⁶³ In *Sweatt*, the Court stepped out of the traditional legal liberalism, “equal treatment” paradigm.⁶⁴ The Court rejected the argument that excluding whites from an all black school paralleled excluding blacks from a white school. Rather the Court said that argument “overlook[ed] realities.”⁶⁵ In *Sweatt*, the Court identified tangible and intangible factors that were important to a quality education, factors that related to privilege.⁶⁶ Although the

60. 339 U.S. 629 (1950).

61. 347 U.S. 483 (1954).

62. *Sweatt*, 339 U.S. at 631 (at the time of the original lawsuit “there was no law school in Texas which admitted Negroes”). For biographic information on Heman Sweatt, see *The Handbook of Texas Online*, at <http://www.tsha.utexas.edu/handbook/online/articles/view/SS/fsw23.html> (last modified Mar. 8, 2005).

63. *Sweatt*, 339 U.S. at 633.

64. See PRIVILEGE REVEALED, *supra* note 13, at 170–71 for a discussion of legal liberalism.

65. *Sweatt*, 339 U.S. at 634.

66. The Court stated:

[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is

Court did not use the term privilege, it recognized its existence in the form of tangible factors, like faculty, courses, and library, and intangible factors such as faculty reputation, administration experience, alumni influence, school tradition, and prestige. That recognition of privilege has been largely absent in post-*Brown* jurisprudence.⁶⁷

The absence of a privilege analysis in law can result in the perpetuation of injustice, as occurred in the case based on the following facts. In March 1995, Denise Arguello and her family, including her father Alberto Govea, stopped to purchase gas at a Conoco gas station in Fort Worth, Texas.⁶⁸ After her husband pumped the gas, Ms. Arguello and her father entered the station's convenience store to pay for the gas and to purchase beer. They waited in line while Cindy Smith, a clerk, helped other customers. Fifth Circuit Judge Jerry E. Smith summarizes the testimony about what happened next:

Arguello testified that Smith was rude to her when she reached the counter and that her demeanor was less friendly than it had

difficult to believe that one who had a free choice between these law schools would consider the question close.

Id. at 633–34.

67. Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000) (describing the dismantling of civil rights precedent); *see also id.* at 974 (explaining how the Civil Rights Act of 1964 overturned aspects of American culture that had resulted in white privilege); *cf.* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. REV. 967 (1997) (urging a legislative rather than judicial focus for social change); *see also id.* at 974 (explaining how the Civil Rights Act of 1964 overturned aspects of American culture that had resulted in white privilege).

68. *Arguello v. Conoco*, 330 F.3d 355, 356 (5th Cir. 2003). The absence of outrage surrounding this decision suggests it is unremarkable, part of "the way things are." A few exceptions, expressing a sense of injury from the case include Deseriee A. Kennedy, *Processing Civil Rights Summary Judgment and Consumer Discrimination Claims*, 53 DEPAUL L. REV. 989 (2004) and Allison McJunkin, Casenote, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 163 (2004); *see also* Anne-Marie G. Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1 (2003) (citing facts of *Arguello* in notes).

Several surveys of franchise law do mention the case, *see, e.g.*, Deborah S. Coldwell et al., *Franchise Law*, 53 SMU L. REV. 1055, 1076 (2000); William L. Killion, Ellen R. Lokker, & Anne-Marie Gauthier, *2001 Franchising Currents*, 20 WTR FRANCHISE L.J. 150, 152 (2001); *see also* Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1101 (2002) (citing *Arguello* as supporting the need for liability for trademark owners).

been with the customers she had previously served. After Arguello presented her credit card as payment, Smith requested identification. Arguello testified that Smith singled her out by demanding that she provide identification; Smith contends that she requested identification because Arguello was attempting to buy beer.

Arguello, an Oklahoma resident, presented Smith with her valid Oklahoma driver's license. Smith initially refused to accept it, claiming she could not take an out-of-state license, but she eventually accepted it and completed the transaction. During Arguello's purchase, Govea became increasingly frustrated with the manner in which Smith was treating his daughter. Consequently, he left the beer he had intended to purchase on the counter and walked out of the store.

