Articles

Whites Will Be Whites: The Failure to Interrogate Racial Privilege

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THE PROJECT OF naming and seeing the Whiteness of Whiteness and then decentering Whiteness from its position as the universal norm is an important and significant project. One of the most eloquent voices in this project is Professor Stephanie Wildman's. In her work on privilege, Professor Wildman interrogates and exposes what is often viewed as an objective norm as hiding within the language of the dominant discourse. Professor Wildman states that once we learn to look for this privilege and how to look for it, we start to discover it in virtually all aspects of our life. But Professor Wildman's project is not simply to name privilege but to destabilize and change it.[1] I would like to associate myself with this project. In doing so, I want to examine some of the complexities and difficulties with the project. I should be clear, however, that I am not pointing out the difficulties to derail the project, but to sharpen and deepen the effort.

I will not spend much time arguing that there is indeed White privilege in our society. I have argued this in other articles and Professor Wildman, Professor Grillo, Professor Crenshaw, Professor McIntosh, Professor Frankenberg, Professor Roediger, Professor Calmore,

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1. *See* STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996). *See also* Ruth Frankenberg, *Whiteness and Americanness: Examining Constructions of Race, Culture, and Nation in White Women's Life Narratives*, *in* RACE 62 (Steven Gregory & Roger Sanjek eds., 1994).

Professor Delgado, and many others have effectively argued this point.[2]

Instead, I accept that there is White racial privilege—of what Peggy McIntosh calls the negative kind,[3] and what I prefer to call White supremacy or White racial hierarchy—and I endeavor to determine how we should think about it. Without trying to comprehensively address any one of these important issues, this Article will focus on several concerns. The first is the relationship between privilege and Otherness, rhetorically. Next, I review the nature and function of privilege as it has been articulated. Part of this review is an examination of the ways in which the rhetoric of privilege contributes to its invisibility, and corroborates the myth of White innocence. I touch on the problems that confronting privilege creates for Whites, and then move to a far more involved critique of privilege.

In order to more fully state the problem and make the case for a transformative approach to racial privilege, I here engage the debate of sameness and difference, or Whiteness and Otherness, and in doing so question the long-term utility of valorizing difference as well as assimilationist approaches to power structures. From this position, this Article looks closely at the work of two critics, Iris Young[4] and Genevieve Lloyd,[5] in order to draw from their work a dialogue on the constitution of Whiteness and Otherness in the dominant body, and to elicit the components of the transformative approach. I advocate for a communicative ethic, whereby we would have a mode for transformation cognizant of the relational nature of difference, the need for participation by both marginalized and dominant groups, and the problems of retaining exclusionary institutions and practices.

Following the establishment of this position, this Article discusses the Supreme Court's treatment of issues of privilege and sameness/

2. *See* 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 (1995); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); RICHARD DELGADO, THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16 (1995); DAVID ROEDIGER, TOWARDS THE ABOLITION OF WHITENESS (1994).

3. *See* Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, Working Paper No. 189, Wellesley College Center for Research on Women (1988), *in* POWER, PRIVILEGE AND LAW (Leslie Bender & Daan Braveman eds., 1995).

4. *See* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

5. *See* GENEVIEVE LLOYD, THE MAN OF REASON: "MALE" AND "FEMALE" IN WESTERN PHILOSOPHY (1984).

difference. I look at some of the ways the Court has made a difficult problem even more intractable through the Court's language and assumptions. In problematizing recent Supreme Court decisions, I assert that a profound interrogation of privilege is a prerequisite to meaningful change in the Court's treatment of privilege.

I. The Problem of Defining Privilege and "Deficit"

The relationship between privilege and non-privilege, or "deficit," is hard to define. Professor Stephanie Wildman defines 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."[6] In other words, privilege is a system by which groups of people actively acquire or passively attach to reward without earning it, but rather simply by membership in privileged groups. This membership could be in the group of Whites, heterosexuals, men, or able-bodied persons, or a combination of these or other categories. That is, individuals and groups can be privileged in society without being all of these, a point which complicates recognition of privilege. For example, a Black female heterosexual can access structures of privilege as a heterosexual, even if she cannot be privileged by her status as a racial minority or as a woman.

If privilege is relatively simple to define, its relational Other is not. This problem casts doubt upon the validity of a definition of privilege, as well as on the lived meaning or social construction of the term. French structuralists[7] would seek the meaning of privilege in opposition to other meanings; the significance of a word is located through contrast. But an opposite to privilege is not readily available. Contemporary dictionaries do not contain the terms "aprivilege" or "nonprivilege," nor do these capsules of collective meaning register the term "unprivilege," which Margalynne Armstrong employs.[8] Privilege is defined without its linguistic Other. The problem is more pronounced when approached from a post-modernist or post-structuralist orientation to meaning.[9] Instead of a spectrum of terms to express the

6. WILDMAN ET AL., *supra* note 1, at 29.

7. *See, e.g.*, Ferdinand de Saussure, *Course in General Linguistics, in* CRITICAL THEORY SINCE PLATO (Hazard Adams ed., rev. ed. 1992) 718–26.

8. *See* Margalynne Armstrong, *Privilege in Residential Housing, in* PRIVILEGE REVEALED, *supra* note 1, at 52.

9. *See, e.g.*, Jacques Derrida, *Structure, Sign, and Play in the Discourse of the Human Sciences, in* CRITICAL THEORY SINCE PLATO, *supra* note 7, at 1117–26.

nature of groups that access systems of privilege at multiple sites, few sites, or no sites, there is only the term "underprivileged."

The recently popular but subsequently disfavored term "underprivileged" functions problematically as a linguistic companion to privilege; it reifies the notion of privilege as normal and unquestionable. In indirect contrast to privilege, underprivilege is:

> [A] kind of special case, to indicate those falling below an assumed normal level of social existence. It is the assumption of what is normal that is then the problem, given the verbal continuity of *privilege*, which in its sense of very specific and positive social advantages underprivileged can have the effect of obscuring or canceling.[10]

The continuity of privilege exists, but is not facilitated by a discrete set of terms. This absence of terms serves to confound the examination of privilege and its relational Other, both from a structuralist and a post-modernist orientation. Lacking a vocabulary limits dialogue and action.

This dearth of terms has not foreclosed all fashioning of definitions for the Other in the privilege dialogue. In any power system, from the conservative perspective, the privilege holder is "normal," and the groups that cannot access or attach to privilege are "aberrant or 'alternative'"[11] or "deficit" holders. But these definitions do not give an account of the complex implications of Otherness.

A. The Function of Privilege: A Brief Explication

Privilege normalizes the dominant body. To explain this, Professor Wildman offers the example of the workplace as a locale of normalization. Though the term "workplace" seems neutral, it is exclusive of many locations of work that tend to be performed by women and people of color, rather than White males.[12] Obvious examples include childcare and participation in informal economic structures. "Workplace" does not define either of these types of work, and is indeed exclusionary of these other work types, but the term survives because it has the semblance of neutrality. Looking beyond language, Professor Wildman points out that the behavior expected at workplaces is White and male, from social behavior between employees to collective behavior.[13] And laws governing discrimination in the workplace serve only to compensate the Other for the deficit held; activation of these

10. *See* RAYMOND WILLIAMS, KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 324 (rev. ed. 1983).

11. WILDMAN ET AL., *supra* note 1, at 14.

12. *See id.* at 27.

13. *See id.* at 26–27.

laws creates access to the White male work structure, but does not transform the workplace.[14]

At the level of system, privilege serves to normalize power structures. At the level of the individual—or the level at which we can almost see privilege—it advantages members and disadvantages nonmembers. Members access privilege and receive rewards both passively and actively. As described by Armstrong, "White privilege involves advantages and options that are available merely because one is white. A white person need not be a bigot to benefit from racial privilege; simply having white skin means having access to neighborhoods and jobs that are closed to people of color."[15]

The manner in which members benefit from privilege is multilayered. "First, the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group. Second, privileged group members can rely on their privilege and avoid objecting to oppression."[16]

B. White Innocence: Ignoring Privilege Equates to Racial Subordination

The notion mentioned above, that privilege holders do not have to be bigots in order to be implicated in the power systems, raises the issue of the innocence of Whites.[17] That is, as Thomas Ross has articulated, Whites are implicated even as the rhetoric surrounding race privilege serves to further cleanse Whites of responsibility and even awareness of their participation in privileging structures.[18] In *Innocence and Affirmative Action*, Ross challenges the idea that Whites are innocent if they do not actively discriminate against people of color or otherwise act in a racist manner.[19] Instead, Ross asserts that Whites do not have innocence because they participate in unconscious racism, or the "dominant public ideology," which is a system of beliefs constructed over time and supportive of unspoken racism.[20] That belief system, a carriage of stereotypes and preconceptions, pervades society and dictates behavior that subordinates people of color. "The pres-

14. *See id.* at 31–32.

15. Armstrong, *supra* note 8, at 59.

16. WILDMAN, *supra* note 1, at 13.

17. The concept of White innocence has been discussed by a number of scholars. *See, e.g.*, Kathleen M. Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

18. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990).

19. *See id.*

20. *See id.* at 311.

ence and power of unconscious racism is apparent in job interviews, in social encounters, in courtrooms and conference rooms, and on the streets."[21]

But privilege does not require the conscious participation of Whites, and it is a mistake to try to locate privilege simply in the psychology of Whites. As I will examine below, privilege is mediated through structures, language, power, and institutions that always outrun the control of any given individual. But Whites are nonetheless implicated in this arrangement by their willingness to see the deficit of others and to wear the benefit conferred on them by Whiteness.

Further, in the Affirmative Action dialogue, Whites support and engage in a rhetoric that casts White non-recipients of contracts, school admission, and jobs as innocent victims. In contrast, the recipients of these are cast as "takers"[22] of something rightfully belonging to Whites, or the dominant body.

By these three methods, Whites assert their innocence and demonize the Other. This perpetuation of systems of privilege translates into a very real subordination of people of color and other privilege non-holders. Each of these methods has also been insinuated into court decisions, having grave implications for civil rights and other plaintiffs.[23]

C. The Damaging Effects of Privilege on Privilege Holders

A further complication to understanding and problematizing privilege is that it negatively affects not only the "deficit" holders, but also members of the dominant or privileged body. Peggy McIntosh writes of her acknowledgement that confronting privilege means accepting that comforts and gains were not necessarily the result of good work, that reward does not follow desert.[24] Recognizing the necessity of confronting privilege is a difficult task for privilege holders: "The pressure to avoid it is great, for in facing it I must give up the myth of meritocracy."[25]

According to McIntosh, a privilege holder's participation in and confrontation of the myth of a meritocracy is more complex than

21. *Id.* at 313.

22. *See id.* at 315.

23. The insinuation of the rhetoric of innocence into contemporary jurisprudence is addressed more fully, infra Part III.

24. *See* McIntosh, *supra* note 3, at 27.

