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# Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight

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# TEACHING RACE/TEACHING WHITENESS: TRANSFORMING COLORBLINDNESS TO COLOR INSIGHT\*

MARGALYNNE J. ARMSTRONG AND STEPHANIE M. WILDMAN\*\*

*This Article argues that whiteness operates as the normative foundation of most discussions of race. Legal educators often overlook the role of whiteness in the law school setting and in law more generally. Identifying and understanding whiteness should be an essential component of legal education. This Article considers reasons why legal education rarely addresses this normative role played by whiteness. An incomplete understanding of the nature of white privilege and the modern move toward "colorblindness" conceal the raced nature of much law. To draw the harmful operation of colorblindness into relief, this Article proposes adopting "color insight," which would admit that most of us do see race and underline the need to understand what that racial awareness might mean. This Article argues that color insight is particularly essential in the law school environment where legal educators need to ensure that students do not encounter race only by happenstance or believe race only affects people of color. This Article provides classroom techniques and institutional programming that would foster a more complete understanding of the function of race and whiteness in the law.*

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## INTRODUCTION

Every law student in the United States encounters the issue of race at some point during his or her legal education. At the very least, aspiring lawyers encounter race when studying the idea of equality in constitutional law. Issues of equality in U.S. constitutional history necessarily implicate racial justice, beginning with the Constitution's slavery compromises and the decision to count only taxed Native Americans and three-fifths of the slave population for purposes of determining state representation in Congress.<sup>1</sup> The

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1. "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons." U.S. CONST. art. I, § 2. Section 2 of the Fourteenth Amendment eventually altered this language, but the document that U.S. culture celebrates as birthing democracy also created a racialized hierarchy that continued as Latino/a Americans and Asian Americans increasingly populated the United States. That racialized hierarchy privileged—and continues to privilege—whiteness. See generally IRA I. KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005) (arguing that progressive reforms from the 1930s through the post-war years benefited middle-class Whites); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (exploring case

Fourteenth Amendment's guarantee of equal justice under the law generates cases, even today, that attempt to locate the parameters of racial equality.<sup>2</sup> Race, as it arises in these contexts, usually concerns the treatment of people of color.<sup>3</sup> This focus on race and racial justice highlights the role of law in relation to non-Whites. Yet these equality determinations implicitly situate people of color in relation to an invisible or undiscussed white norm.<sup>4</sup>

The earliest racial equality cases under the Fourteenth Amendment involved attempts by people of color to receive the same treatment that the law accorded to Whites.<sup>5</sup> Challenges to exclusion from white presence and from state institutions open only to Whites formed the second generation of racial equality cases.<sup>6</sup> More recent

law that determined whether naturalization applicants were white as required by federal immigration law).

2. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. \_\_\_, \_\_\_, 127 S. Ct. 2738, 2746 (2007) (deciding that equal protection was violated by K-12 public school assignment schemes in Seattle and Louisville that used race as a factor in tie-breaking (Seattle) or in making certain elementary school assignment decisions (Louisville)).

3. But see Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1341-56 (2000) (detailing victories by Whites in civil rights cases that serve to preserve white privilege).

4. Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail To Protect Latinos*, 117 HARV. L. REV. 1420, 1448 (2004) ("An explicit statement of Whiteness as a norm for equality can be found in 42 U.S.C. § 1981, or the current version of the Civil Rights Act of 1866, which was the predecessor of the Fourteenth Amendment. The current language of § 1981 guarantees to all persons the same legal rights as those 'enjoyed by white citizens.'"). Perea observes: "A demonstrable norm of White racial identity has, from early times, constituted the meaning of full citizenship and equality." *Id.* at 1447.

Perea documents the "tension between the wish for a homogeneous nation and the reality of a heterogeneous one." *Id.* at 1446. Perea quotes early leaders who expressed a "desire for a racially and linguistically homogeneous White republic despite conflicting demographic evidence." *Id.* at 1447. Whiteness has continued to be the implicit measure of equality. See George A. Martínez, *Immigration and the Meaning of United States Citizenship: Whiteness and Assimilation*, 46 WASHBURN L.J. 335, 336 (2007) (analyzing the role of whiteness for those seeking U.S. citizenship).

Catharine MacKinnon has made a similar argument in the gender area that men are the measure by which women's equality is evaluated. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 216 (1989). According to MacKinnon, under traditional equality theory women are "the same as" or "different from" men who remain the measuring stick for the norm. *Id.* at 224.

5. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating a facially neutral law for its egregiously discriminatory application against Chinese American laundry owners); *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879) (invalidating a West Virginia statute that prevented persons of color from serving as jurors).

6. See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 216 (1972) (Douglas, J., concurring) ("[T]here is no constitutional difference between *de facto* and *de jure* segregation for each is the product of state actions or policies."); *Brown v. Bd. of Educ.*,

equality cases have examined the permissibility of considering race as a factor in allocating access to an economy and to institutions that, even after the elimination of de jure racial segregation, continue to be dominated by Whites and white interests.<sup>7</sup> Given the primacy of whiteness<sup>8</sup> and white norms in the factual settings of equality cases, the role of whiteness in constructing equality should be a topic for thorough examination. But legal determinations of racial equality rarely explore whiteness, which remains the hidden but generative force that has propelled and continues to structure issues of race in American law.

This Article posits that legal educators must develop an understanding of the role of whiteness in the construction of equality and teach future lawyers to do so as well. Professor John O. Calmore,

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347 U.S. 483, 495 (1954) (overturning segregation in schools); *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896) (upholding the constitutionality of racial segregation).

7. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding the affirmative action policy at the University of Michigan Law School); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (holding that racially conscious criteria in federal contracting are subject to strict scrutiny, even when these criteria are used to correct historical disadvantages); *Piscataway Bd. of Educ. v. Taxman*, 91 F.3d 1547, 1558 (3d Cir. 1996) (finding affirmative action policy in teacher hiring for purposes other than to remedy past discrimination violates Title VII).

8. The meaning of white and whiteness as used in this Article is aptly described by Tim Wise:

When I speak of “whites,” or “white folks,” I am referring to those persons, typically of European descent, who are able, by virtue of skin color or perhaps natural origin and cultures, to be perceived as “white,” as members of the dominant group. I do not consider the white race to be a real thing, in biological terms, as modern genetics pretty well establishes that there are no distinct races . . . . But the white race certainly has meaning in social terms, and it is in that sense that I use the concept here.

TIM WISE, *WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON*, at ix (2005). Wise also notes, “when all other factors are equal, whiteness matters and carries with it great advantage.” *Id.*

Educational institutions have recently developed curricula in whiteness studies, often named “critical white studies.” Eric Arnesen, *Whiteness and the Historians’ Imagination*, 60 INT’L LAB. & WORKING-CLASS HIST. 3, 8–9 (2001) (emphasizing the impact of whiteness studies on labor history and critiquing critical white studies for turning the meaning of whiteness into a “moving target”). For more on critical white studies, see generally RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (1997); MIKE HILL, *AFTER WHITENESS: UNMAKING AN AMERICAN MAJORITY* (2004); ROBERT JENSEN, *THE HEART OF WHITENESS: CONFRONTING RACE, RACISM AND WHITE PRIVILEGE* (2005); FRANCES E. KENDALL, *UNDERSTANDING WHITE PRIVILEGE: CREATING PATHWAYS TO AUTHENTIC RELATIONSHIPS ACROSS RACE* (2006); KARYN D. MCKINNEY, *BEING WHITE: STORIES OF RACE AND RACISM* (2005); TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1993); GEORGE YANCY, *WHAT WHITE LOOKS LIKE: AFRICAN AMERICAN PHILOSOPHERS ON THE WHITENESS QUESTION* (2004).

whom this commemorative Issue honors, wrote of the need to “[challenge] the universality of white experience [and] judgment as the authoritative standard that binds people of color and normatively measures, directs, controls, and regulates the terms of proper thought, expression, presentment, and behavior.”<sup>9</sup> Identifying and confronting whiteness may prove to be key factors in moving the nation forward toward a more complete realization of racial equality.

This Article first examines the role of whiteness as the measure of equality for all people, even as that white norm remains unacknowledged. It then explores why whiteness often remains invisible during discussions of race. Two central reasons foster that invisibility: (1) the conflation of white privilege with white supremacy and (2) the societal insistence upon colorblindness. This Article suggests that legal educators, in order to train lawyers in the service of democracy, must not only teach about race and racial justice, but also discuss whiteness and white privilege as part of the racial dialogue. Legal education needs to counter colorblindness with color insight.

Because race is so central to the role of lawyers as professionals,<sup>10</sup> this Article next considers race in the law school classroom and legal education’s failure to consider race. Finally, this Article argues that teaching about whiteness necessitates setting a context for discussions about race and whiteness within law schools as institutions and in large, Socratic-style classrooms as well as within seminars.

## I. WHITENESS AS THE DOMINANT MEASURE OF RACIAL NORMS

In many legal contexts, race refers to people of color in contrast to a non-racialized and not-visible white norm.<sup>11</sup> For example, *Plessy*

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9. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992); see also *id.* at 2135 (drawing a link between jazz and critical race scholarship “to illustrate a common tradition of African-American culture that speaks of a perspective structured by emphatic declarations of dissent from dominant norms”). John Calmore is an early critical race theorist, instrumental in developing oppositional legal scholarship.

10. See *infra* notes 72–73 and accompanying text.

11. See, e.g., BARBARA FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* 35–36 (1998); STEPHANIE M. WILDMAN WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADRIENNE D. DAVIS & TRINA GRILLO, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 14 (1996) [hereinafter *PRIVILEGE REVEALED*]; Martha R. Mahoney, *Constructing Solidarity: Interest and White Workers*, 2 U. PA. J. LAB. & EMP. L. 747, 748–51, 763–71 (2000) (“[W]hites do not perceive white privilege and norms.”).

*v. Ferguson*<sup>12</sup> upheld the constitutionality of racial segregation under a “separate but equal” standard. Segregation meant separating Blacks, Mexicans,<sup>13</sup> or other people of color from Whites. Racial separation did not inconvenience Whites as a group; people of color used facilities inferior to those used by Whites or none at all. Although unmentioned, white facilities served as the baseline for equal protection. In the educational setting, no white school would be reduced to match a black school to achieve equality.<sup>14</sup>

In a more contemporary example, race and whiteness are not mentioned in the text of federal laws that imposed disparate sentences for the possession of rock cocaine (crack) and powder cocaine,<sup>15</sup> drugs that are pharmacologically identical.<sup>16</sup> Prosecutors charge Blacks disproportionately for possession of rock cocaine compared to Whites who are more frequently prosecuted for possession of powder cocaine.<sup>17</sup> This disparate treatment of Blacks and Whites furthers inequality.