After Smith completed Arguello's sale, the tension between them escalated into a confrontation. Arguello testified that Smith began shouting obscenities at her and making racially derogatory remarks. [According to the trial court memorandum opinion Arguello alleged that "Smith referred to her as a 'f* * *ing [sic] Iranian Mexican bitch.'"⁶⁹] Arguello began to leave with her purchase, but realized that she had the wrong copy of the credit card slip and approached the counter again. After another argument, Arguello and Smith exchanged copies. As Arguello walked away the second time, Smith shoved a six-pack of beer off the counter and onto the floor.

Plaintiffs testified that after Arguello left the store, Smith began screaming racist remarks over the intercom. At the same time, Smith laughed at Arguello and her family and made several crude gestures. Govea and other family members telephoned Conoco from a payphone outside the store to lodge a complaint. During that telephone conversation, the Conoco official indicated that he wanted to know the name of the clerk in question. When Govea attempted to re-enter the store to

69. 2001 WL 1442340, No. CIV.A. 397CV0638-H, at *1 (N.D. Tex. Nov. 9, 2001).

determine Smith's name, Smith locked him out while laughing and making crude gestures.⁷⁰

Arguello and Govea sued claiming race discrimination under 42 U.S.C. § 1981. A jury decided the case in their favor, but the district court granted Conoco's motion for a judgment as a matter of law. The Fifth Circuit affirmed the district court ruling in favor of Conoco.⁷¹

The Fifth Circuit began its decision by reviewing the elements of a § 1981 claim:

[A] plaintiff must establish “(1) that she is a member of a racial minority; (2) that [the defendant] had intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute.”⁷²

The court acknowledged no dispute existed over plaintiffs' status as racial minorities⁷³ and that the evidence had been sufficient to create a jury question as to whether they had suffered discrimination during their visit to defendant's store.⁷⁴ The court stated: “this case turns on the third element, namely, whether Smith's conduct implicated rights guaranteed by § 1981.”⁷⁵

Fifth Circuit law for establishing a denial of § 1981 rights in the retail setting requires evidence of an attempt to contract that was thwarted by the defendant merchant. The purchase must be thwarted, not merely deterred by the merchant.⁷⁶ The Fifth Circuit stated that because Govea voluntarily left the beer on the counter and exited the

70. 330 F.3d at 356–57.

71. *Id.* at 362.

72. *Id.* at 358.

73. “The first element is not disputed—all parties concede that Arguello and Govea are Hispanic.” *Id.*

74.

[T]he testimonial and other evidence provides a basis for concluding that Smith subjected Arguello to substandard service. In conjunction with that evidence of maltreatment, the testimony regarding the racially charged nature of Smith's comments sufficed to create a jury question regarding whether Smith intentionally discriminated against plaintiffs on the basis of race.

Id.

75. *Id.*

76. *Id.* at 359.

store without trying to buy it, the clerk Smith did not prevent Govea from making the purchase.⁷⁷ The court similarly found Arguello without remedy because she did “successfully complete the transaction.”⁷⁸

Plaintiffs had argued for a broader interpretation of the statute that included “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”⁷⁹ The court declined to follow this proposed broader application. Rather, it distinguished case law involving both discriminatory service in restaurants and clubs⁸⁰ and other cases concerning discriminatory prepayment or check-writing policies.⁸¹

The lack of outrage surrounding the result illustrates another way that privilege operates. The decision does not merely reflect the view of an aberrational circuit court ignored by the Supreme Court in its denial of certiorari; the case also becomes precedent, setting the terms for appropriate future behavior. How will the general counsel of Conoco advise employees to act in the future?⁸² What advice might corporate counsel have given to employees if the result had come out differently? This decision permits subordination and abuse to continue without redress or even acknowledgment that it was wrong. That continuation reinscribes the white privilege that made the conduct and ensuing judicial decision possible. White privilege enabled the judges to cast Mr. Govea’s transaction as a voluntary withdrawal from purchasing beer. Most likely, the judges had been to convenience stores much like this one, but they probably had not been welcomed with racial epithets.⁸³ Life lived in the white comfort zone made it easy for judges to miss the injustice. The judges likely experienced their own convenience store visits as individuals. As

77. *Id.*

78. *Id.*

79. *Id.* (citing 42 U.S.C. § 1981(b)).