25. *Id.*

could be reversed by this single act of self-reflection.[26] Awareness and confrontation of the myth is, in fact, traumatic because it doesn't merely provide the justification for or command to undo present circumstances and avoid attaching to privilege in the future; the confrontation of privilege also requires an exposure and problematization of a legacy of values that have constituted privilege holders. Writing about White privilege in particular but not in isolation, McIntosh states:

> We need more understanding of the ways in which white "privilege" damages white people, for these are not the same ways in which it damages the victimized. Skewed white psyches are an inseparable part of the picture, though I do not want to confuse the kinds of damage done to the holders of special assets and to those who suffer the deficits.[27]

One inhibitor to confrontation on the part of privilege holders is their denial and search for other explanations for their status. As Martha Minow explains:

> [T]here is an assumption that the existing social and economic arrangements are natural and neutral. If workplaces and living arrangements are natural, they are inevitable. It follows, then, that differences in the work and home lives of particular individuals are because of personal choice. We presume that individuals are free, unhampered by the status quo, when they form their own preferences and act upon them. From this view, any departure from the status quo risks nonneutrality and interference with free choice.[28]

Attempts to reconcile the notions of Otherness and free choice have resulted in the limited, compensatory models of altering power structures, such as Affirmative Action programs, which receive full examination in a latter section of this article in which the courts' treatment of these issues is problematized.[29]

D. Working Against Privileging Systems: A Critical Approach

Because privilege is inscribed into our relationships, language, and law, it may seem to be an impossible task to undo it. And, if systems of privilege are undone, would this also obliterate useful components of the structure? How can the bad be discerned from the good, if it is so pervasive and entrenched? Does the recognition of privilege require the complete dismantling of all existing structures, or simply

26. *See id.*

27. *Id.* at 31.

28. Martha Minow, *Making All the Difference, in* POWER, PRIVILEGE AND LAW, *supra* note 3, at 93.

29. *See infra* Part III.A.

access to these structures by marginalized groups? Several critics offer approaches to privilege that stop short of entirely dismantling all existing structures. These approaches, alone or in combination, can be seen to address the ill fit of the Other into the dominant, to borrow Genevieve Lloyd's ideas,[30] but do not promote either relativism or assimilationism.

One approach is to begin to look at power structures critically. Martha Minow advocates for a critical position characterized not by mere tolerance or celebration of multiple perspectives, but, instead, by an attention to the tensions between different perspectives.[31] She asserts that a critical position is ultimately a more productive position, writing:

> Some say that moral relativism results if we solicit and celebrate the view of those who have been excluded, degraded, or oppressed. Surely, this celebration of multiplicity topples the hierarchy that canonized one set of experiences as the norm. Yet the demand for that kind of pluralism does not and should not suspend the critique of power relationships that motivate it.[32]

Another approach, very similar to that taken by Minow, is to make privilege visible. Rebecca Aanerud calls this exposure of racial dominance the "interruption of Whiteness."[33] She advocates for this as an approach to reading texts, both texts that omit race in assumption of Whiteness and texts that approach race non-critically.[34] Aanerud proposes that all reading be done critically, in confrontation of Whiteness, and in that way privilege structures are made more visible.[35]

The utility of this visibility approach, as a first step toward confronting privileging forces, hegemony, and the myth of monolithic Whiteness, is embraced, too, by Ruth Frankenberg. In regard to textual analysis, Frankenberg argues that this confrontation will expose the ways in which Whiteness is continuously reinforced as the norm, as neutral, or "doxa."[36] If the seemingly normal Whiteness is not ques-

30. *See* LLOYD, *supra* note 5, at 101.

31. *See* Minow, *supra* note 28, at 93.

32. *See* Martha Minow, *Partial Justice and Minorities, in* POWER, PRIVILEGE AND LAW, *supra* note 3, at 16, 17.

33. Rebecca Aanerud, *Fictions of Whiteness: Speaking the Names of Whiteness in U.S. Literature, in* DISPLACING WHITENESS: ESSAYS IN SOCIAL AND CULTURAL CRITICISM 42, 43 (Ruth Frankenberg ed., 1997).

34. *See id.* at 56–57.

35. *See id.*

36. Ruth Frankenberg, *Introduction: Local Whitenesses, Localizing Whiteness, in* DISPLACING WHITENESS, *supra* note 33 at 15–16.

tioned, according to Frankenberg, it will continue to be the dominant, subordinating actor.

Making privilege visible is only a first step, as Professor Wildman acknowledges: "Once 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."[37]

The complexity of the problem, and of the theoretical discourse surrounding the problem of privilege, should not result in stasis. That is, responses to the power structure are available and should be implemented, even if they do not represent a complete solution. The search for a total solution not only should not stand in the way of action. It also should be built on a consciousness that attempts to abandon systems that altogether cannot leave the Other "intact" as Lloyd reads de Beauvoir to articulate.[38]

II. Taking the Critical Approach Further: Decentering Whiteness and Addressing the Dilemmas of Sameness and Difference

A. Reason and Individualism: Civil Rights Ideals or Exclusionary Mechanisms?

Part of the White gaze is making the racial Other the racial Other without seeing how that also helps to constitute Whiteness. This move not only normalizes Whiteness but places the impossible burden on the racial Other to become equal by becoming like Whites—that is, raceless.[39] The appeal of this transparent norm is seductive. As Blacks and others have been excluded, subordinated, and marginalized for apparently being different, there has been a powerful pull to address these issues, by both the excluded group as well as the dominant group, by making Blacks just like Whites.[40] Of course, the language of sameness is expressed in terms of being treated the same or just like everyone else. Until recently, it was hardly noticed that the sameness that is being held up as a universal norm is in fact a specific White norm.[41] The specificity of this White gaze has been hidden in the lan-

37. WILDMAN ET AL., *supra* note 1, at 24.

38. *See* LLOYD, *supra* note 5, at 102.

39. *See generally* THEODORE W. ALLEN, THE INVENTION OF THE WHITE RACE, VOLUME ONE: RACIAL OPPRESSION AND SOCIAL CONTROL (1994); YOUNG, *supra* note 4.

40. For a good critique of this position, see generally Marilyn Frye, *Oppression, in* POWER, PRIVILEGE AND LAW (Leslie Bender & Daan Braveman eds., 1995).

41. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997); *See*, e.g., John O. Calmore, *Random Notes of*

guage of Enlightenment claims, such as objectivity, rationalism, and universalism. It is not surprising, then, that challenges to the universal claims associated with Whiteness are attacked as undermining objectivity, reason, and standards.

The attack on the Enlightenment claim of objectivity, the role of reason, and the perspectiveless claim of its totalizing story have been under attack almost since its founding.[42] The role of reason, and other foundational universal claims, was not just a philosophical issue, but was bound up with the way society rationalized and excluded women, racial minorities, and other marginalized groups. But as the dominant language and justification for these groups took hold, the argument for inclusion was frequently cast in the same dominant discourse. Women and racial minorities and their advocates tried to demonstrate that women and racial minorities were indeed capable of the apparent mental and non-mental characteristics prerequisite to membership in society.

Often these arguments took on absurd forms. One example is the discussion as to whether slaves, as property, were or were not capable of reasoned human process and, therefore, could form the necessary mens rea to commit certain crimes like murder. Another example was the debate as to whether women could participate in society as public figures without the supervision of a man. The argument about the place of these subordinated groups in society was often framed on the sameness/difference axis. One position was that if, indeed, women and Blacks were different, they were appropriately limited in terms of societal participation. This reasoning became a vehicle of inclusionary practices; those who championed the inclusion of marginalized groups often did so by asserting that members of these groups could perform the tasks or had the traits requisite and identical to those already included in the dominant society.

At a time when the ideal of equality was taking root, there was a strong need to explain who was not included in the apparent universalizing reach of equality. In the important but controversial book

an Integration Warrior—Part 2: A Critical Response to the Hegemonic "Truth" of Daniel Farber and Suzanna Sherry, 83 MINN. L. REV. 1589 (1999).

42. The height of the claim for the objective universal function of reason was epitomized by such philosophers as Kant and Descartes. *See generally* IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood trans. & ed., 1998); RÉNE DESCARTES, DISCOURSE ON METHOD: AND, THE MEDITATIONS (F. E. Sutcliffe trans., 1968) But, almost immediately, these claims were challenged by philosophers like Hegel. *See generally* GEORG W.F. HEGEL, REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY (Robert S. Hartman trans., 1953).

White Over Black,[43] Winthrop Jordan argues that it was the need to justify slavery and the exclusion of Blacks at the time of the spread of the rhetoric of equality that helped to coalesce the ideology of racism and the racialized excluded Other.[44] This simultaneous process of inclusion and exclusion was not just descriptive of how members of society functioned or were to function in society, it was also constitutive. The Enlightenment project that rhetorically championed the equality of White males was also the justification for the subordination of Others. The Othering of Blacks, American Indians, and women was essential in the making of White males.[45] The challenge, then, to Whiteness is more than an aberration requiring marginalized groups to tinker at the edge of an otherwise rational, free society.

B. The Sameness/Difference Debate: Should Everyone Be Treated the Same?

The process of arguing about the sameness and difference of marginalized groups has and continues to be a central part of the public and private discourse. The consequences of the argument have been extraordinary. Those who would support inclusion have been forced into arguing that members of the disfavored subordinated group are the same as everyone else.[46] But, as Frye and Minow have noted, this means being the same, or different, than some assumed norm.[47] This unstated norm through most of our history has been the norm of Whiteness and maleness. One should not assume that the norm of Whiteness and maleness is necessarily the same as actual White men.

The apparent logic of the sameness/difference discourse under the dominant meaning of equality is this: people who are the same should be treated the same, or equally, and people who are different should be treated differently.[48] The liberalizing role of this schematic is that as we come to accept that we are all apparently the same—

43. WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812 (1968).

44. *See id.*

45. *See id.*; *see also* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989).

46. *See, e.g.*, YOUNG, *supra* note 4; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW (1997); Frye, *supra* note 40.

47. *See* YOUNG, *supra* note 4; *see also* Minow, *supra* note 32.

48. *See generally* john a. powell, *The "Racing" of American Society: Race Functioning as a Verb Before Signifying a Noun*, 15 LAW & INEQ. J. 99 (1997).

reasoning, autonomous, rights-holding individuals—then we can all make claims to equal treatment.

Given the powerful, damaging function of the rhetoric of difference, it is not surprising that the rhetoric of sameness has appeal. I have argued that in our society the sameness/difference debate is predicated on White supremacy.[49] One who is not the same as the White norm is both different and inferior, and therefore can be excluded. On the other hand, if one wants to, one can seek sameness by being like the White norm. The sting of this position becomes clear when we realize that the very Whiteness that the Other is being called to emulate is constitutively anti-Black.[50] Whiteness not only has a relationship to Blackness; this relationship is both hierarchical and oppositional.

What if individuals and groups are different? The sameness/difference approach suggests that it is appropriate that the different be excluded or in some other way subordinated. To treat people the same who are in fact different would be to give them special treatment, thereby violating the requirement of equality that is fundamental to the logic.[51] This is what one writer refers to as the dilemma of sameness and difference.[52]

How are we to address this dilemma? We have largely failed to recognize its existence, and this failure of recognition is one component of the dilemma. Part of the racing process is taking the language and culture away from the dominated group, subjecting them to what one writer calls a social death.[53] The dominated group is then left to try to reclaim its humanity through the very language and social practices that have defined it as less than, or inferior to the dominant group.