When equality is at issue, establishing some kind of congruence with the resources available to Whites is often the strategic aspiration. Affirmative action programs try to increase access for non-Whites to

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12. 163 U.S. 537, 550–52 (1896).

13. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 476 (1954) (petitioner claimed jury service targeted “Mexicans,” not Latinos generally, for segregation from Whites). For more on *Hernandez*, see generally MICHAEL A. OLIVAS ET AL., “COLORED MEN” AND “HOMBRES AQUÍ”: *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (2006).

14. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 632–36 (1950) (commenting that no white law student would attend the law school especially established for black students).

15. Federal Sentencing Guidelines, effective in 1987, provided five-year mandatory minimum sentences for first-offense cocaine trafficking of 5 grams or more of crack cocaine or 500 grams or more of powder cocaine, and ten-year mandatory minimum sentences for 50 grams or more of crack cocaine or 5,000 grams or more of powder cocaine. *Executive Summary of Special Report on Cocaine and Federal Sentencing Policy*, in 2 GERALD F. UELMEN & VICTOR HADDOX, *DRUG ABUSE AND THE LAW SOURCEBOOK* § 9:9, at 9-196 (1997–2005); U.S. SENTENCING COMMISSION, REP. TO CONG.: *COCAINE AND FEDERAL SENTENCING POLICY IV* (2002), available at [http://www.ussc.gov/r\\_congress/02crack/2002crackrpt.pdf](http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf). Federal mandatory sentences were found to be unconstitutional in *United States v. Booker*, 543 U.S. 220, 244 (2005). The Supreme Court determined that judges can impose a sentence for crimes involving crack cocaine that is shorter than the 100-to-1 ratio recommended by the sentencing guidelines. *United States v. Kimbrough*, 552 U.S. \_\_\_, \_\_\_, 128 S. Ct. 558, 564 (2007).

16. Drug Policy Alliance, *Cocaine/Crack/Coca*, <http://www.drugpolicy.org/drugbydrug/cocainecrack/> (last visited Jan. 24, 2008).

17. UELMEN & HADDOX, *supra* note 15, § 9:9, at 9-203 (“Blacks accounted for 88.3 percent of federal crack cocaine distribution convictions in 1993. Hispanics 7.1 percent, Whites 4.1 percent and others 0.5 percent. The racial breakdown for powder cocaine distribution offenses sentenced in 1993 shows 32.0 percent White, 27.4 percent Black, 39.3 percent Hispanic, and 1.3 percent other.”).

these resources. Whites have raised equal protection challenges to such programs in anti-affirmative action cases against institutions which have attempted to include minorities into schools or workplaces that have been and remain predominantly white.<sup>18</sup> The anti-affirmative action plaintiffs in these cases fail to acknowledge that the institutions to which they seek entry remain primarily white,<sup>19</sup> further evidencing the unacknowledged benchmark role of whiteness.

The task of confronting the operation of whiteness in the law of equality requires making visible and explicit the standards by which law measures legal equivalence. Articulating the operation of whiteness recognizes that every person in the classroom is relevant to understanding the role of race in the legal system. Discussing whiteness makes clear that issues of race and racial justice do not solely concern people of color and the law. Rather, everyone has a stake in understanding whiteness. Discussion of whiteness can lead to awareness of other privileged statuses as well. Intersecting with race, identity categories (like gender, class and economic background, sexual orientation, physical ability, and educational achievement) permeate the operation of privilege and law in the United States.<sup>20</sup>

The perpetuation of white dominance is racist, but as bell hooks has written, liberal Whites do not see themselves as prejudiced or interested in domination through coercion; yet, "they cannot recognize the ways their actions support and affirm the very structure of racist domination and oppression that they profess to wish to see eradicated."<sup>21</sup>

The word "racist" may seem jarring to some, but:

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18. See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 317 (2003) (white petitioner alleged the university had no compelling interest to accord minority status greater weight); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995) (white petitioner alleged the government's weighting grants of contracts to minority contractors violated Equal Protection); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (white petitioner alleged the use of racial "quotas" in higher education affirmative action policies violated Equal Protection).

19. See, e.g., University of Michigan Law School, *Your Life as a Michigan Law Student: A Close Community of Scholars and Practitioners*, <http://www.law.umich.edu/prospectivestudents/admissions/pages/community.aspx> (last visited Jan. 23, 2008). According to its admissions statistics, the University of Michigan Law School, the school at the center of *Gutter*, remains seventy-two percent white. *Id.*

20. See, e.g., *PRIVILEGE REVEALED*, *supra* note 11, at 22–23 (presenting the description of the Koosh ball as representing multiple strands of privilege and subordination within each individual and in society).

21. BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 113 (1989).



All whites are racist in this use of the term, because we benefit from systemic white privilege. Generally whites think of racism as voluntary, intentional conduct, done by horrible others. Whites spend a lot of time trying to convince ourselves and each other that we are not racist. A big step would be for whites to admit that we are racist and then to consider what to do about it.<sup>22</sup>

Overcoming avoidance of the issue is an important first step in eliminating race-based oppression. Whites must realize that recognition of their own racism is not an admission of intentional wrongdoing. Nonetheless, while racism may not be intentional, it continues to take a toll on non-Whites.

As non-white people have achieved greater levels of access and opportunity, the appearance of white dominance has become less blatant. But success in the United States often requires the adoption of a kind of normative or performed whiteness.<sup>23</sup> When in predominantly white settings, non-Whites (using Blacks as an example) must be “phenotypically but unconventionally black—that is to say . . . ‘look’ but do not ‘act’ black.”<sup>24</sup> Illustrations of this phenomenon include employment policies that prohibit hairstyles favored by African Americans, such as corn rows<sup>25</sup> or fade haircuts.<sup>26</sup>

22. PRIVILEGE REVEALED, *supra* note 11, at 7, 21.

23. John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J.L. & POL’Y 99, 101–02 (2005).

Non-white performance in a dominantly white setting has been a historical predicament. . . . [T]he rights enjoyed by white males could only be obtained through assimilatory behavior. Under these circumstances, in social contract terms, white performance was the *quid pro quo* for white privilege. Today, this is still largely the *quid pro quo*, but this is a bad bargain for people of color.

*Id.*; see also Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1645 (2004) [hereinafter Carbado & Gulati, *Race to the Top*] (arguing that racial minorities successful in corporate life rarely reform the corporate structure to the advantage of racial minorities that follow because they have to conform to “successful racial types”); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792–93 (2003) (book review) (arguing that corporate employers “screen for racial palatability” among minority hires).

24. Carbado & Gulati, *Race to the Top*, *supra* note 23, at 1676–77.

25. See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

26. Employee dress requirements at Abercrombie & Fitch prohibited a neat hairstyle worn by many African American males. The policy stated that “a neatly combed, attractive, natural, classic hairstyle is acceptable, but any type of ‘fade’ cut is unacceptable.” NAACP Legal Defense and Educational Fund, Inc., *The Classic Look of Discrimination: Abercrombie & Fitch Charged with Employment Discrimination in Federal Class Action Lawsuit*, <http://www.naacpldf.org/content.aspx?article=55> (last visited Feb. 28, 2008).

Prohibiting the speaking of Spanish on the job at all times similarly requires Spanish speakers to “perform whiteness” at work.<sup>27</sup> Discrimination against job applicants with black- or Latino-sounding names<sup>28</sup> illustrates the screening function that conformance with whiteness serves. Whites who recognize these expectations placed upon people of color and who acknowledge that these demands arise from a white perspective can begin to understand white privilege and how it operates to subordinate non-white others.<sup>29</sup>

Most discussions of race not only fail to recognize whiteness, but also reinscribe the existing racial hierarchy that privileges Whites. Reva Siegel has described this process as “preservation-through-transformation.”<sup>30</sup> Siegel explains that during the nineteenth and twentieth centuries, women in relation to men, and people of color in relation to white people, appeared historically and formally in law as holding lower status in these hierarchical relationships.<sup>31</sup>

In gender [and] race . . . , the legal system continued to allocate privileges and entitlements in a manner that perpetuated [the] former systems of express hierarchy. Analyzed from this vantage point, the rise of liberal and capitalist systems of social organization did not result in the dismantlement of status

27. See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486–87 (9th Cir. 1993) (noting plaintiffs’ charge that an English-only rule limits Spanish-speaking employees’ ability to “express their cultural heritage on the job”). See generally Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347 (1997) (seeking “to understand why judges hold national origin challenges based on language discrimination in such low esteem”).

28. See Angela Onwuachi-Willing & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1298–1300 (discussing legal implications of a recent report that employers often reject applicants based on resumes bearing a black- or Latino-seeming name); Mariane Bertrand, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* 10–13 (Mass. Inst. of Tech. Dep’t of Econ., Working Paper No. 03-22, May 27, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=422902](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=422902).

29. A white perspective that acknowledges that non-Whites must often operate in “white spaces” and the privilege that operates in such spaces could mark a starting point for responding to racism. John A. Powell has theorized on “white space” as based on individualistic, Hobbesian norms that harm people of all races. John A. Powell, *Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL’Y 13, 36–37 (2005).

30. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997); see also John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167, 1171 (2004) (further exploring “preservation-through-transformation”).

31. Siegel, *supra* note 30, at 1116.

relationships, but instead precipitated their evolution into new forms.<sup>32</sup>

Thus, even supposed transformation efforts may preserve existing hierarchies in a new guise, often with evolving rhetoric that sustains and legitimates hierarchy. As Kenji Yoshino observes, “[T]he status hierarchy may be preserved precisely because the rhetoric has changed, permitting social actors to tell a progress narrative that legitimates the status quo.”<sup>33</sup> The current rhetoric of colorblindness is an example of “preservation-through-transformation” that hampers progress towards racial equality. The conflation of white privilege with white supremacy similarly preserves the racialized status quo.