80. *Id.* at 360–61.

81. *Id.* at 361.

82. Thank you to Martha Mahoney for offering this insightful question.

83. Kennedy, *supra* note 68, at 1009 (“[W]hite judges may lack the experiences to be able to recognize the legal harms articulated in a consumer discrimination complaint. . . . [I]t is very likely that these are the same stores in which white upper-class males (like judges) shop without incident.”).

individuals they were unable to see the group identification that represents the lived reality for non-whites. That reality means not only facing this kind of harassment but also never knowing when it will strike as one goes about the business of life.⁸⁴ That fear of a world gone awry, like a rug pulled from under one's feet, has not been part of the white comfort zone. The push to colorblindness further supports law operating within these cultural practices to ignore the racialized reality in which the transaction took place. The judicial form of "taking back the center" maintains the status quo that led to the injustice.

Until law and the legal system address scenarios like that faced by Ms. Arguello and Mr. Govea, subordinating practices will continue. This case suggests the limits of antidiscrimination law, which does seem fairly useless if its scope cannot comprehend the injustice apparent in this situation.⁸⁵ Reflecting on the inexplicable unfairness of key judicial decisions, Jerome Culp asked:

How do you defend the tests in *Washington v. Davis*, the decision in *Bowers*, or the rule in *Korematsu*, the failure to apply prior principles in *McCleskey*, or the reasoning in *Shaw v. Reno*?⁸⁶

He answers his question, "The court ultimately simply responds that we the white majority have the power to do what we want in these cases."⁸⁷ He reminds us that white judges, who do not face the same risk in making contracts as the Arguello family, have the power, reinforced by white privilege, to ignore the non-privileged reality. This failure to recognize privilege results in injustice like the *Arguello* case.

84. This family did not have same security a white family would have when traveling by car and stopping to purchase gas. *See, e.g.*, PRIVILEGE REVEALED, *supra* note 13, at 168–69 (following the eviction of two families, one white and one African-American, the African-American family has fewer options when seeking new housing than the white counterpart).

85. Wildman, *supra* note 44, at 711–12.

86. Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1669 (1999).

87. *Id.*

CONCLUSION

Catharine Wells explains that judging is “an inherently situated activity.”⁸⁸ According to Wells, a judge “cannot escape the effects of his or her own particular situation” in performing the task of judging.⁸⁹ Wells relates Justice Benjamin Cardozo’s illuminating delineation of the situated nature of judging:

There is in each of us a stream of tendency . . . which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions In this mental background every problem finds its settings. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.⁹⁰

Wells argues that if judging is situated, judges must pay attention to their situation.⁹¹ But it is not only judges, but all of us with white privilege, whether we are decision makers, part of decision-making bodies, or comfortable individuals, who need to pay more attention. Paying attention means becoming more self-conscious about the ways “personal history, character, and outlook” impact the decisions and interactions with which we engage the world.⁹² Reaching that self-consciousness is more difficult from within the white comfort zone that emphasizes colorblindness and individualism. Combating the persistence of privilege requires self-consciousness about these socio-cultural patterns and the material conditions that maintain the

88. Catharine Pierce Wells, *Improving One’s Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 323 (1992); see also Sherrilyn A. Ifill, *Racial Diversity on the Bench*, 57 WASH. & LEE L. REV. 405 (2000) (explaining that minority judges could enrich judicial decisionmaking as representatives of outsider perspectives); Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990) (discussing contextual decisionmaking).

89. Wells, *Improving One’s Situation*, *supra* note 88, at 324.

90. *Id.* at 323 (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12–13 (1921)).

91. *Id.*

92. *Id.* at 324.

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white privilege reality. Self-consciousness can be the first step toward action.