The subordinated and marginalized groups that work to reclaim humanity are caught in the same dilemmas. In response, some call for assimilation. While the "passing" of the late nineteenth and early

49. *See* john a. powell, *"Is Racial Integration Essential to Achieving Quality Education for Low-Income Minority Students, In the Short Term? In the Long Term?* 5 POVERTY & RACE 7 (September/October 1996).

50. *See generally* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS (1992).

51. This argument will be very familiar to those who claim that Affirmative Action is both unfair and illegal. *See, e.g.*, FARBER & SHERRY, *supra* note 41.

52. *See* Joan Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory, in* POWER, PRIVILEGE AND LAW (Leslie Bender & Daan Braveman eds., 1995).

53. *See* ALLEN, *supra* note 39, at 35.

twentieth century has fallen out of favor, the passing of today takes the form of the assertion of "pure" individualism, stripped of race and gender. But this notion of the individual is an ideological fiction, reflective of the image of male Whiteness, and still situated in the assimilationist position. While it may be true that we are all individuals, it is certainly not true that any one of us is just individual.[54]

In *Racist Culture*, David Goldberg explores how the concept of the individual as an ideological claim was used in derogation of the collective social arrangements of the Irish, indigenous people, and Blacks.[55] The concept was used against those groups as part of a process of White-making and Other-making. By this process, the concept of the individual was racialized.[56] It is not surprising, then, that women and racial minorities may experience the weight of their womanness or their Blackness and long for the seeming weightlessness of White maleness, or freedom to be just an unencumbered individual.

Robin West makes a similar observation, provocatively stating that women are not human beings if "human being" means a rational, autonomous individual.[57] Like West, a number of theorists steeped in the language of privilege have begun to challenge the assumption of assimilation. I will return to the discussion of assimilation below, and suggest that there are some forms of assimilation that avoid forms of passing and may not be as problematic.

C. Is Valorization of Difference the Answer?

The other part of this dilemma is to recognize the maleness and Whiteness of this norm of the rational, autonomous individual and therefore reject it. In race discourse, this means rejecting what is apparently White as well as rejecting the call for assimilation—which can only be understood as a form of both passing and self-denial—or accepting and valorizing one's difference.[58] Similarly, in gender, women may claim their difference from men and define it as positive.

The dilemma attached to sameness is also a dilemma attached to difference, and, therefore, is not so easily resolved. The heart of this dilemma is that the Other is still caught in the dominant discourse and structure, whether one embraces the assimilationist/sameness

54. *See* john a. powell, *Talking Race*, 31 HUNGRY MIND REV. 15 (1994).

55. DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING (1993).

56. *See id.*

57. *See* Robin West, *Jurisprudence & Gender*, 55 U. CHI. L. REV. 1 (1988).

58. *See* Gary Peller, *Race Consciousness*, 1990 DUKE L. J. 758, 761–62 (1990).

side of the paradigm or the separatist, self-determinist/difference part of the paradigm. This may seem counter-intuitive. Indeed, many of the apparently more radical members of marginalized groups have adopted this stance of claiming and valorizing the "deviant" characteristics that the dominant discourse names as both Other and negative. I remember growing up and receiving the message that to be Black was negative. Part of the message of the Black Power movement was to claim and reclaim the positive aspects of being Black. But, even after having tentatively accepted the positive possibilities of Blackness, there still was the negative connotation with Africanness. The move to redefine Black American as African-American was a further move to both redefine and reclaim an identity in opposition to the dominant discourse. But how does one know which part of the anti-White stance will reflect a positive or negative position for marginalized groups? Consider the educational setting. It has been noted that a number of African-Americans, especially males, define doing well academically as White, and, therefore, work to avoid the stigma of Whiteness by doing poorly in school.[59]

We have witnessed a similar shift in the gay and lesbian community with the embracing of the word "Queer."[60] All of these moves are more than simply the renaming of a people. They are political and cultural maneuvers that attempt to create a space not allowed in the dominant discourse.[61] For much of our nation's history, Whites, and White males in particular, have been the subject that has "raced" the racial Other.[62] Oppositional efforts to valorize what has been denigrated by the dominant society are an attempt to challenge the racing or Othering process. Attempts have consisted of claiming a voice as a subject in opposition to the dominant discourse. But voice is often trapped within the unexamined language and symbols of the dominant group that it wishes to reject.

Despite the fact that such a move may not be as destabilizing of Whiteness as we would like, we nonetheless hear strong opposition from the assimilationist stance. The dominant discourse is littered with statements like: "Why do they want to call themselves Black? They aren't really *Black*." Negative or resistant reactions have come, too,

59. *See* Signithia Fordham & John U. Ogbu, *Black Students' School Success: Coping with the "Burden of 'Acting White'"*, 18 URB. REV. 176, 177 (1986).

60. *See* Lisa Duggan, *Making It Perfectly Queer*, 22 SOCIALIST REV. 11 (1992), *reprinted in* SEX WARS 155 (Lisa Duggan & Nan D. Hunter eds., 1995).

61. *See* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7 (1997).

62. *See* powell, *supra* note 48.

from Blacks, including Justice Marshall, who for some time refused to embrace this shift.[63]

Indeed, the discussion of the radical Other and the reformist Other often takes place around the appropriateness of assimilation versus separation. This strategy of renaming is also associated with an anti-assimilationist stance, and sometimes an explicitly separatist stance.[64] In the Black Power movement and the radical feminist movement, there was—and in many cases remains—a separatist force. Again, I should be clear that, in terms of strategy, marginalized groups may need to explore all or any of these approaches. But, if these strategies are not part of a larger plan, or are seen as an end in themselves as opposed to being a strategy, they will continue to suffer from the sameness/difference dilemma. This may make what seems like a radical move from the dominant discourse be, in actuality, a strategy firmly embedded in and derivative of the dominant discourse. To the extent that they remain only oppositional, or try to assimilate as an end, they also remain dependent on the dominant discourse that they seek to challenge. Indeed, this is the other part of the dilemma of sameness/difference.

D. Decentering Whiteness Is the Best Approach to Race Privilege

Challenging the dominant discourse requires disturbing and decentering the White gaze. This means first naming it and then engaging it. Once it is engaged, the task is to deeply interrogate and challenge the claims associated with it.

The current evolving discourse on privilege and Whiteness exemplified in the work of Professor Wildman and others is part of the process of decentering Whiteness. Development of this discourse is a critical first step. The failure to make the universal norm of Whiteness opaque leaves the privilege of Whiteness invisible both to Whites and people of color alike.[65] The normalcy of male Whiteness, while ob-

63. Marshall insisted on calling himself and other Blacks "Negro" for some time, challenging the appropriateness of the terms "Black" and "African American." *See* Peter Linzer, *White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 187, 214 n.121 (1991).

64. The anti-assimilation position was and still is often confused with an anti-integrationist movement. In much of the popular debate, these terms are used interchangeably. But true integration is not the same as assimilation. *See* john powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL'Y 337, 353–54 (1996). One can also think of assimilation from either a transformative perspective or from more narrow perspectives. *See* YOUNG, *supra* note 4. The confusion of these terms has made the discourse on these issues more torrent than needed.

65. Of course, the universality and normalcy of Whiteness was never complete. If it were, there would be no counter story or challenge to the dominant discourse. At times,

scuring the privilege of Whiteness, does not obscure the lack of the racial or gendered Other. Indeed, what this normalized structure does is name the failure of Blacks and women as a failure that has little to do with Whites. So, not only must the excluded Other then suffer both the material and cultural oppression caused by this exclusion and domination, but the other must also shoulder the responsibility for it.

Whites and White institutions are perceived to be not responsible for this failure. Rather, they are held up as the ideal to which the racial and gendered Other must strive in order to attain full membership in society. Along with the material and cultural benefits associated with Whiteness, Whites are also given a story about the undeservedness of Blacks as contrasted with or entirely unrelated to White innocence.[66] White male innocence is clearly the dominant rhetoric of the Supreme Court as it contends with racial justice and affirmative action issues.[67] This story then becomes a powerful justification for not only maintaining the racial status quo, but also suggesting that any effort to intervene in the status quo is itself unjust.[68]

E. The Deficit Story That Is Told About Blacks

What I am suggesting is that the decentering of Whiteness and the exposure of the White gaze must occur either prior to or concurrently with a strategic effort to separate or assimilate into society. There may be resistance to this, as it may appear that this attempt requires refocusing on White people, instead of marginalized groups focusing on themselves. But that is not what I am suggesting. The dominant language is not just the language that Whites use; it is the language that we all use. The dominant language is both the Black and White language. Focusing on the failure of Blacks without considering the privilege of Whites and Whiteness, and the relationship between Black and White status in society, leads to locating the problem in Blacks. While Blacks may indeed have problems, the heart of the problem is the dominant discourse itself and the deficit story it tells of Blacks, and the innocence story it tells of Whites.[69]

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society has enforced the material and cultural logic of this dominant story by brute force and threats. *See, e.g.*, Crenshaw, *supra* note 2.

66. *See* Ross, *supra* note 18.

67. *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265 (1978).

68. See the language to this effect in *Hopwood v. Texas*, 861 F. Supp. 551 (1994), and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

69. *See* Crenshaw, *supra* note 2.

The deficit story goes something like this. There is nothing wrong with the institutional and structural arrangement of society. In fact, there is hardly an acknowledgement that we have a structural arrangement. To the extent that this is acknowledged, we assume it is neutral and fair. By fair, it is assumed that we all have an equal opportunity to achieve in our society. What White males have they deserve by force of individual commitment and hard work. Those that don't have lack because of personal failure. Indeed, they have what *they* deserve.[70] For policy-makers to consider race, then, is both wrong and violative of liberalism and the civil rights goal of being treated as an individual.[71]

Toni Morrison encourages us to examine the way the history of slavery and racism have marked and scarred White people.[72] Peggy McIntosh writes about the invisible knapsack that Whites are given. I envision that in that knapsack are versions of this story that allow Whites to rationalize and feel innocent in the face of racial oppression and exclusion: "If only Blacks would change their family structure." This story is augmented by claims that other groups that started at the bottom have made it without special dispensation—groups such as the Jews or the Irish.[73]

Despite the telling and the retelling of these stories in schools, churches, on television, in the popular media, and in public and private discussions, there are cracks in the stories. These stories are being challenged by a counter-story of privilege, Whiteness, and relationalism. The story of the individual making it in a value neutral society has its underpinning in the Enlightenment claim of universal norms, objectivism, and neutral, ahistoric foundations. The attack on these Enlightenment claims have been present since their inception. In law, legal realists were some of the first to challenge the claim of the objectivity in law. Late modernism and postmodernism in politics and philosophy continue to interrogate and put forth the dubious assumptions of these claims. As people of color and women have gained political voice, many have used this new voice to assert counter-stories to autonomy, reason, and individuality. Even as liberalism tries to accommodate challenges to Enlightenment without re-

70. *See* JENCKS, *supra* note 50; JUDY H. KATZ, WHITE AWARENESS: HANDBOOK FOR ANTI-RACISM TRAINING (1978).