## II. THE INVISIBILITY OF WHITENESS REINFORCED

The failure to address whiteness in contemporary legal pedagogy is not surprising given two related sets of beliefs: (1) the tendency to conflate discussions of white privilege with white supremacy and (2) the norm of colorblindness in the dominant culture. To be able to move beyond the impasse in which racial equality remains mired, it is essential to understand two points. First, white privilege does not operate with the same dynamic as the now discredited notion of white supremacy; and second, colorblindness perpetuates white privilege. This Article first considers white supremacy, which involves attitudes about racial characteristics and racial hierarchy, proclaiming the superiority of Whites and the inferiority of others.<sup>34</sup> The dominant

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32. *Id.*

33. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 825 (2002) (theorizing models of anti-discrimination that avoid the unintended consequence of perpetuating more insidious forms of discrimination).

34. For more on white supremacy, see Margaret E. Montoya, *Of “Subtle Prejudices,” White Supremacy, and Affirmative Action: A Reply to Paul Butler*, 68 U. COLO. L. REV. 891, 900–02 (1997) (defining white supremacy as “the way that whites have deployed racial differences, from pre-colonial times to the present, to justify the creation and maintenance of territorial, spiritual, moral, labor, social, constitutional, and other group hierarchies”). See also Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 7, 13 (2004) (arguing that the “two pillars” of white supremacy are disenfranchisement and segregation); Michael Poulshok, *The Struggle Within the Struggle: White Supremacy in the Movement for Racial Justice*, 14 TEMP. POL. & CIV. RTS. L. REV. 259, 260–61 (2004) (assessing white supremacy within progressive movements based on “the subjective perceptions of people of color” and “the presence of institutional racism”); c.f. John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1260 (2001) (“[R]ace consciousness was delegitimated within the core cultures, because it was associated with militant black nationalists and white supremacists.”).

culture now equates supremacist attitudes with extremists and fringe elements.<sup>35</sup> Nonetheless, the problematic history of white supremacy in the law—in which judges, legislators, and drafters of constitutions unabashedly asserted that the white race was superior to other subordinate races—still tarnishes the legal system.<sup>36</sup>

#### A. *White Privilege Differs from White Supremacy*

Although rooted in white supremacy, white privilege is more powerful and pervasive than the beliefs or perceptions of supremacy because white privilege actively continues to dictate the terms of day-to-day life in the United States. White privilege establishes whiteness as society's baseline or norm, ultimately determining who has presumptive access to citizenship, material goods, political power, and social standing.<sup>37</sup> While mainstream thought in the United States would now consider white supremacy to be morally repugnant and explicitly rejected, white privilege remains largely unacknowledged. The existence of white privilege allows white people of good will—many with antiracist views—to benefit from the privileged white norms.

Legal educators encounter the juncture of white supremacy and white privilege in two commonly taught constitutional law cases that explicitly proclaim whiteness as the societal norm and also starkly condone white supremacy. *Dred Scott v. Sanford*<sup>38</sup> and *Plessy v.*

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35. As an indication of how far from the mainstream white supremacist ideology has moved, even the conservative and openly anti-immigrant group, the Minutemen, fear the "white supremacist" label. Judy Keen, *Calls To Get Tough on Illegals Grow*, USA TODAY, Apr. 19, 2006, at A3. A leader of the Minutemen told a reporter for *USA Today* that they were conducting "background checks to prevent white supremacists from forming chapters." *Id.* Another member from Kansas wrote an editorial specifically refuting charges that the group was composed of "hard-core white supremacists." Ed Hayes, Op-Ed., *Ed Hayes on the Minutemen: Our Mission Is About Security and Jobs, Not Race as I See It*, KAN. CITY STAR, May 24, 2007, at B8.

36. HANEY LÓPEZ, *supra* note 1, at 3–9 (discussing the "racial prerequisite" cases in the early 1900s in which a determination of race preceded conferral of citizenship).

37. PRIVILEGE REVEALED, *supra* note 11, at 14.

The characteristics and attributes of those who are privileged group members are described as societal norms—as the way things are and as what is normal in society. This normalization of privilege means that members of society are judged, and succeed or fail, measured against the characteristics that are held by those privileged.

*Id.*

38. 60 U.S. 393 (1856).

*Ferguson*<sup>39</sup> are problematic because they uphold and valorize white supremacy.<sup>40</sup> Both cases are infamous and notably overruled.<sup>41</sup>

The discourses concerning whiteness in both decisions, and even in the *Plessy* dissenting opinion, are paeans to white supremacy. *Dred Scott* extols Whites as human, civilized, and endowed with absolute power over a black race subject to the "deepest degradation."<sup>42</sup> *Plessy*'s dissent proclaims white supremacy: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . ."<sup>43</sup> But the *Plessy* Court's supremacist ruminations should not distract the reader from examining the white privilege Homer Plessy and his attorneys indicted in the very pleadings of the case: "The petition for the writ of prohibition averred that petitioner . . . was entitled to every right, privilege, and immunity secured to citizens of the United

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39. 163 U.S. 537 (1896).

40. In *Dred Scott* the Court noted:

The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

*Dred Scott*, 60 U.S. at 404–05. *Plessy* expressed a similar sentiment:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. . . . If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

*Plessy*, 163 U.S. at 551–52.

41. The Fourteenth Amendment to the U.S. Constitution mooted the *Dred Scott* case's denial of citizenship to African Americans. See U.S. CONST. amend. XIV. The Supreme Court of the United States, in *Brown v. Board of Education*, 347 U.S. 483 (1954), explicitly overruled *Plessy*. *Id.* at 494–95; see also John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 663 (2001) (describing how *Brown* also overruled *Dred Scott* because *Brown* "embodied a pledge . . . [to] educate youth for citizenship").

42. *Dred Scott*, 60 U.S. at 409.

43. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

States of the white race . . . ”<sup>44</sup> While Justice Harlan’s dissent agreed, stating “[o]ur Constitution is color-blind,”<sup>45</sup> he made that statement as he applauded white superiority. Justice Harlan’s dissent equated whiteness with supremacy and turned the focus away from Plessy’s desire for white privilege.<sup>46</sup> Ironically, the modern emphasis on colorblindness averts examination of that white privilege described in Homer Plessy’s complaint.<sup>47</sup>

*Brown v. Board of Education*<sup>48</sup> held that excluding non-white children from white public schools failed to satisfy the Constitution’s requirement of equal protection of the law.<sup>49</sup> *Brown* radically departs from the supremacist rhetoric of earlier Supreme Court decisions. The Court’s language in *Brown* implies that racial supremacy is a fallacy: “To separate (children in grade and high schools) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>50</sup> Rather than confronting the nature of the challenged inequality as a practice that privileged whiteness and subordinated non-white others, the decision referred to the relief sought by the plaintiff as “admission to the public schools of their community on a nonsegregated basis.”<sup>51</sup> The *Brown* opinion relegated to a footnote the Delaware trial court’s specific recognition that equality meant that black children should receive “educational opportunities . . . available to white children otherwise similarly situated.”<sup>52</sup> Thus, the Supreme Court’s use of the term “nonsegregated” obscured the Delaware court’s recognition that white children’s education was superior, privileging them. So even though, in *Brown*, the Supreme Court moved beyond white supremacy discourse, the existing white privilege remained unacknowledged, still alive and powerful.<sup>53</sup>

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44. *Id.* at 541. Plessy’s pleadings, which expressed his own internalized white supremacist views, alleged that he “was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him.” *Id.*

45. *Id.* at 559.

46. *Id.*

47. See *infra* Part II.B (discussing colorblindness).

48. 347 U.S. 483 (1954).

49. *Id.* at 493–95.

50. *Id.* at 494.

51. *Id.* at 487.

52. *Id.* at 494 n.10 (quoting *Belton v. Gebhart*, 87 A.2d 862, 865 (Del. Ch. 1952)).

53. The failure to hold state protection of white privilege explicitly unconstitutional left the *Brown* decision open to the criticism that the decision failed to recognize the constitutional supremacy of white associational interests in excluding Blacks from their presence. Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV.

### B. Colorblindness

Discussions about race today occur in an era when the societal notion of colorblindness is a dominant value.<sup>54</sup> The idealized notion of colorblindness tells us that noticing race is wrong because people are equal. The hegemony of colorblindness suggests that by noticing race, one is undermining equality itself. Any conversation about race, or about whiteness in particular, must work against that dominant social norm.

Television provides a snapshot of this norm's operation within popular culture. Satirist Stephen Colbert emphasized the irony embedded in the idea of colorblindness when, in his role as a conservative news pundit on *The Colbert Report*, he interviewed African American sports reporter Bill Rhoden<sup>55</sup> about Rhoden's book *Forty Million Dollar Slaves*.<sup>56</sup> Colbert, seated across a table and looking directly at the dark-skinned and very obviously black Rhoden, said, "I don't see color. I don't see race. Are you a black person? I see [an] American."<sup>57</sup> I am like an infant, I see shapes. Doesn't color divide this country?"<sup>58</sup> Rhoden answered that seeing color is not the problem.<sup>59</sup> He then tried to talk about power, but Colbert interrupted the conversation before Rhoden could truly comment on the subject of power.<sup>60</sup>

This exchange illustrates several key aspects of the operation of colorblindness as a rhetorical device. The focus on colorblindness values not-seeing-color and stops the possibility of dialogue about race before it can begin. In stopping the discussion, the mantra of colorblindness also cuts off any dialogue about power or racial

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L. REV. 1, 34 (1959) ("[W]here the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?").

54. See PATRICIA J. WILLIAMS, SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE 8–9 (1997); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 16 (1991) (arguing that "nonrecognition" of race is a technique that "fosters the systematic denial of racial subordination"); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y REV. 245, 251 (2005) (identifying a "contemporary cultural push to colorblindness").

55. *The Colbert Report* (Comedy Central television broadcast Aug. 8, 2006) [hereinafter *Colbert*].

56. WILLIAM C. RHODEN, *FORTY MILLION DOLLAR SLAVES: THE RISE, FALL AND REDEMPTION OF THE BLACK ATHLETE* (2006).

57. Cf. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (Scalia, J., concurring) ("We are just one race here. It is American.").

58. *Colbert*, *supra* note 55.

59. *Id.*

60. *Id.*

privilege. With no ability even to talk about race or racial justice, the status quo remains. Thus, the dominant value of colorblindness maintains the status quo of white privilege: "Colorblindness is the new racism."<sup>61</sup>

An aspiration to color insight would serve society as a better value than colorblindness. Color insight would encourage noticing race in each context in which it arises, including the operation of white privilege and any other advantaging or disadvantaging function of race. Rather than suppressing an awareness of race, as an aspiration to colorblindness does, color insight would encourage further exploration of the impact of race in society.