71. *See* john a. powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789 (1997).

72. *See generally* TONI MORRISON, PLAYING IN THE DARK (1992).

73. For a counter-story about the Jews making it without help, see Karen Brodkin Sacks, *How Did Jews Become White Folks?*, *in* RACE 78 (Steven Gregory & Roger Sanjeck eds., 1994).

linquishing core principles, the challenges persist and are likely only to intensify.

These struggles have not just stayed in the limited domain of philosophers. The fight of muticulturalism and the culture wars show that these issues are touching increasing numbers of our political community as more people notice their absence from or low status in the dominant discourse. It is not clear what the result of these challenges will be, but the disembodied, rational, transcendent, autonomous individual is probably behind us.

For those of us who have taken the counter-story by Professor Wildman and others seriously, we must turn to the question, not whether unjustified White male privilege exists, but having caught a glimpse of it, how should it be discussed and interrogated? We must refuse to be trapped in the deficit story, even a story that calls for asserting the positive aspects of these deficits.[74]

F. Interrogation of the Sameness/Difference Debate; Understanding Difference as Relational, and Embracing the Transformative Model

One only reinscribes the sameness/otherness dilemma by simply accepting or rejecting the terms as they are. But, then, how is one to think about this dilemma? It is this issue on which I will focus now. I will try to show that sameness and difference must not be seen as bipolar and oppositional, but as relational and mutually constitutive. I will emphasize the importance of a transformative model to addressing privilege, as opposed to the assimilationist or conformist model on one hand or the separatist/opposition model on the other. To do this more expansive critique than that presented already in this article, I will draw upon the writings of Iris Young and Genevieve Lloyd.

I have asserted above that one does not address the dilemma by either simply gaining access to the privileging structure or by simply adopting what could be called either an oppositional or inverted stance. There are many examples of Blacks, women, and other marginalized groups that have adopted a variation of these two positions. There are those who fight to assimilate into the existing power structure. While under the present configuration this effort should be supported, it remains a limited strategy that is likely to both reinforce

74. Notice that I am not calling for a rejection or an embracing of what is considered the norm. It is not so easy to understand what our relationship to these norms should be.

and legitimate the existing structure of privilege. But, my primary concern lies with clarifying the dilemma and starting to move beyond it.

The dilemma is essentially this: the assimilationist model purports to give everyone the same right to become the male White norm that is constituted by the negation of the Other.[75] This position has been the one that has received the most criticism, which has sometimes led to rejecting assimilation and the norms associated with it. But to valorize our Otherness in opposition to this White male norm is to ignore that our very Otherness is intricately bound up in this norm. Even though it may appear to be a break from the established norm to claim what was seen as negative and weak because of its otherness as, instead, positive and strong, this may reassert the dominance of the dominant discourse at a more profound level.

There are a number of ways of thinking about this problem. I will focus on two. The first is to think of this problem as largely a distribution problem.[76] If structures, practices, and norms are reflective of the favored and disfavored status of members of society, simply accessing these distributive structures does not disestablish hierarchy or privilege. Iris Young draws attention to this problem in her important book, *Justice and the Politics of Difference.*[77]

The other way of thinking about this problem is as a constitutive problem. Language, norms, and culture that generate the hierarchy are constitutive of both the dominant group and the marginalized group, and their relationship. Genevieve Lloyd calls attention to this in her important book, *The Man of Reason.*[78]

I turn first to Young and the distributive problem of this dilemma. In addressing this dilemma, Young starts by naming and critiquing the assimilation model. She acknowledges that, even under the assimilationalist model, there has been substantial progress toward an emancipatory ideal, especially in opposition to exclusion based on natural inferiority:

> There is no question that the ideal of liberation as the elimination of group difference has been enormously important in the history of emancipatory politics. The ideal of universal humanity that denies natural differences has been a crucial historical development in the struggle against exclusion and status differentiation . . . .

75. *See* YOUNG, *supra* note 4; LLOYD, *supra* note 5.

76. Iris Young recognizes the distributive approach as the one most heavily relied upon by justice theorists, and she is explicitly critical of this approach. *See* YOUNG, *supra* note 4.

77. *Id.*

78. LLOYD, *supra* note 5.

> The assimilationist ideal retains significant rhetorical power in the face of continued beliefs in the essentially different and inferior natures of women, Blacks, and other groups.[79]

In naming the assimilationist ideal, Young distinguishes between what she calls the conformist model and the transformative model of assimilation.[80] In the conformist model:

> [S]tatus quo institutions and norms are assumed as given, and disadvantaged groups who differ from those norms are expected to conform to them. A transformational ideal of assimilation, on the other hand, recognizes that institutions as given express the interests and perspectives of the dominant groups. Achieving assimilation therefore requires altering many institutions and practices in accordance with neutral rules that truly do not disadvantage or stigmatize any person, so that group membership really is irrelevant to how persons are treated.[81]

The transformative model is more emancipatory than the conformist model because it recognizes that simply distributing benefits based upon institutional practices, where the hierarchy and group norms are embedded in the institution, reproduces domination at deeper and more subtle levels. Young criticizes the present way we approach affirmative action as an example of conformist assimilation. Even though transformative assimilation is substantially better than conformist assimilation, it remains flawed, according to Young,[82] because it is still based on the assumption that there is no space in our legal or political system for recognition of positive difference that should support different treatment.[83] Young's transformative assimilation is not the assimilation against which most theorists write. She is not assuming that the Other must become like the dominant norm under this model, but that both the Other and the dominant norm will participate in the creation of new norms and institutions.[84] Young's objection to this model is that it still does not leave room for groups and group differences.

Young asserts that the dominant culture of liberal individualism must be relativist, making room for other value, including the recog-

79. YOUNG, *supra* note 4, at 159. Because racism and other forms of exclusion and subordination reflect a set of practices, they change. *See* powell, *supra* note 48; Omi, *supra* note 61; WILLIAMS, *supra* note 10; Crenshaw, *supra* note 2; and GOLDBERG, *supra* note 55. This also means that the strategies to challenge these practices must also change. *See* Crenshaw, *supra* note 2; GOLDBERG, *supra* note 55.

80. *See* YOUNG, *supra* note 4, at 165.

81. *Id.*

82. *See id.* at 166.

83. *See id.*

84. *See id.* at 167–68.

nition of groups.[85] Young calls for embracing what she terms the "politics of difference."[86] By positively claiming difference, one *may* be backing into the sameness/difference dilemma:

> Since those asserting group specificity certainly wish to affirm the liberal humanist principle that all persons are of equal moral worth, they appear to be faced with a dilemma. Analyzing W.E.B. Du Bois's arguments for cultural pluralism, Bernard Boxill poses the dilemma this way: "On the one hand, we must overcome segregation because it denies the idea of human brotherhood; on the other hand, to overcome segregation we must self-segregate and therefore also deny the idea of human brotherhood." Martha Minow finds a dilemma of difference facing any who seek to promote justice for currently oppressed or disadvantaged groups. Formally neutral rules and policies that ignore group differences often perpetuate the disadvantage of those whose difference is defined as deviant; but focusing on difference risks recreating the stigma that difference has carried in the past.

These dilemmas are genuine, and exhibit the risks of collective life, where the consequences of one's claims, actions, and policies may not turn out as one intended because others have understood them differently or turned them to different ends.[87]

Young believes that part of the dilemma is caused by the universal gaze of dominant culture that defines the Other in opposition and subordination to the values and characteristics of the norm. This infinite Other, then, is not seen in relation to the values and characteristics of the universal self, because these universal values are seen as valueless or neutral. This approach fails to see how the included groups are privileged. Instead, it draws attention to the lack, or deficit, of the excluded, subordinated groups:

> In the objectifying ideologies of racism, sexism, anti-Semitism, and homophobia, only the oppressed and excluded groups are defined as different. Whereas the privileged groups are neutral and exhibit free and malleable subjectivity, the excluded groups are marked with an essence, imprisoned in a given set of possibilities. By virtue of the characteristics the group is alleged to have by nature, the ideologies allege that group members have specific dispositions that suit them for some activities and not others. Difference in these ideologies always means exclusionary opposition to a norm. There are rational men, and then there are women; there are civilized men, and then there are wild and savage peoples. The marking of difference always implies a good/bad opposition; it is always

85. *See id.* at 166.

86. *Id.* at 163.

87. *Id.* at 169 (citations omitted).

> a devaluation, the naming of an inferiority in relation to a superior standard of humanity.[88]

The anti-essentialist struggles of women and people of color can be recast as efforts to break out of the essentialist entrapment of the universal gaze of the dominant culture. But, as such groups try to claim their humanity through the lens of liberal individualism, they run the risk of transporting the sameness/difference dilemma into the individual essentialism debate. And, indeed, this debate has occupied most of the discourse as marginalized groups have struggled to reconstitute their humanity.

Professor Daniel Ortiz argues that many legal theorists who have adopted the post-modern critique of the sovereign subject have done so incompletely, and have ended up reproducing the errors of liberal individualism. As an alternative to "metaphysical individualism," they end up positing "discrete and monolithic" communities, of which individuals are expressions. He suggests that the sameness/difference and essentialism/anti-essentialism controversies in feminist legal theory are actually debates over the two characterizing features of these categorical communities. "At bottom, the sameness/difference debate concerns the *discreteness* of men and women, while the essentialism/antiessentialism debate concerns the *monolithicness* of gender identity."[89] Sameness/difference asks whether groups are largely similar or different, essentialism/anti-essentialism asks the same question within a particular community: Are people within a group largely similar or different?[90]

In the sameness/difference debate, liberal feminists take the sameness side, believing that women are fundamentally no different from men, and thus should enjoy the same freedoms men enjoy and the same power to enjoy it. Difference feminists hold that women differ fundamentally from men, either because of biology (as per Robin West) or because they reason and value differently (as per, for example, Carol Gilligan). According to Ortiz, the debate between liberal and difference feminists is really a debate about discreteness. "To what extent are men and women really different, and how deeply do their differences matter? Does it make more sense to think of men

88. *Id.* at 170.

89. Daniel R. Ortiz, *Categorical Community*, 51 STAN. L. REV. 769, 796 (1999) (emphasis added).

90. *See id.* at 802.

and women as humans with superficial differences or as members of separate groups who sometimes exhibit superficial similarities?"[91]

To Ortiz, feminist theory's most successful attempts to resolve the sameness/difference conflict have sought either to break down the opposition by localizing it or to overcome the opposition by analyzing it politically.[92] Joan Williams, who takes the first course, argues that women and men are both alike and different, and thus for some purposes they should be treated the same, and for others they should be treated differently. Williams urges throwing away any global description of men and women as either the same or different and instead settling for the messy and contentious task of describing individual features of their lives one way or another. Catharine MacKinnon's political dominance feminism goes beyond sameness/difference by looking at the overall standing of men and women.[93] Sameness and difference do not matter; what matters is whether existing social practices devalue women, regardless of how those practices treat men.[94] However, as Mary Anne Case notes, in critically evaluating whether a social practice subordinates them, women must at some point ask how men are privileged by it.[95] Ortiz concludes that, "[w]hile giving up discreteness may disable us from making striking claims, like West's, about men and women, it may allow us better to discover and understand both groups' actual needs and values."[96]

Ortiz notes that community matters to identity in ways traditional liberal legal theory cannot account for: "[A]t least partly [it] constitute[s] the individual and is not wholly reflective of unencumbered individual choice."[97] However, categorical communities—ones which are both monolithic and discrete—lead to many problems. First, as feminist and many critical race theorists have pointed out, most common identity categories are anything but monolithic. Second, monolithic identity categories entail certain kinds of politics. By enlisting members of the group behind their "common" concerns, members of the group who match this description—usually those who created the

91. *Id.* at 797.

92. *See id.* at 799.

93. *See id.* (citing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987)).

94. *See id.* at 800.

95. *See id.* (citing Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 102 n.359 (1995)).

96. *Id.* at 801.

97. *Id.* at 803.

category—are privileged, while those who are different are marginalized. Third, most common identity groups are not discrete: identity is multifaceted, complex, and highly provisional, and describing a person as a member of only one group fundamentally misdescribes him or her.[98]

Nonetheless, Ortiz recognizes the persistence of categorical community, which he attributes to its power as a political tool. "Its simplifying assumptions—in particular, that each person belongs in only one community and that each community is everywhere the same—are exactly what allow it to do its political work."[99] Assuming discreteness and monolithicness avoids messy and contentious intellectual analyses that can frustrate political identification and activity. Second, these simplifying assumptions allow the theory to purport to say more: "In particular, discreteness obviates any need to worry about judgments across communities and allows one to identify individuals as manifestations of a single group. Monolithicness, on the other hand, allows one to identify every member of the community as identical in all important ways with every other member."[100] Together, these two assumptions create an almost automatic political entitlement and empowerment.

Recounting Judith Butler's description of the totalization performed by identity categories as a "necessary error," Ortiz questions its necessity.[101] By recognizing, and thus empowering groups that fail to actually represent the interests of many of their putative members, categorical community injures many of those members individually, and collectively disempowers the other communities they inhabit. The answer, according to Ortiz, is not the current proliferation of categorical identities allowing a person to escape one categorical community in situations where it did not address certain concerns, by asserting allegiance to another that better describes the person for a particular purpose.[102] Instead of simplifying identity in dangerous ways, Ortiz

98. *See, e.g.*, Berta Esperanza Hernandez-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997).

99. Ortiz, *supra* note 89, at 804.

100. *Id.*

101. *Id.* at 805 (citing Judith Butler, *Critically Queer*, *in* BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 223, 225 (1993).

102. Unfortunately, this type of serial integration overlooks how people actually find themselves. Identity is complex but not in this protean way. Most of us do not shift dynamically from one simple totalizing description to another. More of us assume instead one complex identity for a period of time. This complex identity is dynamic, of course, because the many different communities a person may inhabit at any one time exert constantly changing claims over his identity.

calls on us to disaggregate and refine it—that is, to acknowledge communities as fundamentally important but also as messily complex.

> This type of analytic move would not make an identity politics impossible but would make its arguments more complex, difficult, and open to disagreement. That may be the price, however, of making identity politics more responsive to the needs and values of the individuals for whom it purports to speak.[103]

Iris Young argues that the way to address this dilemma is neither by assimilation nor by embracing the oppositional stance of group difference, but, rather, to recognize difference as relational instead of oppositional:

> In this relational understanding, the meaning of difference also becomes contextualized. Group differences will be more or less salient depending on the groups compared, the purposes of the comparison, and the point of view of the comparers. Such contextualized understandings of difference undermine essentialist assumptions. For example, in the context of athletics, health care, social service support, and so on, wheelchair-bound people are different from others, but they are not different in many other respects. Traditional treatment of the disabled entailed exclusion and segregation because the differences between the disabled and able-bodied were conceptualized as extending to all or most capacities.[104]

Both Ortiz and Young seem to take a pragmatic view of this problem, but Young reminds us that the focus on essentialism may be in part an inadequate response to the universal claim of the White gaze. Young, then, would seem to counsel that we draw our attention back to the White gaze instead of trying to think of ways out of the essentialism problem.

Individuality and the denial of the role of groups is part of the dominant discourse to which Ortiz and Young draw our attention. This is part of the assimilation model against which Young writes. But, despite this warning, there is still a strong tendency to locate the problem of privilege almost entirely in personal relationships. By that view, addressing privilege becomes an issue of personal relationships.[105] The Supreme Court, in its discussion of innocence and affirmative action, adopts this limited framework; it conceives of both the perpe-

Id. at 805 n.206.

103. *Id.* at 806.

104. YOUNG, *supra* note 4, at 171 (citations omitted).

105. The discussion about Whites giving up White privilege often suffers from this limitation. *See* McIntosh, *supra* note 3; *see also* JANE LAZARRE, BEYOND THE WHITENESS OF WHITENESS: MEMOIR OF A WHITE MOTHER OF BLACK SONS (1996).

trator and the subordinated victim as being individual.[106] Young reminds us that our personal relationships are mediated through power and institutional structures; privilege cannot be addressed at only the personal level.[107]

Young's criticism of the assimilationist model is insightful and helps us theorize about the problems of sameness and distribution. Her critique on Otherness is not as helpful. After acknowledging some of the limitations of the oppositional stance of Otherness, and with a nod toward feminist cultural studies warning about valorizing one's Other, Young does little to help us reframe the process of identifying a positive claim to Otherness in the relational context. Many of the examples she gives of groups positively claiming their Otherness are arguably reflective of the oppositional stance against which Young warns.[108]

The discussion about the limitations and dangers of simply asserting the positive values of one's Other is taken up by Genevieve Lloyd in *Man of Reason.*[109] Like Iris Young, Lloyd recognizes the dilemma of either accepting the universal claims of the dominant group, and the limitations associated with flatly rejecting the claims. But, unlike Young, Lloyd focuses her attention on the inutility of valorizing one's Other.[110]

Lloyd turns her attention to the role of reason as marking and justifying the domination of the gendered Other. Lloyd successfully makes the case that reason, as we understand it, is a male-centered process that does not occupy the universal mandate that is attributed to it. This universal consciousness, called "reason," is perceived to be a prerequisite for membership in public life. Those lacking it, specifically women and people of color, are justifiably excluded from public life for their lack of reason under the Enlightenment and modern model.[111] Again, it is *their* lack and not the White maleness of reason to which our attention is drawn. Women's immediacy and lack of tran-

106. *See* Ross, *supra* note 18. While most of the Court's language on affirmative action reflects this, the Court has recognized that one of the purposes of affirmative action is undoing the effects of White Supremacy. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

107. *See* YOUNG, *supra* note 4.

108. In discussing the Black Power Movement and Feminist separatism, Iris Young's suggestion that these groups might be embracing separatism as a way to gain inclusion in society is questionable. *See id.* at 159–62.

109. *See e.g.,* Frye, *supra* note 40 and MACKINNON, *supra* note 46.

110. *See* LLOYD, *supra* note 5.

111. *See id.*

scendence, which is necessary for reasoning, make her a hazard to public life.[112]

Through the work of Simone de Beauvoir, Lloyd highlights the problems associated with trying to reconstitute the Other without interrogating the dominant discourse.[113] For Lloyd, the challenge is not one of primarily material re-distribution, but the constitution of the dominant self and the subordinated Other.[114] Lloyd notes that women participate in the constitution of their own Otherness.[115] Lloyd acknowledges that many present-day feminists would take issue with the Sartrean and Hegelian model of the transcendental self and freedom that is employed in de Beauvoir's work.[116] Lloyd does not try to define these models of the self. Instead, the focus is on de Beauvoir's use of these models. While the philosopher challenges the claim that women by their bodies are in the Hegelian netherworld and are unable to transcend the specific, she nonetheless seems to accept the model that the immediate, the body, must be transcended.[117] According to Lloyd, de Beauvoir is aware that the body, as experienced by women, is a social construct, but, nonetheless still seems to be trapped by the assumptions in the discourse against which she argues.[118] While seeming to challenge the Hegelian conceptualization of women as existing in the netherworld, and in order to understand the social construction of the woman's body, de Beauvoir retains the language of transcendence without realizing that it contains the anti-female and the male prospective.

The push by Blacks and other people of color for acceptance as just individuals, without a confrontation of individuality's construction in opposition to these groups, has the same limitations. That is, transcendence as oppositional to women is analogous to individualism as oppositional to Blacks and other racially and culturally subordinated groups.[119] Lloyd's warning about sameness and assimilation is constitutive and lays the foundation for a constitutive stance on difference and Otherness.

Can marginalized groups claim the positive nature of their uniqueness without slipping back into the sameness/otherness dilemma?

112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.* at 96–97.
116. *See id.* at 97–98.
117. *See id.* at 100–01.
118. *See id.*
119. *See* GOLDBERG, *supra* note 55.

For women, the issue is whether immediacy can be claimed and the need for transcendence eschewed. Young believes that this is possible, through the recognition of difference as relational, rather than oppositional. But, as Lloyd reminds us, the Otherness of the Other is itself constituted in the discourse and defined as inferior.[120] Lloyd, like Young, rejects simply asserting that women should be viewed as having the same capacity as men to participate in the dominant structures, including the structure of reason. But Lloyd also argues against simply accepting as valid what constitutes the Otherness of the Other, even if one tries to reevaluate it as positive:

> However, alternative responses are no less beset by conceptual complexities. For example, it may seem easy to affirm the value and strengths of distinctively 'feminine' traits without subscribing to any covertly assumed 'norm' – to have, as it were, a genuine version of Rousseau's idea that the female mind is equal, but different. But extricating concepts of femininity from the intellectual structures within which our understanding of sexual difference has been formed is more difficult than it seems. The idea that women have their own distinctive kind of intellectual or moral character has itself been partly formed within the philosophical tradition to which it may now appear to be a reaction. Unless the structural features of our concepts of gender are understood, any emphasis on a supposedly distinctive style of thought or morality is liable to be caught up in a deeper, older structure of male norms and female complementation. The affirmation of the value and importance of 'the feminine' cannot of itself be expected to shake the underlying normative structures, for, ironically, it will occur in a space already prepared for it by the intellectual tradition it seeks to reject.[121]

Young seems to accept that Otherness is already constituted by the dominant structure, while Lloyd warns against accepting this. Lloyd's observation about gender applies with equal weight to other excluded groups, including racial minorities: "The content of femininity, as we have it, no less than its subordinate status, has been formed within an intellectual tradition. What has happened has been not a simple exclusion of women, but a constitution of femininity through that exclusion."[122]

This constitution of the Other through subordination and exclusion has also been the process that has constituted the *included* dominant group.[123] The distorting effect of subordination and privilege

120. *See* LLOYD, *supra* note 5, at 102–04.