For example, in the school financing case *San Antonio Independent School District v. Rodriguez*,<sup>62</sup> the Edgewood school district, where Mr. Rodriguez's children attended school, spent only two-thirds as much per pupil compared to the Alamo Heights school district's per student expenditures.<sup>63</sup> The residents of the Edgewood district were predominately Mexican American; in contrast, the residents of Alamo Heights were predominately "Anglo."<sup>64</sup> The Court's analysis downplayed the role of race or ethnicity or wealth in the resulting educational disparities.<sup>65</sup> This failure to notice race impacted later litigation. In 1996, the Fifth Circuit decided *Hopwood v. Texas*,<sup>66</sup> a challenge to the admissions policy at the University of Texas School of Law. The court rejected as unconstitutional the school's affirmative action plan, designed to remedy de facto segregation.<sup>67</sup> Read together these cases illustrate the poverty of colorblindness.

Children who attended kindergarten in Texas at the time *Rodriguez* was decided were 25 years old when the *Hopwood* litigation began. . . . Texans who were in the applicant pool to attend the University of Texas Law School grew up in an educational system that had allowed vast differentials in their publically funded education because of *Rodriguez*.<sup>68</sup>

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61. Benjamin Kuo, Santa Clara Law student, Comment During Social Justice Thursday Discussion at Santa Clara University Law School (Oct. 19, 2006). For a discussion of Social Justice Thursday, see *infra* notes 113, 127–28 and accompanying text.

62. 411 U.S. 1 (1973).

63. *Id.* at 11–13.

64. *Id.* at 12.

65. Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1226 (2007).

66. 78 F.3d 932 (5th Cir. 1996).

67. *Id.* at 934.

68. Moran & Wildman, *supra* note 65, at 1226.



Thus, the colorblind approach caused the courts to emphasize a theoretical neutrality that actually had a race-based differential impact. Noticing race by applying color insight could have resulted in true justice for the children who were denied educational opportunities at two points in the public education system.

Color insight would serve to promote equality and to emphasize non-discrimination among races. Color insight would admit that most of us do see race and underline the need to understand what that racial awareness might mean. Color insight would not assume that people or groups have any specific traits or propensities. Teaching to develop color insight, rather than colorblindness, would better prepare students for the heterogeneous, democratic society that American ideals embrace.

Given the status quo of white privilege, recognizing the context<sup>69</sup> in which conversations about race can occur is critical. One aspect of that context is the society and social history in which the conversation takes place. Legal educators must also note that they work in the institutional context of a particular school and within a specific classroom setting (either a "race" or a "non-race" course, a large section course or a seminar). These multiple contexts complicate conversations about race and whiteness.

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69. See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty*, 67 *FORDHAM L. REV.* 1927, 1927-46 (1999). John Calmore issued a call for context in a different setting:

By issuing a call to context, I am directing attention to the inner-city poor's lived experiences, including the interconnection of legal and non-legal issues they confront, the web of experiences within which they live, and what Michael Katz calls "their anchor in context." This suggests that we cannot view their issues or the features of context as fixed and unchanging. Instead, we must view them as historically evolving, relational, changing in meaning, and, as Katz says, "to be interpreted in terms of time and place."

*Id.* at 1927-28.

Examining oppression faced by his clients, Calmore found it was "group-based, structured, and systemic." *Id.* at 1938. He deplored the marginalization of his clients that removed them from the option of societal participation. He suggested that advocates "search for invitation, opportunity, and connection," urging that "[a]n open mind and correct sensibility may be more important than the command of technical craft, because often we must learn as we go." *Id.* at 1956. Similarly, in seeking to set institutional and classroom contexts to discuss race and whiteness, we must be willing to learn as we go.

### III. LEGAL EDUCATION'S FAILURE TO TALK ABOUT RACE AND WHITENESS

For the most part, legal educators do not teach about race.<sup>70</sup> Hidden within the already inadequately studied issue of race and absent from discussions of equality, whiteness remains largely invisible within legal education. As legal educators, we often do not notice the operation of race in our classrooms and daily lives. In those rare instances when race is the subject, race remains defined as an issue about people of color. Rarely, in the law school classroom, does race refer to whiteness.<sup>71</sup> In the authors' experience, students of color remain the majority in many race and the law classes. While many white students do enroll in race courses, the relative dearth of white students suggests a view that these classes are a subject of interest primarily to "raced" others. Whiteness can literally become a physical absence in classes in which the acknowledged subject of the class is race. To reach white students, who may be accustomed to ignoring race, legal educators must be willing to speak about race in almost all situations and to examine whiteness in these discussions. When racial inequality is the issue, it is particularly crucial to make the whiteness referent explicit.

It is hard to talk and teach about race in the law school classroom, but it is even harder to address whiteness. Teaching about race needs to be linked expressly to exploring whiteness and making the systemic privileging of whiteness visible for future lawyers. Lawyers serve as officers of the court<sup>72</sup> and have a professional responsibility to foster the pursuit of justice that is an essential element of democratic practice.<sup>73</sup> Given these roles, knowledge about

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70. Lisa Chiyemi Ikemoto, *Some Tips on How To Endanger the White Male Privilege in Law Teaching*, 19 W. NEW. ENG. L. REV. 79, 79–80 (1997); see also Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 55 (1994) (observing the norm of whiteness in legal education and "[r]ace is addressed only through widespread silence").

71. But see JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 487–571 (2d ed. 2007) (describing and analyzing whiteness as a racialized group).

72. James A. Cohen, *Lawyer Role, Agency Law, and the Characterization of "Officer of the Court,"* 48 BUFF. L. REV. 349, 352–58 (2000).

73. Stephanie M. Wildman, *Democracy and Social Justice: Founding Centers for Social Justice in Law Schools*, 55 J. LEGAL EDUC. 252, 252–55 (2005). Social justice law encompasses the protection of democratic ideals such as "life, liberty, and the pursuit of happiness," equality, and representative government. Thus, promoting individual and collective well-being, enhancing human dignity, ending discrimination, and correcting imbalances of power and wealth are the province of social justice lawyers. Social justice lawyers work to give "material meaning to these ideals in the daily lives of individuals and

racial issues should be central to legal education. Discussions about race in general, and whiteness in particular, need to be more than accidental occurrences in students' education. How legal educators teach about race in law school should be a major concern.<sup>74</sup>

In this racialized world, race enters the law school classroom even when faculty do not name or discuss it. Legal education culture, despite its reputation for liberalism, tends to "whitewash" law, ignoring the roles of whiteness and privilege in the construction of legal rules and institutions and the application of law.<sup>75</sup> Some teachers examine race in criminal law classes or aspects of other first-year subjects, but many do not because they fear addressing the issue or do not believe in its relevance. The issue of race appears in "special interest classes" like race and the law or law and social justice, reinforcing the idea that the subject should be compartmentalized and only a concern for some race specialists.<sup>76</sup>

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communities that are marginalized, subordinated, and underrepresented." MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 1 (2003). Given this commitment to marginalized, subordinated, and underrepresented communities and individuals, social justice lawyers must necessarily be working for racial justice. See generally PENDA D. HAIR, *LOUDER THAN WORDS: LAWYERS, COMMUNITIES AND THE STRUGGLE FOR JUSTICE: A REPORT TO THE ROCKEFELLER FOUNDATION* (2001) (concurring with the assessment that social justice lawyering necessarily included addressing issues of race, noting the link between racial exclusion and other societal ills).

The State Bar of California requires attorneys to attend continuing legal education on elimination of bias in the profession. See State Bar of California, MCLE "Regular" Requirement, [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10138](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10138) (last visited Jan. 23, 2008) (noting one-hour requirement for Minimum Continuing Legal Education in "Elimination of Bias in the Legal Profession"). The "elimination of bias" continuing legal education requirement reflects a growing recognition that all lawyers are obligated to promote justice and equality no matter what the specific nature of their practice may be. Oregon and Minnesota also have mandatory "elimination of bias" CLE requirements. See Oregon State Bar, Minimum Continuing Legal Education Rules and Regulations, R. 3.2, 5.5 (effective April 26, 2007), available at [http://www.osbar.org/\\_docs/rulesregs/mclerules.pdf](http://www.osbar.org/_docs/rulesregs/mclerules.pdf); Minnesota Board of Continuing Legal Education, Rules of the Minnesota State Board of Continuing Legal Education, R. 6(B) (effective July 1, 1996), available at <http://www.mbcle.state.mn.us/mbcle/pages/rules.asp>.

74. Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 1-3 (2005) (urging the importance of studying race with law, including an extensive bibliography of sources).

75. MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 22 (2003) (noting that "discussions of racial inequality commonly dwell on only one side of the color line").

76. Cf. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 31-32 (1992) (outlining a similar debate in the field of legal ethics about how to best teach the subject); Joan Howarth, *Teaching in the Shadow of the Bar*, 31 U.S.F. L. REV. 927, 927-35 (1997) (describing how the bar dictates subject matter in legal education; but, as the world has changed, the notion of bar courses has not kept up, specifically with regard to clinical and skills requirements).

Even in these classes, teaching about whiteness remains an often overlooked aspect of teaching about race.

*A. Race in the Law School Classroom*

It is never easy to discuss race in the classroom. Race remains a sensitive subject in the United States, particularly when the conversation occurs across racial lines. Students and faculty may fear they will be misunderstood or viewed as racist. The prevailing notion of colorblindness<sup>77</sup> suggests that recognizing race is inappropriate. Students often resist discussing any issue that they perceive to be outside of the course subject area. Notwithstanding efforts to avoid the topic, race remains present. Too often legal educators suppress opportunities to examine issues of race, including whiteness, when they could help students to engage thoughtfully with these issues.

The following anecdote illustrates some of the barriers to and risks of discussing race in the law school classroom.<sup>78</sup> In a civil procedure class, a few weeks into the semester, one case involving the suspension of several children from school reported that one child was black. Other cases made no mention of the race of the parties. Several classes later, discussing a different case, the professor probed reasons for the plaintiff's involvement. "She was poor; she was probably homeless," said one student. A man in the first row raised his hand and offered in a helpful spirit, "She was probably black." A woman a few seats away turned to him angrily and said, "Now why would you think that?"

The professor intervened, saying, "We will talk more about this later." The professor continued that day with the planned discussion of the case without further mentioning race.