121. *Id.* at 104–05.

122. *Id.* at 106.

123. *See, e.g.*, Omi, *supra* note 61; GOLDBERG, *supra* note 55; ALLEN, *supra* note 39.

marks the "normal" group as well as the denigrated group.[124] This suggests a need to interrogate not only Otherness, but also the very structures and institutions that support this apparent normalcy. But, according to Lloyd, in challenging the norms of the privileged dominant group, it remains important to be agnostic about the norms of the excluded groups. Indeed, in looking at some of the strengths or positives associated with excluded groups, Lloyd cautions against turning these traits into norms: "[S]uch strengths must be seen in relation to structural features of gender difference. They are strengths that derive from exclusion; and the merits of such 'minority consciousness' depend on avoiding asserting it as a rival norm."[125]

In other words, for Lloyd, asserting that what was negative is now positive does not resolve the difference dilemma, but may just reinscribe the dominant discourse. Lloyd not only argues against simply trying to claim the positivity of one's Otherness, she also argues against summarily rejecting the norms of the dominant society. While being critical of the maleness of reason, she wishes to avoid relativism or the facile rejection of reason: "The claim that Reason is male need not at all involve sexual relativism about truth, or any suggestion that principles of logical thought valid for men do not hold also for female reasoners."[126] Lloyd's effort is to adopt an "ambiguous stance" toward reason; its maleness is not an excuse to leave it uncritically intact:

> Philosophers can take seriously feminist dissatisfaction with the maleness of Reason without repudiating either Reason or Philosophy. Such criticisms of ideals of Reason can in fact be seen as continuous with a very old strand in the western philosophical tradition; it has been centrally concerned with bringing to reflective awareness the deeper structures of inherited ideals of Reason.[127]

The complexity of the sameness/otherness dilemma does not suggest paralysis. As Young point out, there is a pragmatic response to the immediate problem that would support transformative assimilation as well as groups positively claiming their Otherness.[128] Young

124. Toni Morrison makes the observation that we have not focused on the scarring consequence to Whites of living in a society with slavery and White supremacy. *See* MORRISON, *supra* note 72. Whites are often willing to concede that slavery and racism have marked Blacks, but assume they have remained largely untouched.

125. LLOYD, *supra* note 5, at 106.

126. *Id.* at 109.

127. *Id.* Unfortunately, frequently the challenge to Reason and other false claims of universal norms by groups excluded by these norms is an assertion of the objectivity of such norms that define the exclusion as justified. *See generally*, FARBER & SHERRY, *supra* note 41.

128. *See* YOUNG, *supra* note 4.

makes this assertion despite being aware of the dilemmas of sameness and Otherness.

As one embraces this dilemma, it becomes apparent that it cannot be addressed in a solitary, unequivocal manner. It requires engagement with the Other as well as with the norms and institution of the dominant society. This condition places a high priority on participation and looks with skepticism on practices, structures, and norms that exclude marginalized groups.[129] It is not enough for marginalized groups to claim their voice for their community or their world. They must participate in the making of the world and the selves that inhabit it.[130] This moves us toward a communicative ethic where legitimacy must be claimed inter-subjectively.[131]

III. The Approach of the Courts: Jurisprudential Devices Obscure Privilege

Much of the public language that is used to construct the story of privilege is replete with legal language. The law is more than discourse, it is also coercive. But its power goes beyond the force of the state; it is a powerful medium of rhetoric and myth. It tells a story of individuality, reason, and symmetry. It is the official organ of the normalcy of White male privilege. It is an ahistoric and acontextualized story of assimilation that tells a bleaker story of Black failure and deficit, of undeserved in a fair system. This story of Black failure is in no place more powerful than in the myth of individual Black failure and individual White innocence.

The Supreme Court has consistently deployed an inter-dependant set of stories and rhetorical techniques to argue that the Constitution provides no solution for these problems. These stories include that of White innocence, and the related intent requirement. In an article exploring the use of innocence in Affirmative Action jurisprudence, Thomas Ross discusses how the story of the individual "innocent [W]hite victim[ ]" of affirmative action works to avoid "the argument that white people generally have benefited from the oppression of people of color, that white people have been advantaged by this oppression in a myriad of obvious and less obvious ways."[132] Simi-

129. *See* john a. powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 Ky. L. J. 9, 93 (1996–97) (citing Roberto Mangabeira Unger, Knowledge and Power (1975)).

130. *See id.*

131. *See* Jürgen Habermas, The Theory of Communicative Action (Thomas McCarthy trans., Beacon Press 3rd ed. 1985) (1981).

132. Ross, *supra* note 18, at 300–01.

larly, the discriminatory intent standard, premised on an assumption that people are rational actors whose decisions depend solely on their individual moral will, treats racism as an individual, aberrational problem. This approach cannot result in an end to racial subordination, because it does not address underlying systems of privilege. As Professor Wildman notes, "The invisible cannot be combated, and as a result privilege is allowed to perpetuate, regenerate, and re-create itself."[133]

Professor Wildman also writes that "[p]rivilege is invisible only until looked for, but silence in the face of privilege sustains its invisibility."[134] Faced with clear evidence of how systems of privilege are working to reinforce racial disparities, the Court turns a (color) blind eye. It does this by deploying two seemingly contradictory rhetorical techniques. First, the Court "decontextualizes" people and groups of people, portraying them as self-created individuals who live outside of any social, historical, or political context. As Professor Ross notes, this decontextualization shores up the story of White innocence.[135] This approach is epitomized in Justice Powell's opinion for the Court in *Wygant v. Jackson Board of Education*:[136]

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive.[137]

Cast into the past and portrayed as too abstract and diffuse to remedy because "practiced by no one in particular against no one in particular,"[138] mere societal discrimination cannot justify disadvantaging innocent Whites. At the same time that it portrays societal discrimination, the Court makes seemingly contradictory "slippery slope" arguments that, in fact, suggest how deeply and concretely embedded in society systems of privilege really are. This final rhetorical technique—the argument, for example, that Blacks cannot be allowed the right to sit in Whites-only train cars because this would undermine the justification for segregated schools and anti-miscegenation laws,[139] or that startling evidence of how race influenced capital sentencing

133. Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible, in* PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 7, 8 (1996).

134. *Id.*

135. *See* Ross, *supra* note 18, at 301.

136. 476 U.S. 267 (1986).

137. *Id.* at 276.

138. Ross, *supra* note 18, at 304.

139. *See* Plessy v. Ferguson, 163 U.S. 537, 544–51 (1896).

could not create a constitutionally-cognizable claim because this would call into question how racial and other biases work throughout the criminal justice system[140]—recognizes the complexity and pervasiveness of privilege, but uses that as an excuse to turn away, rendering it invisible again.

A. The Myth of the Innocent White: An Obscuring Device

Since Justice Blackmun's admonition in *Regents of the University of California v. Bakke*[141] that, "[i]n order to get beyond racism, we must first take account of race,"[142] the Court has steadily moved away from this fundamental notion and has proceeded toward the myth of colorblindness. This doctrinal shift is indicative of the Court's conception of equality. Equality no longer means that systems of subordination will not be tolerated; it now means that the systemic manifestations of racism will be ignored in the name of colorblindness.[143] Cedric Merlin Powell describes how colorblindness functions "as a rhetorical myth focusing the affirmative action debate not on the victims of systemic racism and caste, but on a generalized class of 'innocents' who are arbitrarily punished."[144]

This choice "reflects a desire to avoid the painful revelations that may be lurking in an examination of either racial history or the current racial disparities in society."[145] Thus, proponents of the colorblind model embrace a series of convenient doctrinal myths, including the myth of the innocent White.[146] It is striking that, in order to avoid any consideration of race, it must first be recognized and

140. *See* McCleskey v. Kemp, 481 U.S. 279, 316–17 (1987).

141. 438 U.S. 265 (1978).

142. *Id.* at 407 (Blackmun, J., dissenting).

143. *See* Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191 (1997).

144. *Id.* at 200.

145. John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 324 (1994).

146. Professor Morrison lists the following:

> [1] Affirmative action is not colorblind, because it intentionally invokes racial classifications;
>
> [2] Affirmative action is not based on individuals, but on groups; [3] Affirmative action is not based on merit;
>
> [4] Affirmative action leads to racial politics and backlash in the form of white extremists; [5] Affirmative action is exploited by middle-class African-Americans;
>
> [6] Affirmative action stigmatizes its intended "beneficiaries"; [7] Affirmative action is social engineering, demanding equal results rather than equal opportunity; and [8] Affirmative action victimizes innocent (white) workers.

Id. at 314.

then ignored: we are not concerned about race until "innocent Whites" are injured. As Professor Morrison notes, colorblindness is held together by a baseless contradiction; it "draws just as much attention to race as does race consciousness."[147]

In his opinion in *Bakke*, Justice Powell wrote that we "should not lightly dismiss" the "deep resentment" with which state efforts to rearrange burdens and benefits on the basis of race are likely to be viewed by the "innocent persons" so burdened.[148] This indignation, which Powell described as evidence that such reapportionment could be viewed as invidious discrimination, can be attributed to societal, and judicial, refusal to recognize the operation of White privilege.[149] Powell wrote that innocent individuals "are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others."[150]

The Court continued to tell stories about White innocence in the cases following *Bakke*. As noted above, in *Wygant*, the Court held that a collective bargaining agreement—which had been used in prior litigation to provide meaningful integration by giving black teachers greater protections from layoffs than white teachers—was unconstitutional because it violated the constitutional rights of the innocent White teachers.[151] In *City of Richmond v. J.A. Croson Co.*,[152] Justice Stevens wrote in his concurring opinion that the class of White contractors "disadvantaged" by a set-aside for minority contractors "presumably includes . . . some who have never discriminated against anyone on the basis of race."[153]

Justice Scalia's concurrence in *Croson* spins another strand of the innocence story, which Thomas Ross describes as the denial of "actual victim[ization] status" of Blacks.[154] Applying the intent standard discussed below, Scalia would require proof of a particular act of discrimination against an individual before any kind of affirmative remedy

147. *Id.* at 338.

148. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978).

149. *See* Erin E. Byrnes, Note, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535 (1999).

150. *Bakke*, 438 U.S. at 294 n.34.

151. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270–76 (1986).

152. 488 U.S. 469 (1989).

153. *Id.* at 516 (Stevens, J., concurring).