After class, several students approached the professor and said, "We are so glad you stopped the conversation about race, so we could study what we are here for—the real subject." Other students approached the professor to say they did want to talk about race.

The professor returned to discuss the race issues at the outset of the next class meeting. The professor had wanted to give the students involved a chance to speak with each other and to give the class a chance to reflect on the exchange. The professor began the class by explaining that legal education rarely offers enough opportunity to discuss the important implications of race and race-based issues,

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77. See *supra* Part II.B (discussing colorblindness).

78. These events occurred during a law class in the United States in 2006. The authors elect to maintain the anonymity of the professor and students involved.

particularly in a civil procedure course that tends to be very rules-based. The professor engaged the students in a conversation about the implications of identifying the race of the parties for the purposes of study and how those identities might impact litigation.

By deferring the discussion of race, the professor diffused a possible battle over the issue. By placing race at the forefront of the discussion when returning to it in the next class, the professor was able to lead a more nuanced exchange. The issue, as it initially had arisen in class, presented a classic classroom conflict about race. Typically a student makes a comment not intending to offend, but the remark triggers a visceral response from another student who bristles at the stereotyping embedded in the statement. Waiting until the next class separated the subject from the emotions that the topic triggered when the issue first emerged. Focusing on the importance of the subject and the frequent failure to examine it enabled a learning opportunity. By beginning the next class with the subject of race, the professor rejected the value of colorblindness that had led students to believe that race was not important to discuss. The professor rather provided the class with an opportunity to apply color insight in the context of their own classroom dynamic.

The male student's mention of race provoked another student to confront him about his assumptions. Other students believed that the discussion of race was irrelevant. But race is clearly present in this story. As you read it, did you ascribe racial identities to the participants? Would the race of the actors have any bearing or significance on your own response to the story? Did the race of the students in the exchange affect your reaction to their interchange? What race do you think the students who commented after class were? Of what significance is the race or gender of the professor?

As the anecdote and the responses to these questions show, most people fill in racial information from narrative cues.<sup>79</sup> Some readers of this story have assumed that the professor was a white male who was glossing over the importance of race and moving on. Why might those readers have made that assumption? Does a professor of color have greater latitude in handling a conversation about race or might that professor face other constraints? Is it possible to assess the meaning of the story through a "colorblind" lens?

Professor Amy Kastely discusses the phenomenon of filling in racial information from narrative cues and its implications for law by

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79. See *infra* note 80 and accompanying text.

examining Toni Morrison's short story *Recitatif*,<sup>80</sup> a narrative that leaves the reader to supply the race of the parties. Kastely observes:

Whether casual and unthinking or deliberate and deceitful, whether informed by charity or domination, use of raced factual inferences and raced doctrine maintains white norms as legal norms, thus assuring legal enforcement of institutional and ideological white supremacy. Whether these practices are unthinking or deliberate, it is important for lawyers to expose and dishonor them.<sup>81</sup>

Following Professor Kastely's advice to expose and dishonor the common use of racial inferences liberates law professors to examine the elephant in the room too often ignored.<sup>82</sup> Even when professors do not mention race as part of a course, race in general and whiteness in particular are present in the law school classroom and embedded in the law the professor teaches.<sup>83</sup> Race and the whiteness within race infuse discussions from which race is verbally absent, often resulting in alienation of students who become frustrated by the classroom silence on this important topic.<sup>84</sup> Race and whiteness affect students and faculty from all racialized groups, but they often affect students and faculty of color differently from white students and faculty.

### B. Barriers to Discussing Race and Whiteness

When a discussion about race arises spontaneously in a classroom setting, white students and professors may experience discomfort about being misinterpreted or fear making a comment

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80. Toni Morrison, *Recitatif*, in CONFIRMATION: AN ANTHOLOGY OF AFRICAN AMERICAN WOMEN 243, 243–61 (Amiri Baraka & Amina Baraka eds., 1983).

81. Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 314 (1994).

82. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 49 (1991) (describing race as the elephant in the room); see PRIVILEGE REVEALED, *supra* note 11, at 76–78.

83. When entering a law school classroom would you consciously notice the race of the teacher? Does your answer depend on the race of the teacher? On whether the teacher is white? Black? Does your answer depend on what your race is? A room full of white people is about race, about who has been excluded and who has access; but for many white people race can be “safely” ignored if no people of color are present.

84. See Stephanie M. Wildman, *Democratic Community and Privilege: The Mandate for Inclusive Education*, 81 MINN. L. REV. 1429, 1437 (1997) (discussing ways to ensure “safety within our classroom communities”); Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 97 (1995) (exploring ways to lessen the alienation experienced by minority students in class).

that might be perceived by students as racially insensitive. Impromptu discussions of race raise different issues for faculty of color. When a white professor chooses to allow spontaneous discussion of race to continue, students and colleagues do not seem to view the white professor's decision as self-interested, although Whites may be labeled advocates of "political correctness."<sup>85</sup> Faculty of color, however, may be seen as mounting a soapbox. What goes unacknowledged is that even without raising the issue of race, faculty of color bring race into the classroom by their mere presence because the "norm" for faculty remains white in most law schools.<sup>86</sup> The faculty member of color, just like the student of color, is a rare visible minority in the majority of law school classrooms and is at risk when these discussions occur.

Teachers of color often face hostility from students merely for raising racial justice issues. Robert Chang reports an anonymous student evaluation that he received after his first year of teaching law: "Leave the racist comments out. Go visit Korea if you don't like it here. We need to unite as a country not drive wedges between us."<sup>87</sup> The student's message made to Chang echoes the more general accusation: "All you ever do is think about (or write about) race." The unspoken message in both Chang's evaluation and the more general accusation is that conversation about race does not belong in the law school classroom, a message conveyed by the civil procedure students who spoke to the professor at the end of their class.<sup>88</sup> One must wonder how many ideas and learning opportunities are lost because of this attitude that examining race is not worthy of classroom time. Would the accusation "all you ever discuss is law and economics" be equally damning? White privilege flourishes in an atmosphere that minimizes the legitimacy and importance of examining race. Some white students even may assume they lack as much of a personal stake in racial justice issues as non-white students.

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85. See Patricia J. Williams, *Defending The Gains*, in *BEYOND PC: TOWARDS A POLITICS OF UNDERSTANDING* 191 (Patricia Aufderheide ed., 1992).

86. Surveys indicate that fifty-seven to sixty-nine percent of U.S. law faculty are white. PATI ABDULLINA, AMERICAN ASSOCIATION OF LAW SCHOOLS STATISTICAL REPORT ON LAW FACULTY 2006-2007, at 4-5, 17-18 (2007), available at <http://www.aals.org/statistics/0607/0607statistics.pdf>.

87. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1299 (1993).

88. See *supra* note 78 and accompanying text.

However, because lawyers are officers of the court, race and whiteness are issues for which we are all responsible.<sup>89</sup>

For this African American professor [Margalynne], bringing up race in the property class has generated a range of responses. For several years, when covering the materials on housing discrimination in my first-year property course, I showed a videotape in which an African American plaintiff who had successfully pursued a fair housing claim described her experience of, and reaction to, housing discrimination.<sup>90</sup> The video generated a wide spectrum of reactions including student appreciation, student eyeball rolling, dismissive comments after class,<sup>91</sup> student attacks in course evaluations, and the question "Do you always show propaganda to your students?" from a colleague who was sitting in on my class. Reactions such as these illustrate why it is difficult to discuss race in required law school classes and indicate that discussions of whiteness might prove equally or more difficult.

#### IV. WHAT LEGAL EDUCATORS AND LAW SCHOOLS CAN DO

American society is built with many, many white spaces.<sup>92</sup> One predominantly white space that shapes and forms its inhabitants is the academy. Yet some may wonder, how can the academy be a white space now, when so many more people of color are present as students and teachers than ever before?

Charles Lawrence (a noted African American founder of critical race theory) had a dream before he got tenure.<sup>93</sup> In the dream, he was struggling to be himself in the presence of a monolithic white maleness that wanted to oppress him and to deny his intellect, his

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89. See Beverly Daniel Tatum, *Defining Racism: "Can We Talk?,"* in READINGS FOR DIVERSITY AND SOCIAL JUSTICE 79, 82 (Maurianne Adams et al. eds., 2000) (citing costs to Whites of system of racism).

90. See Videotape: Housing Discrimination—Who Should Ever Have To Get Used to That?, (HOPE Fair Housing Center of Lombard, Ill., 1991); see also PRIVILEGE REVEALED, *supra* note 11, at 43–44 (discussing comments which were originally made in the video by Professor Okainer Christian Dark).

91. Students who overheard these comments repeated them to Margalynne.

92. John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1234–35 (1995) (explaining how "location and community are carried and placed on racial identity" to create white and black space).

93. Charles R. Lawrence III, *A Dream: On Discovering the Significance of Fear*, 10 NOVA L.J. 627, 627–30 (1986) [hereinafter Lawrence, *A Dream*]; Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2231–33 (1992); see also PRIVILEGE REVEALED, *supra* note 11, at 1–2 (discussing Lawrence's dream).



humanity, and his belonging in the academic community.<sup>94</sup> I [Stephanie] appeared in his dream and attempted to speak on his behalf, but the white man and I spoke as if Lawrence were not there.<sup>95</sup>

This portrayal disturbed me because I know Lawrence can speak for himself. He, too, recognized this fact, and when he wrote about the dream, he described my discomfort at participating in this conversation that made him invisible.<sup>96</sup> But this portrayal also disturbed me because it made clear my privileged role in the academy, a role I had not previously acknowledged.

Lawrence was describing the privilege of whiteness that would allow me and the man in the dream to talk about Lawrence and issues of race in a particular way, between ourselves and to his exclusion. Our shared white privilege meant that our conversation mattered in terms of the decision as to whether Lawrence would ultimately be part of the community. Our whiteness defined the community, although neither the man nor I articulated that fact or were even necessarily aware of it. That we were both white gave us more than something in common; it gave us the definitive common ground that transcended our own differences and gave shape to us as a group with power to define who else would be included in the circle of the academy.

Within this community of whiteness, the academy replicates itself as a predominately white institution serving predominately white interests. This replication impacts how students study law, and it further reproduces itself as they enter the legal profession. Legal educators must name and talk about whiteness to identify this cycle and move toward more inclusive practices.

Developing an ability to talk in the classroom and in the institution about race and the whiteness that is part of race necessarily begins with faculty studying the issue for ourselves, in our own lives. That work invokes a commitment to a lifetime of learning; teachers cannot talk with a class about these issues without first thinking about them or discussing them in our own circle of peers. Preparation outside the classroom will help the instructor lead conversations that may arise within it.<sup>97</sup>

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94. Lawrence, *A Dream*, *supra* note 93, at 627–30.

95. *Id.* at 628.

96. *Id.*

97. Frances Ansley provides a useful collection of resources analyzing race in the law school classroom:

Numerous authors have considered race as a feature of contemporary legal education and legal pedagogy. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY*

*A. From Talking About Race to Teaching About Whiteness*

Talking to white students about whiteness often involves teaching about race more generally. White students may have assumptions that are common to and a result of white privilege. White students may think that they do not have a race or that racial issues do not matter in their own lives. Many white law students do not recognize white racial privilege. Some may even believe that they are not privileged because they lack economic privilege or failed to gain admission to an elite college or university.

In proposing to discuss race in the law school classroom, this Article makes the following assumptions. A racial hierarchy does exist in the contemporary United States that privileges whiteness. Whiteness defines the institutional norm in most law schools.<sup>98</sup> Race enters the room when each of us steps into the classroom, but it enters in a different way for the white teacher and for the teacher of color. When a white teacher enters the classroom, white students see him or her as a professor and for the most part do not see race.<sup>99</sup> Race enters the room with each student as well as with the professor. Again, because of the racial hierarchy that privileges whiteness, students of color and white students remain situated differently with respect to discussions of race and whiteness. Racial balance in the classroom impacts the discussion as well. A discussion with thirty white students and one student of color would be very different from a discussion with fifteen students of color and fifteen white students.

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OF RACE AND RIGHTS 80–97 (1991) (chapter entitled “Crimes Without Passion”); Kimberlé W. Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989) (discussing difficulties minority students face in the classroom and suggesting ways to overcome them); Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (black law professor begins law courses with personal narrative); Gerald P. López, *The Work We Know So Little About*, 42 STAN. L. REV. 1 (1989) (using narrative to give another perspective); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN’S RTS. L. REP. 7 (1989) (urging lawyers to see the world from the viewpoint of the oppressed).

Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1518 n.18 (1991).

98. But compare the mission statement for Howard University School of Law urging engagement in solving “problems that are of particular concern to minority groups.” Howard University, Mission Statement, <http://www.law.howard.edu/774> (last visited Jan. 23, 2008).

99. But compare discussion by the late Jerome Culp, an African American law professor, who describes his first day class experience, *infra* notes 120–23 and accompanying text. Culp’s students did not need reminding of the presence of race, which visibly entered the room with him.

The racial diversity of a particular classroom may impact the level of racial awareness as well as the potential for deep conversation about racial justice.

Even when racial awareness exists in the classroom, students and professors are often reluctant to talk about race.<sup>100</sup> White participants may particularly fear making a racist statement or otherwise showing racial ignorance. Faculty of all races fear causing emotional damage to students of color who may not wish the added attention that a discussion of race may bring to their presence. Any discussion of race, particularly when instituted by a white professor, highlights the presence of students of color in the room. Yet, presumably, students of color attend class for their own legal education and not as fodder for white students to learn about race. Regina Austin urged participants at an American Association of Law Schools Plenary Session to make certain that students of color were learning needed material for their own educations and not serving as the teachers in the class, especially on matters of race.<sup>101</sup> A professorial interest in talking about race and whiteness must not impair the educational experience for students of color.<sup>102</sup>

A professor may also fear emotional damage to white students.<sup>103</sup> If a discussion suggests a student's racism, a professor may be unsure about how to handle the backlash from the conversation. Any conversation about race that does not occur in a class on race and the law also runs the risk of criticism from students for being "off

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100. See, e.g., Leslie Espinoza Garvey, *The Race Card: Dealing with Domestic Violence in the Courts*, 11 AM. U.J. GENDER SOC. POL'Y & L. 287, 296-300 (2003) (exploring the difficulty of talking about race yet emphasizing the importance for culturally competent lawyering); Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1355-56 (2005) (describing conversations about race as taboo in society).

101. Regina Austin, Speech at the Plenary Session of the American Association of Law Schools (Jan. 6, 1990) (transcript on file with the North Carolina Law Review).

102. Race is central to legal education, yet legal educators must avoid using non-white students as teaching tools. Some might find this assertion confusing when contrasted with a white student's perception that she attends law school for her own legal education and not to be racially "sensitized." However, these ideas are not parallel. No student should be required to be the object of learning unless all students are. In contrast, students who feel that classroom time spent on race detracts from the study of legal rules fail to recognize the importance for practicing attorneys of cultural competence and attention to injustice.

103. See Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOL. L. REV. 59, 65 (2007) (acknowledging the emotional impact of the topic for all students, in the setting of a predominately white class).

subject.” Professors of color who raise racial justice issues may be especially susceptible to criticism that “all they talk about is race.”

Given these risks and doubts, it is no wonder that many are reluctant to engage the topic of race or whiteness in the law school classroom. Kevin Johnson cautions: “A teacher must be careful to avoid missteps in the classroom. Issues of race, gender, and class touch on individual and group identities as well as on powerful experiences in the students’ lives.”<sup>104</sup> As noted, race is present in the classroom before any classroom discussion occurs. Race is not only present when students and professors enter the room, but also pervades the law school building and its history, often evidenced by pictures hanging on the wall or names engraved on the edifice. Racial justice and whiteness must be analyzed as part of legal education because of their central influence on life in the United States, its legal system, and the practice of law.<sup>105</sup>

In the face of these obstacles, it becomes important to establish a context for any discussion about race and whiteness, both in the classroom and within the institution. Individual teachers can try to shape their own classroom environment as appropriate for the class subject matter. But faculties and administrators in legal education have an obligation to consider methods to enable these conversations within their institutions. Rather than waiting for a racial justice crisis, such as hate speech directed at students of color<sup>106</sup> or a campus theme party that insults a racial group,<sup>107</sup> law schools should ensure that

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104. Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242, 245 (2004).

105. See, e.g., *id.* “Analysis of civil rights and racial justice issues is important to legal education generally because those issues are central to a full understanding of U.S. social life.” *Id.* at 243. “[I]t is not easy to ignore the fundamental truth that race, class, and gender influence the judicial system in the United States.” *Id.*

106. See, e.g., Joseph Berger, *Film Portrays Stifling of Speech, but One College’s Struggle Reflects a Nuanced Reality*, N.Y. TIMES, June 27, 2007, at B7 (discussing approach to hate speech in Vassar College campus publications); *College Assesses Limits of its Free-Speech Wall*, N.Y. TIMES, Jan. 3, 1996, at B6 (analyzing incident at Pomona College that lead to rethinking the campus free-speech policy); Editorial, *Hate Speech and the University*, N.Y. TIMES, Apr. 6, 1995, at A30 (discussing CUNY’s reaction to racist remarks made by a professor).

107. See, e.g., Stephanie Irwin, *Racism Now Hidden, UD Professor’s Study Shows, Whites’ ‘Gangsta’ Parties Seem To Follow Trend of Two-Faced Incidents Recorded in Student’s Journals*, DAYTON DAILY NEWS (Dayton, Ohio), Feb. 2, 2007, at A1 (reporting on an investigation into “Gangsta” theme parties thrown by white students at several U.S. universities); Opinion, Roey Rahmil, *“Hate Speech” Policies Ineffective*, SANTA CLARA, Mar. 1, 2007, at 7, available at <http://media.www.thesantaclara.com/media/storage/paper946/news/2007/03/01/Opinion/hate-Speech.Policies.Ineffective-2750808.shtml> (discussing a “South of the Border” theme party at Santa Clara University that triggered debate about the school hate speech policy).

channels of communication already exist for discussions about the role of race and the role of whiteness within the legal profession. The following sections discuss some methods for creating those communication channels.

*B. Toward Color Insight: Fostering Institutional Settings for Talking About Race and Whiteness*

The societal notion of colorblindness remains a dominant social value in the landscape of racial dialogue. By having any conversation about race, or about whiteness in particular, the professor works against that dominant value. Colorblindness, however, maintains the status quo of white privilege.<sup>108</sup> Given that status quo, establishing institutions and classrooms in which these conversations can occur productively is critical.

In many law schools, students of color form student groups based on identity categories. Administrators often call upon these groups and faculty of color when a racial crisis occurs within the institution.<sup>109</sup> Many schools also have diversity or minority affairs committees that include white faculty. Increasingly, law schools have social justice centers that can provide a locus for the coalition work necessary to bring groups together across racial difference to engender conversations.<sup>110</sup>

Institutional programming about racial justice, outside of the classroom, provides a sustained forum for discussion. Such programming might involve a film series. Film provides a common

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108. See *supra* notes 37–69 and accompanying text. Although white supremacy differs from white privilege, the perpetuation of white privilege, even by inaction, maintains a racial power imbalance.

109. See, e.g., Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1226–27 (1991) (offering reasons for people of color, hired essentially to serve as role models, to be wary of jobs as law faculty members). Delgado writes that the job expectation includes service above and beyond the call of duty: “Of course Tanya will agree to serve as our faculty advisor, give this speech, serve on that panel, or agree to do us X, Y, or Z favor, probably unpaid and on short notice. What is her purpose if not to serve us?” *Id.* at 1227. Furthermore: “If you are a role model, are you expected to do the same things your white counterpart does, in addition to counseling and helping out the community of color whenever something comes up?” *Id.* Delgado observes: “Most professors of color of my acquaintance do an inordinate amount of counseling, recruiting, and speaking on behalf of minority causes.” *Id.* at 1227 n.28; see also Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. REV. 419, 419–20 (1986) (concluding that overwork and overcommitment produce serious risk of early death for professionals of color in high-visibility positions).

110. See, e.g., Wildman, *supra* note 73, at 257 n.18 (listing social justice centers).

context for discussion.<sup>111</sup> Seeing a film with someone of a different race can provide insights for both viewers.<sup>112</sup>

Common reading also provides a context for discussion. A regular reading group for first-year students, facilitated by faculty, introduces race, gender, and other identity-based issues in conjunction with first-year courses.<sup>113</sup> Excerpts from Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*,<sup>114</sup> and Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*,<sup>115</sup> make a powerful beginning to such a series.