154. Ross, *supra* note 18, at 306.

could be justified.[155] By contrast to his denial of the "victimization" of Blacks absent evidence of an intentionally discriminatory act, he shows concern for the white victims of affirmative action. "[E]ven 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race."[156]

In *Adarand Constructors, Inc. v. Pena*,[157] the supposed injury to "innocent Whites" was the denial of a government subcontract to Adarand, even though it submitted the lowest bid, because it was not a minority-owned business.[158] Justice O'Connor reasoned from a principle of "consistency," which recognized "that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[159] This concept of consistency required that the Court apply strict scrutiny to determine whether the injury to "innocent Whites" was justified by a compelling governmental interest. For Justice O'Connor, racial classifications could only satisfy this test if used to remedy past illegal discrimination.[160]

Even in the rare cases upholding affirmative action policies, the Court's more moderate Justices adopted language of innocence. In *Fullilove v. Klutznick*,[161] for example, Justice Warren Burger, in upholding a federal statute mandating a ten percent set-aside for minority contractors in a federally-supported public works project, wrote that a "sharing of burdens" by innocent Whites is "not impermissible" as long as it is "limited and properly tailored . . . to cure the effects of prior discrimination."[162] Justice Brennan, in his concurrence in *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[163] adopted the same approach: upholding a particular affirmative action program, but emphasizing innocence to limit the holding:

> [W]e cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given

155. *See* City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 526–28 (Scalia, J., concurring).

156. *Id.* at 527.

157. 515 U.S. 200 (1995).

158. *See id.* at 205.

159. *Id.* at 229–30.

160. *See id.* at 235–37.

161. 448 U.S. 448 (1980).

162. *Id.* at 484. Justice Burger also stressed the "relatively light" burden that would be placed on nonminority contractors by this limited and flexible set-aside. *Id.*

163. 430 U.S. 144 (1977).

> classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination.[164]

Justice Brennan went on to state: "[However, the] direct nexus to localities with a history of discriminatory practices or effects enhances the legitimacy of the Attorney General's remedial authority over individuals within those communities who benefited (as whites) from those earlier discriminatory voting patterns."[165]

Justice Brennan limited his plurality opinion in *United States v. Paradise*.[166] In a one-for-one promotion requirement for selection of state trooper corporals, Justice Brennan noted that the requirement did not impose an "unacceptable burden on innocent third parties."[167] Because of the temporary and extremely limited nature of the remedy, it did not "disproportionately harm the interests, or unnecessarily trammel the rights, of innocent individuals."[168]

Similarly, Justice Souter in his *Adarand* dissent agreed with using "catch-up" mechanisms to eliminate the lingering effects of racial discrimination.[169] He recognized that "members of the historically favored race" would be harmed as a result of racial classifications, but that this "is a price to be paid only temporarily."[170] Because he saw Affirmative Action programs as temporary remedies to eliminate the effects of past illegal discrimination, "the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing."[171] To comfort those who view Affirmative Action programs as detrimental to the equal protection rights of non-beneficiaries, Justice Souter reiterated that these programs are only temporary remedies.[172] What is problematic with the approach is not only that it adopts the myth of the "innocent White," but that in attempting to palliate them, it casts racial subordination and deeply embedded systems of privilege as problems that can be solved soon, and

164. *Id.* at 174 (Brennan, J., concurring).

165. *Id.* at 177–78 (Brennan, J., concurring) (footnote omitted).

166. 480 U.S. 149 (1987).

167. *Id.* at 182.

168. *Id.* at 183.

169. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 270 (1995) (Souter, J., dissenting).

170. *Id.* (Souter, J., dissenting).

171. *Id.* (Souter, J., dissenting).

172. *See id.* (Souter, J. dissenting). The "temporary nature of this [race-based] remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Id.* (Souter, J., dissenting) (quoting Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

thus, the innocent Whites will not have to give up their "rights" for long.

According to some commentators, the failure of the "innocent White" to attain a position because of racial classifications is justifiable because it will effect those persons much differently than it would an African-American.[173] "Such a failure by a white is unlikely to lead to his being treated as a second-class citizen" while "[a] similar failure by a black, however, is likely to perpetuate the stigma of racial stereotypes and to inhibit the achievement of genuine equal dignity and respect."[174] Therefore, although affirmative action programs may treat Whites and African-Americans differently, this does not necessarily mean that it is depriving whites of "legitimate equal opportunity rights." When viewed in the proper historical perspective, the only thing of which affirmative action seems to deprive the "innocent White" is "the increased prospects of success gained as a consequence of the racially discriminatory acts (or omissions) of the state."[175] This view has been summed up as follows:

> The reduction in the prospects of blacks attributable to official racial discrimination has already produced a windfall in the form of increased prospects of success for all the other competitors seeking to obtain scarce public goods. In this sense, affirmative action merely restores the equal- opportunity balance, placing both blacks and whites in the position in which formal . . . equality of opportunity would have left them absent official racial discrimination. Consistent with this, affirmative action designed to remedy the present effects of past discrimination does not take away from "innocent" whites anything that they have rightfully earned, such as educational skills developed through hard work, and which they deserve to keep. Even if completely innocently acquired, the increased prospects of success gained through the unjust treatment of blacks are entirely undeserved. Thus, although the loss of these increased prospects may result in bitter disappointment, it does not amount to a violation of any equal opportunity right.[176]

173. *See, e.g.*, Michael L. Manuel, Adarand Constructors, Inc. v. Pena*: Is Strict Scrutiny Fatal in Fact for Governmental Affirmative Action Programs?*, 31 NEW ENG. L. REV. 975 (1997); Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1789–90 (1989) (discussing the distinguishing features between exclusionary and inclusionary uses of race, and how they pertain to the Equal Protection Clause).

174. Rosenfeld, *supra* note 173, at 1789–90. Justice Brennan in his *Bakke* concurrence noted that the rejection of Bakke from medical school would not "affect him throughout his life in the same way as the segregation of the Negro school children in *Brown I* would have [been affected]." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 375 (1978) (Brennan, J., concurring).

175. Rosenfeld, *supra* note 173, at 1790.

176. *Id.* (footnote omitted).

"Whites are taught to conceive of racism as putting others at a disadvantage, yet are encouraged to remain oblivious to the correlation between their own race" and the privilege it accords.[177] "The failure to acknowledge, the acquiescence in, and the reliance upon, the hierarchical status quo enables whites to argue against affirmative action without appearing inconsistent."[178] "[W]hites are taught to think of their lives as morally neutral [and] normative . . . ."[179]

B. The Intent Standard and Decontextualization as Devices

In *McCleskey v. Kemp*,[180] the Supreme Court was presented with compelling evidence of how Whites, because of White privilege, received more justice in the United States than do non-whites.[181] Rather than address how systems of privilege were implicated in capital sentencing policies that had a disparate impact on Blacks, the Court reinforced its requirement that an Equal Protection claim be supported by proof that individual decision-makers acted with discriminatory intent. Although the Court had established this standard in *Washington v. Davis*,[182] *McCleskey v. Kemp* "worsened the myopia of the Court's approach to the reality of racial discrimination by refusing to acknowledge the . . . effect of race-based statistical disparity in sentencing."[183]

Warren McCleskey was an African-American man sentenced to death in Georgia for the murder of a White police officer.[184] In his habeas petition, he presented a statistical study—the Baldus study—in support of his claim that Georgia's capital sentencing policy was being administered in a racially discriminatory manner.[185] The study showed that murder defendants in Georgia with White victims were more than four times as likely to receive the death penalty as defendants with Black victims.[186] Furthermore, the death penalty was assessed in 22% of cases involving Black defendants and White victims, 8% of cases involving White defendants and White victims, 3% of

177. Byrnes, *supra* note 149, at 558.

178. *Id.*

179. *Id.* (quoting Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 1990 INDEP. SCH. 31, 31–33 (1990)).

180. 481 U.S. 279 (1987).

181. *See id.* at 286.

182. 426 U.S. 229, 239 (1976).

183. Tanya Kateri Hernández, *"Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence*, 57 MD. L. REV. 97, 142 n.229 (1998).

184. *See McCleskey*, 481 U.S. at 279, 283.

185. *See id.* at 286.

186. *See id.*

cases involving White defendants and Black victims, and only 1% of cases involving Black defendants and Black victims.[187] The Court concluded that, even if it were to take this evidence as true, the defendant had failed to prove the existence of purposeful discrimination by the individual decision-makers that had had a discriminatory effect on him.[188]

"Decontextualization" is one of the rhetorical devices that courts commonly use to justify the exclusion and subordination of different groups of people.[189] The intent standard incorporates this technique by portraying individuals as living outside of any social, historical, or political context. Implicit in this approach is another rhetorical device: the use of arguments and language that draw on dominant norms to convey the impression of objective and neutral decision-making.[190] At the heart of the intent standard is the deeply embedded assumption about the nature of identity, namely, that all of us, including the participants in Georgia's capital sentencing process, are rational individuals whose decisions depend solely on individual moral will.[191]

In trying to meet the heavy burden of proof imposed by the Court's intent standard, Warren McCleskey presented historical evidence to demonstrate discriminatory intent on the part of Georgia's legislature. Although the Court acknowledged that the historical background of a legislative decision is one evidentiary source of proof of intentional discrimination, it held that, unless this evidence is "reasonably contemporaneous with the challenged decision, it has little probative value."[192] Furthermore, even if Georgia's legislature was aware of the racially disparate impact of its sentencing policies, proof of decision-makers' awareness of the consequences of allowing the policy to remain in force was not enough. McCleskey would have to prove that the legislature selected the policy because of, not despite of, its adverse effects upon Blacks.[193]

187. *See id.*

188. *See id.* at 292–93 (citing Whitus v. Georgia, 385 U.S. 545, 550 (1967) and Wayte v. United States, 470 U.S. 598, 608 (1985)).

189. *See* LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW, *supra* note 3, at 138–41.

190. *See* Wildman & Davis, *supra* note 133, at 8.

191. "My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture. I was taught to see myself as an individual whose moral state depended on her individual moral will." McIntosh, *supra* note 3, at 24.

192. *McCleskey*, 481 U.S. at 298 n.20.

193. *See id.* at 298.

This decontextualization (or dehistoricization), ignored the fact that:

> [It had] been scarcely a generation since [the] Court's first decision striking down racial segregation, and barely two decades since the legislative prohibition of racial discrimination in major domains of national life. These have been honorable steps, but we cannot pretend that in three decades we have completely escaped the grip of a historical legacy spanning centuries.[194]

Ironically, the Court accused the Baldus study of "ignoring the realities" of criminal sentencing, and, in particular, the discretion inherent in the process.[195] It criticized the study for taking cases with different results "on what are contended to be duplicate facts" and concluding that differences in the results were based on race alone,[196] whereas, according to the Court, these differences could be explained by the individual characteristics of the individual defendants and the facts of the particular capital offense. The Court maintained its conclusion despite the fact that the study took into account non-racial factors that might have legitimately influenced sentencing.[197] By focusing on the individual—the individual defendant, case, and decision-maker—the Court rendered the evidence of privilege exposed by the study invisible again. Thereby, the Court was able to make the perverse assertion that any inference of discriminatory intent raised by the study could be rebutted by a legitimate, non-discriminatory reason: the fact that McCleskey committed an act for which the United States Constitution and Georgia law permit imposition of the death penalty.

As Justice Brennan suggested in his dissent, discretion is not a reason to ignore the statistics; it is rather one of the factors shaping them. The Baldus study found that prosecutors were nearly four times as likely to seek the death penalty in a case involving a Black defendant and a White victim, than in a case with a White defendant and a Black victim.[198] Considering Georgia's long history of dual punish-

194. *Id.* at 344 (Brennan, J. dissenting).

195. *See id.* at 290.

196. *Id.*

197. *See id.* at 287. As Justice Brennan noted in his dissent, the Court's Title VII jurisprudence did not require multiple regression analysis to account for every conceivable variable, as long as it accounted for the major factors that are likely to influence decisions. *See id.* at 327–28 (Brennan, J., dissenting). In fact, in response to criticisms and suggestions by the district court, Professor Baldus conducted additional regression analysis, "all of which confirmed, and some of which even strengthened, the study's original conclusions." *Id.* at 328 (Brennan, J., dissenting).

198. *See id.* at 287. The study found that prosecutors sought the death penalty in 70% of cases involving Black defendants and White victims, but in only 32% of cases involving

ment and the continuing influence of race in its sentencing system,[199] it is not surprising that prosecutors made the decision to seek the death penalty in these cases; they knew they were likely to succeed. Georgia had no guidelines governing prosecutorial decisions to seek the death penalty, and provided jurors with no list of aggravating and mitigating factors to consider. Individual discretion, Justice Brennan notes, created significant "opportunit[ies] for racial considerations, however subtle and unconscious, to influence charging and sentencing decisions."[200]

C. The Device of the Slippery Slope

Another rhetorical technique that the Court often uses to deny relief to those challenging their subordination under systems of White privilege is the "slippery slope." As noted above, much of the Court's rhetoric works to make privilege invisible. Ironically, the argument that the Constitution cannot be used to combat a specific iteration of subordination because doing would call into question assumptions that run throughout the legal system, suggests how deeply and concretely embedded in society systems of White privilege really are.[201]

In *McCleskey* the Court reasoned that recognizing the defendant's claim would open a Pandora's box:

> [I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty . . . the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender.[202]

This is not a new technique. The Court has been drumming in the parade of horribles to undermine challenges to White privilege for nearly a century. Holding in *Plessy v. Ferguson*[203] that the object of

White defendants and White victims; 15% of cases involving Black defendants and Black victims; and 19% of cases involving White defendants and Black victims. *See id.* Furthermore, cases involving Black defendants and White victims were more likely to result in a death sentence than any other racial combination of defendant and victim. *See id.* at 321 (Brennan, J., dissenting).

199. *See id.* at 328–30 (Brennan, J., dissenting). In the 15 years preceding the *McCleskey* decision, the Court invalidated portions of Georgia's capital sentencing system on three separate occasions. *See id.* at 330 (Brennan, J., dissenting).

200. *Id.* at 334 (Brennan, J., dissenting).

201. Bender and Braveman note that the rhetoric of the slippery slope is commonly used to justify exclusion and subordination. *See* BENDER & BRAVEMAN, *supra* note 189 at 140.

202. *McKleskey*, 481 U.S. at 315–17.

203. 163 U.S. 537 (1896).

the Fourteenth Amendment was to ensure the equality of the races before the law, but not "to abolish distinctions based upon color," the Court hinted at the problems that would follow if Plessy were allowed to sit in a Whites-only train coach.[204] Noting that laws requiring the separation of Whites and non-Whites were "generally, if not universally"[205] accepted as valid, the Court went on to list areas where such distinctions had been upheld: namely the establishment of separate schools for White and non-White children and anti-miscegenation laws.[206] These laws, which were enacted in "good faith for the promotion of the public good," and not for the oppression of a particular class, were therefore valid.[207] When, in *Brown v. Board of Education*,[208] the Court finally overruled *Plessy*, the same recognition of how deeply entrenched were systems of White privilege in society shaped and limited the relief granted. Separate but equal was no longer equal, but the Court, acknowledging how widely the impact of its decision would be felt, and the fact that desegregation would involve "problems of considerable complexity," ordered an equitable approach.[209] Therefore, in eliminating a variety of obstacles to bring school systems into accordance with the constitutional principles set forth in *Brown I*, only a "prompt and reasonable" start toward full compliance with that opinion was required.[210]

> Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[211]

This repeating narrative, the recognition of the indices of the privilege and then a subsequent backing away from its full implications, also intertwines with the Court's rhetoric of intent and the sto-

204. *Id.* at 544.
205. *Id.* at 544–45.
206. *See id.* at 544.
207. *Id.* at 550.
208. 347 U.S. 483 (1954) [hereinafter *Brown I*].
209. *Id.* at 495.
210. Brown v. Board of Educ., 349 U.S. 294, 300 (1955).
211. *Id.* at 300–01.

ries it tells about innocence. In *Washington v. Davis*,[212] the Court justifies its holding that a facially-neutral policy cannot be held invalid merely because it benefits or burdens one race more than another, because the impact of holding otherwise "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[213]

D. Positive Steps Taken by the Court

There are counterstories in the language of the Court, language that hints at the dilemma of sameness and Other. Some of the clearest language occurs when the Court acknowledges and discusses the disestablishment of White supremacy or when the Court rejects the acontextual claim of individuals removed from the context of the group.

The Court has not entirely shied away from exposing the ways in which systems of privilege create racial disparities. As Martha Minow notes, "[s]ometimes, judges have challenged the assumption that the status quo is natural and good; they have occasionally approved public and private decisions to take difference into account in efforts to alter existing conditions and to remedy their harmful effects."[214]

In *Swann v. Charlotte-Mecklenberg Board of Education*,[215] for example, Chief Justice Burger, delivering the opinion of the Court, recognized the complex interaction between continuing racial imbalances in schools and changing residential patterns. He noted how school decisions, in response to changes in housing patterns, can further "promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races."[216]

212. 426 U.S. 229 (1976).

213. *Id.* at 248. According to one study cited by the Court, "disproportionate-impact analysis might invalidate 'tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . .; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges.'" *Id.* at 248, n.14 (citations omitted). In addition, "minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule." *Id.* (citations omitted).

214. Minow, *supra* note 28, at 106.

215. 402 U.S. 1 (1971).

216. *Id.* at 21.

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and capacity in light of population

This more complex understanding of how different types of racial disparity interact allowed the Court to imagine broad remedies, rather than attempt to put these problems, once recognized, someplace where courts could not reach them.[217] Chief Justice Burger acknowledged the massiveness of the problem of desegregation, which had been rendered more difficult by changes in the "structure and patterns of communities, the growth of student population, movement of families, and other changes, some of which had [a] marked impact on school planning . . . ."[218] Nevertheless, he reiterated that the objective remained to eliminate from public schools all vestiges of state-imposed segregation, and thus, a court, in remedying past wrongs, could take steps that "may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems."[219]

The Court cautioned that "[i]n seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis

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> growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Id. at 20–21.

217. *Cf. Freeman v. Pitts*, where Justice Kennedy approved the district court's decision to relinquish supervision and control over student assignments because the racial imbalance in the "schools was not a vestige of the prior de jure dual education system[,]" but rather the inevitable result of individual housing choices. Freeman v. Pitts, 503 U.S. 467, 478 (1992).

218. *Swann*, 402 U.S. at 14.

219. *Id.* at 28. Compare Justice Kennedy's invocation of the slippery slope in *Freeman v. Pitts*:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an ever-changing pattern, one difficult to address through judicial remedies.

Freeman, 503 U.S. at 495.

of a constitutional violation."[220] But, despite this limitation, the recognition that residential and other seemingly neutral societal patterns react to the remnants of past school segregation and enable ongoing violations allows the Court to approve a remedy—the use of racial balance goals—which challenges these patterns by taking difference into account.

Similarly, in *Metro Broadcasting, Inc. v. FCC*,[221] the Court, in upholding a federal program that used minority ownership as a "plus factor" in proceedings for new broadcasting licenses, considered both racial imbalances and their deeper impact. As Justice Brennan noted, not only were there significant statistical disparities between non-minority and minority ownership, but "as late entrants who often have been able to obtain only the less valuable stations, many minority broadcasters serve geographically limited markets with relatively small audiences."[222] Despite the lack of a bad actor with discriminatory intent, the Court recognized that a race-conscious policy was necessary to counter these structural barriers to the important goal of increasing diversity on the airwaves.[223]

But perhaps the best work that is done by the Court is when it acknowledges and discusses the disestablishment of White supremacy, as I mentioned above. The cases I will touch on next contain language that suggests a cognizance of the need to transform structures in order to disturb White supremacy and alter existing power structures.

One example of this positive language is found in Justice Brennan's opinion in *Local 28 of the Sheet Metal Workers' International Ass'n v. EEOC*.[224] There, Justice Brennan acknowledged the systemic nature of privilege, and the need for a remedial device that is far-reaching, not merely operative at the level of the individual: "The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members."[225]

Some understanding of the systemic history and contemporary function of privilege is conveyed in *Johnson v. Transportation Agency, Santa Clara County, California*[226] as well. There, the Court opined that:

220. *Swann*, 402 U.S. at 16.
221. 497 U.S. 547 (1990).
222. *Id.* at 553–54.
223. *See id.* at 600.
224. 478 U.S. 421 (1986).
225. *Id.* at 474.
226. 480 U.S. 616 (1987).

> Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson—whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to "racial balancing for its own sake."[227]

Hopeful language is located, as well, in other cases where White supremacy is not just *hinted* as being the source of problems similar to those that have been discussed in this Article, but White supremacy is *named* as the source. In *Adarand*, Justices Ginsburg's dissenting opinion cites *Loving v. Virginia*,[228] a case in which that state's ban on interracial marriages was held to be unconstitutional, as indicative of the fact that "the Constitution and this Court would abide no measure 'designed to maintain White Supremacy.'"[229]

The Court went further in *NAACP v. Claiborne Hardware, Co.*,[230] by not only acknowledging White supremacy, but by bringing to the surface both its pervasiveness and its effect of severely limiting Blacks' world-making abilities:

> Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This implies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs.[231]

These examples reflect the most positive effort on the part of the Court to incorporate an understanding of White privilege into its opinions.

227. *Id.* at 647 (Stevens, J. concurring) (quoting Kathleen M. Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986)).

228. 388 U.S. 1 (1967).

229. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272 (1995) (Ginsburg, J. dissenting) (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).

230. 458 U.S. 886 (1982).

231. *Id.* at 899–900 n.26.

Conclusion

This critical examination of privilege has revealed that the same stories to which scholars and theorists cite as being powerfully reinforcing of existing power structures are the stories that the courts are listening to and repeating. Recent jurisprudence has been the site of a shift further away from recognizing privileging structures. Instead, the court has nearly narrowed its view to see only individual harms perpetrated by one individual onto another.

It is clear that the Court has not gone far enough in addressing privilege, but even theorists are unclear about the type of remedy that could be sought by the Court. A deep interrogation of privilege is required in order to assist a positive, jurisprudential shift.

This Article has tried to show that, as important as the acknowledgement of privilege is, it is not enough. The dilemma of sameness and difference can only be addressed by interrogating the dominant discourse of the White gaze while challenging the material conditions that support it. This is neither a simple rejection nor embrace of Whiteness or of Otherness, but a transformation that disturbs both.