Professor Crenshaw writes of the “anger and frustration” of students of color in law school classrooms.<sup>116</sup> She explores the

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111. For films examining this topic, see, for example, SOUL OF JUSTICE: THELTON HENDERSON'S AMERICAN JOURNEY (Ginzberg Video Productions 2006) (providing a personal look at racial justice issues through biography of a federal judge); MIRRORS OF PRIVILEGE: MAKING WHITENESS VISIBLE (World Trust Education Services, Inc. 2006); and THE COLOR OF FEAR (StirFry Seminars 1994).

112. Margalynne assigns students in her Race and the Law seminar to see films involving race with a person of another race. Students then discuss their reactions and present their observations to the class. This assignment deepens not only racial analysis, but also friendship within the class.

113. The Center for Social Justice and Public Service at Santa Clara University School of Law offers “Social Justice Thursdays.” This discussion series enriches the first-year curriculum by providing first-year law students with a forum in which to discuss public interest/social justice issues of all kinds, alternative perspectives on legal education, and first-year subject areas. The fall series emphasizes issues of race, ethnicity, gender, and poverty. The spring series focuses on the role of lawyers working with communities. See Social Justice Thursdays, <http://www.scu.edu/law/socialjustice/social-justice-thursdays.cfm> (last visited Feb. 28, 2008) (describing the program and providing links to its reading lists).

114. Kimberlé Williams Crenshaw, *Foreword: Towards a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994) [hereinafter Crenshaw, S. CAL. REV. L. & WOMEN'S STUD.] (discussing her experiences teaching a seminar entitled “Minority Voting Rights and Majoritarian Domination,” designed to address some of the difficulties encountered by minority law students). The above citation refers to the article as reproduced by the *Southern California Review of Law and Women's Studies* as part of its 1994 symposium entitled “Bringing Values and Perspectives Back into the Law School Classroom: Practical Ideas for Teachers.” Professor Crenshaw originally wrote this article as a foreword to an issue of the *National Black Law Journal*. Kimberlé Williams Crenshaw, *Foreword: Towards a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1989).

115. Jerome McCristal Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (suggesting that by sharing their lived experiences, minority law professors create a safer space for minority students and enhance education for students of all races). Sadly, Professor Culp died in 2005. For articles written in tribute to his legacy, see generally Robert S. Chang, *A Call from Jerome*, 50 VILL. L. REV. 785 (2005); Adrienne D. Davis, *Three Jeromes: A Tribute to Professor Jerome McCristal Culp, Jr.*, 50 VILL. L. REV. 777 (2005); and Angela P. Harris, *Tribute to Jerome: Under Construction*, 50 VILL. L. REV. 775 (2005).

116. Crenshaw, S. CAL. REV. L. & WOMEN'S STUD., *supra* note 114, at 34.

"substantive dynamics of the classroom and their particular impact on minority students."<sup>117</sup> She writes:

In many instances, minority students' values, beliefs, and experiences clash not only with those of their classmates but also with those of their professors. Yet because of the dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views, these conflicts seldom, if ever, reach the surface of the classroom discussion. Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics.<sup>118</sup>

Professor Crenshaw calls this dominant mode "perspectivelessness."<sup>119</sup> This theoretically neutral lack of perspective perfectly diverts students from examining how whiteness informs perspectivelessness. Under this view, issues of race are off limits because they pollute objectivity. White interests, served by white creators of legal analysis, can never be unmasked. Critiquing the notion of perspectivelessness is crucial in talking with white students, who often do not believe they have a racialized perspective.

Once the notion of perspectives becomes visible, the discussion can proceed with questions like: Do you agree with Professor Crenshaw that legal analysis incorrectly assumes perspectivelessness? Did your own racial perspective affect how you read Professor Crenshaw's article? If so, how? Have you experienced perspectivelessness in your own classes or are your classes employing a range of perspectives? Do you feel as if you need to master a particular perspective to succeed in law school? If there is a particular perspective, do you think that it serves principles of social justice?

Jerome Culp, who was an African American law professor at Duke, described his own experience of realizing that the question posed by his students every year, "Where did you attend law school?" was really a way of inquiring, "What qualifies you to teach me?"<sup>120</sup> He had not realized the question's unstated meaning until a white

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117. *Id.*

118. *Id.* at 34-35 (citations omitted).

119. *Id.*

120. Culp, *supra* note 115, at 543.

colleague was upset that students had asked Culp the question.<sup>121</sup> Culp told his students that he had attended the University of Chicago and Harvard Law School.<sup>122</sup> He also told them he was the son of a coal miner, seeking to impact the way they viewed race within his classroom.<sup>123</sup> Culp explained that he wanted to say “to [his] black students that they too can engage in the struggle to reach a position of power and influence, and to [his] white students that black people have to struggle.”<sup>124</sup> Yet Culp found that the reaction, from students of both races, was often disbelief.

Culp explained that his use of autobiography conveyed more than an effort to put his students at ease about his qualifications. He wrote that saying, “I am the son of a poor coal miner”:

has informational content that has a transformative potential much greater than my curriculum vitae. *Who we are* matters as much as what we are and what we think. It is important to teach our students that there is a “me” in the law, as well as specific rules that are animated by our experiences.<sup>125</sup>

Coupled with Crenshaw’s exposition of perspectivelessness, Culp’s view of the importance of the “Me” in law and his memorable message about where he came from gives students permission to consider their own journey to law school, aspirations, and the relationship of race to those aspirations. Fruitful discussion springs from questions like: Why do you suppose that writers of color and white women might feel the need to be self-consciously autobiographical or use the “Me” as Professor Culp calls it?<sup>126</sup> Have you had occasion to use the “Me” in your education prior to law school? Was its use encouraged or discouraged? What are the advantages of the autobiographical approach to writing, teaching, or being a student? Does it have any dangers or risks? What do you believe is the ideal relationship between the legal and the personal? Do you agree with Professor Culp that the personal is also legal?

A regular institutionalized forum within the law school like Social Justice Thursdays,<sup>127</sup> where people can talk about racial justice

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121. *Id.* The white colleague was upset because white professors do not receive similar questions with regard to their educational background.

122. *Id.*

123. *Id.*

124. *Id.* at 539.

125. *Id.* at 543.

126. For more examples of an autobiographical approach, see Calmore, *supra* note 23; Chang, *supra* note 87; and Lawrence, *A Dream*, *supra* note 93.

127. See *supra* note 113.



issues within society and within the institution, provides a place outside the classroom for students to reflect upon the learning process in which they have become immersed. Commenting on the value of this institutional learning environment, one student of color wrote:

Social Justice Thursdays set the context for some honest talk about practical things we students can do to confront race and gender issues in the classroom. It was nice to have a space where students of color were able to have honest disagreements and for everyone to think about what else is at stake.<sup>128</sup>

Reading and discussing Crenshaw and Culp can help students to become aware of their environment and perhaps to consider the legal and social implications of diversity's absence in the historical portraits that decorate most law schools. An introduction to writings about perspectivelessness and autobiography cannot be a panacea, or even a recipe, for raising whiteness issues within an institution. However, this step can be used to foster conversation about thought processes and to make classrooms more race-conscious, leading toward color insight.

C. *Toward Color Insight: Providing a Context for Talking About Race and Whiteness Within a Particular Classroom*

Setting a context for talking about race and whiteness will depend both on the subject area and the size of the class, whether a large section, Socratic-style classroom or a more intimate seminar environment. A growing literature makes suggestions for ensuring that discussions of racial justice issues occur within Socratic-style, required courses.<sup>129</sup> Seminar settings, with smaller numbers and often a roundtable approach, appear more conducive to discussing race in

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128. Wildman, *supra* note 73, at 265.

129. See, e.g., John O. Calmore, *Close Encounters of the Racial Kind: Pedagogical Reflections and Seminar Conversations*, 31 U.S.F. L. REV. 903, 907 (1997) (reflecting on teaching intended to serve the "practice of freedom"); Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1217 (2005) (assessing the effectiveness of U.C. Davis Martin Luther King, Jr. School of Law's attempt to shift away from the traditional law school model in order to provide an experience that was less "hostile to students of color and women"); Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education—A Curricular Study with LatCritical Commentary*, 13 BERKELEY LA RAZA L.J. 119, 122 (2002) (advocating "meaningful inclusion of new courses on, or somehow directly relevant to, Latinas/os *qua* Latinas/os in the 'typical' law school curriculum of the United States").

general and whiteness in particular.<sup>130</sup> This section considers both types of classes in turn.

### 1. Large Section, Socratic-Style Classrooms

Race is not a major theme in many large section courses, such as contracts or property, as they are conventionally taught.<sup>131</sup> Similarly, in torts, race per se is not a major issue. Race is implicated in areas like damages awarded for injury, but the classic texts assume the racelessness of the subject.<sup>132</sup> Creating common ground for discussion, through the mechanism of assigned reading, is one avenue that facilitates discussion of race and whiteness.

I [Stephanie] decided to inject a series of seven sessions, every other week throughout the term, on theoretical perspectives on tort law.<sup>133</sup> The use of perspectives not only allowed the explicit introduction of critical race theory into the classroom, but it also enabled utilization of other, better known perspectives, situating critical race theory as an equal to them. Perspectives included pragmatism, critical race theory, law and economics, feminist theory, critical legal theory, process theory, and the practical aspects of lawyering.<sup>134</sup>

Beginning with pragmatism, utilizing the wonderful article by Catharine Wells about situated decisionmaking<sup>135</sup> opens students' eyes to the concept that who we are affects how we view the world. Professor Wells's article examines situated decisionmaking that requires human agency, and she explains why lawyers and judges should develop awareness of divergent cultures.<sup>136</sup> She writes, "every legal judgment is made from a particular perspective."<sup>137</sup> In arguing

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130. Calmore, *supra* note 129, at 905–15.

131. See Forde-Mazrui, *supra* note 74, at 1–2. But see Johnson, *supra* note 104, at 245.

132. See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (7th ed. 2001); see also Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 503 (1998) (noting that the typical law school curriculum on torts does not examine structures of privilege).

133. For more on this idea, see Anita Bernstein, *Perspectives on a Torts Course*, 43 J. LEGAL EDUC. 289 (1993). This idea developed into an introductory chapter on perspectives in TOM GALLIGAN ET AL., *TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS* 4 (rev. 4th ed. 2007).

134. Certainly, other perspectives would be possible, such as corrective justice and social justice. See GALLIGAN ET AL., *supra* note 133, at 10–11, 22–23.

135. Catharine Pierce Wells, *Improving One's Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 323–24 (1992).

136. *Id.*

137. *Id.* at 323.

that legal decisionmaking is inherently situated, Wells urges judges to attend to their situation, recognizing the impossibility of being an impersonal agent in the decisionmaking process.<sup>138</sup> She concludes with a plea for fair-mindedness in considering viewpoints of others.<sup>139</sup>

With this introduction, the students are ready for the Crenshaw and Culp readings<sup>140</sup> that introduce critical race theory. The Crenshaw article provides a point of reference for later conversations engaging the questions, "Do you have a perspective in making that argument that you are assuming as a universal? Does everyone agree it is universal?" The Crenshaw and Culp articles provide a vocabulary for later discussion, and they make race "officially" visible in the classroom. Notice, although none of these articles is about torts,<sup>141</sup> they enrich the teaching of torts and the discussions that are possible to conduct in class. The common texts permit reference to a white perspective (through Crenshaw) or a white situatedness in decisionmaking (through Wells) that would not be possible without the background vocabulary provided by the common reading.

Constitutional law classes also provide often unused opportunities to introduce discussions about race. Students perceive the white supremacy embedded in the Constitution, but addressed by the Thirteenth, Fourteenth, and Fifteenth Amendments, as merely historical. This view that the issue of privileging whiteness has been solved eliminates a sense of urgency for examination of the contemporary applications of white privilege that might implicate the students and faculty themselves.

Recently I [Margalynne] have become more conscientious about noticing when issues of race and whiteness arise in my constitutional law course and less self-conscious about using these issues to present a more complex understanding of substantive legal issues. For example, while teaching about the historical context of *Marbury v. Madison*,<sup>142</sup> I used Garry Wills's book *Negro President*<sup>143</sup> to explain some of the issues that made the presidential election of 1800 so hotly contested and the results so bitter to the Federalists. Wills contends that Thomas Jefferson's victory depended on the additional electoral

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138. *Id.* at 324.

139. *Id.* at 338.

140. See *supra* notes 113–128 and accompanying text (discussing Crenshaw and Culp).

141. A small portion of Culp's article does address his teaching of assault with a racialized example, but the article is not a "torts" article in the sense of a limited subject-matter focus. Culp, *supra* note 115, at 552–54.

142. 5 U.S. (1 Cranch) 137 (1803).

143. GARRY WILLS, *NEGRO PRESIDENT: JEFFERSON AND THE SLAVE POWER* (2005).

votes generated by the three-fifths clause, which added electoral college votes to a state's allocation by counting three-fifths of the state's disenfranchised slaves.<sup>144</sup> Wills's insight into the use of the clause gives this often-mentioned, but little understood, provision of the Constitution real historical impact.

When teaching *Gibbons v. Ogden*,<sup>145</sup> the role of slavery in the national debate about the extent of Congress's commerce power can be easily introduced in class by showing and discussing the videotape "Equal Justice Under the Law: The Marshall Years: *Gibbons v. Ogden*."<sup>146</sup> The video highlights the Denmark Vessey-led slave revolt as an influential undercurrent in the states' desire to maintain control over incoming traffic.<sup>147</sup> These examples can easily focus on whiteness because race is present but people of color are not party to the disputes. Black slaves were excluded from the electorate but served the political interests of white southerners in 1800. The movement of free Blacks was of utmost concern to prominent Whites who wanted to limit the federal commerce power, but the actual subject of the *Gibbons* litigation was steamboat licensing.<sup>148</sup> White interests were clearly the racial component of these cases rather than the rights of non-white litigants. Looking at cases with color insight rather than colorblindness provides a new dimension for the students as well as for the professor.

## 2. The Seminar Class

The small seminar-type setting offers its own challenges for teaching about whiteness. Seminar students have often selected the class because of an interest in the subject area, and the small size permits deeper exploration of issues. Yet the smaller size also increases the potential for students to feel singled out or picked on by other students. The professor can set a tone on the first day by setting some ground rules to ensure a safe space for discussion.<sup>149</sup>

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144. See *id.* at 2 ("Though Jefferson admittedly received eight more votes than Adams in the Electoral College, at least twelve of his votes were not based on the citizenry that could express its will but on the blacks owned by southern masters.").

145. 22 U.S. (1 Wheat.) 1 (1824) (declaring that Congress has the power to regulate interstate commerce).

146. EQUAL JUSTICE UNDER THE LAW: THE MARSHALL YEARS: *GIBBONS V. OGDEN* (Mat Von Brauchitsch WQED-Pittsburgh 1987).

147. *Id.*

148. *Gibbons*, 22 U.S. (1 Wheat.) at 2.

149. Ground rules can be as simple as acknowledging that students will disagree; that indeed it would be surprising if they did not disagree, particularly about race, because of differing perspectives. But the class will benefit from the ability to listen with respect and to voice those disagreements in a respectful manner.

These volatile issues are difficult to discuss in public space. Yet all benefit from the effort, and the classroom provides space for respectful disagreement.

Creating some common ground in student experience helps any classroom conversation. Again, assigned reading provides key common context. In seminars that focus on race, both authors have prefaced discussions of whiteness with an examination of Fran Ansley's power line analysis.<sup>150</sup> Ansley asks the audience to imagine a line dividing dominant characteristics and behaviors from those less favored. The power line for identity categories such as race, gender, and sexual orientation divides those attributes that society privileges from those it does not.<sup>151</sup> Privileged attributes stand above the line and subordinated attributes lie below it.<sup>152</sup> The line marks a "reality of privilege and subordination."<sup>153</sup>

In addition to readings, the authors have found that two color insight exercises provide context and engender fruitful discussion:

Color Insight Exercise One (Thinking About Race)<sup>154</sup>:

What is your race? How do you know? What is your first memory of race?

Color Insight Exercise Two (Observation Project):

Notice the racial composition of your environment for a twenty-four hour period and record your observations. What are the apparent races of the people you view? Note their jobs and/or the activities in which they are engaged. Note the kinds of interactions you observe and your position. Are you privileged in the interaction? Where are you in relation to Professor Fran Ansley's "power line"? Make sure that you are in several different localities during the day (not *just* at home or the law library, although time spent in these places is pertinent). Conclude by sharing your reactions about that which you have observed.

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150. PRIVILEGE REVEALED, *supra* note 11, at 29, 171.

151. *Id.* at 29.

152. *Id.* at 171.

153. *Id.*

154. Tanya Hernandez also discusses giving this assignment. Tanya Kateri Hernandez, The Advantages and Disadvantages of Multiracial Versus Single-Race Focused 'Race and the Law' Course Content: Workshop Paper for the Race and Law Curriculum Workshop Conference, Center for the Study of Race and Race Relations, University of Florida College of Law 7-8 (Feb. 26, 2005) (unpublished manuscript, on file with the North Carolina Law Review).

An example of such an exercise:

Several weeks ago, I [Stephanie] found myself stranded at Dulles airport with a cancelled flight and eight hours until I could depart. So I used some of the privileges I have to walk into one of those red carpet lounges, purchase a day pass, and settle in to work. In the eight hours I spent, I found that all the airline employees who worked at computers and talked with clientele were white; all the clientele, with the exception of one African American man (based on just my looking) were white; the bartender was white; and all the service employees, who put out food, cleaned it up, and cleaned the bathrooms were people of color. I exercised my white privilege by my silence, just doing my work. When I got on the airplane, the fasten seatbelt sign had white hands.

The day after I came home, I went to the gym (mostly white), where a young man, probably high school age, was working out in a T-shirt with a collegiate Indian mascot<sup>155</sup> on it. I didn't know the young man, and I said nothing.

Students share their reflections with the class, deepening their own understanding of the issues and of each other, building a classroom atmosphere to foster further conversation.

Seminars, Socratic-style classrooms, and law schools as institutions all provide rich opportunities for exploring whiteness. Legal educators need to ensure that students do not encounter race only by happenstance or believe race only affects people of color. Rather, students should graduate and become lawyers prepared to face the racial justice issues that pervade daily life in the United States.

### CONCLUSION

The norm of whiteness continues to permeate U.S. society. It regenerates through the common tendency of Whites not to think about whiteness.<sup>156</sup> It manifests as white privilege. The invisible knapsack articulated by Peggy McIntosh provides an easily

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155. On the offensiveness of Indian mascots, see, for example, *N.C.A.A. Bans Indian Mascots in the Postseason*, N.Y. TIMES, Aug. 6, 2005, at D6.

156. Barbara Flagg identified this habit of Whites as the "transparency phenomenon," naming it the defining characteristic of whiteness. Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993); see also Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 248-50 (2005) (further exploring how white privilege continues).

understandable metaphor for that privilege.<sup>157</sup> McIntosh explains that white privilege can be likened to “an invisible package of unearned assets.”<sup>158</sup> The holder of this package remains oblivious to its presence yet can reliably depend on its contents. McIntosh continues: “White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.”<sup>159</sup> White privilege both benefits individuals and maintains systemic subordination of non-Whites. The rhetoric of colorblindness sustains this status quo by averting focus from racial injustice.

Color insight should displace colorblindness in order to move this diverse nation closer to the democratic ideal of “liberty and justice for all.” Law and the legal profession should work together with communities seeking social justice. Legal educators share a responsibility for educating to develop color insight by teaching race and teaching the whiteness within race in law schools and in the law school classroom.

Teaching about whiteness by making whiteness visible embodies John Calmore’s work. He described “a white social identity that presents itself as abstract individualism while masking its support from systems of dominance.”<sup>160</sup> Thus, teaching about race in this nation’s law schools without examining whiteness does not go far enough to challenge white authority. The legal academy must name whiteness and make certain that how it teaches about race does not further obscure the role that whiteness plays within law. Teaching whiteness honors the work begun by John Calmore while moving the legal system toward color insight.

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157. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women’s Studies*, in LESLIE BENDER & DAAN BRAVEMAN, *POWER, PRIVILEGE, AND LAW: A CIVIL RIGHTS READER* 22, 23 (1995).

158. *Id.*

159. *Id.* McIntosh lists “special circumstances and conditions” that she did not earn but perceives as entitlements. *Id.* at 25. Her African American co-workers, friends, and acquaintances cannot count on these same circumstances and conditions. *Id.*; see also Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 313–14 (1997) (listing circumstances and conditions that Latinos/as cannot depend on).

160. Calmore, *supra* note 23, at 100–01 (addressing the difficulties of “[n]on-white performance in a dominantly white setting”).