

LAYING DOWN THE LAW: POST-RACIALISM AND THE DE-  
RACINATION PROJECT

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During the run-up to the 2008 Presidential election, the following essay by Tim Wise was widely circulated on the web and by email. At least half a dozen friends emailed it to me:

For those who still can't grasp the concept of white privilege, or who are looking for some easy-to-understand examples of it, perhaps this list will help.

White privilege is when you can get pregnant at seventeen like Bristol Palin [Sarah Palin's daughter] and everyone is quick to insist that your life and that of your family is a personal matter, and that no one has a right to judge you or your parents, because "every family has challenges," even as black and Latino families with similar "challenges" are regularly typified as irresponsible, pathological and arbiters of social decay.

White privilege is when you can call yourself a "fuckin' redneck," like Bristol Palin's boyfriend does, and talk about how if anyone messes with you, you'll "kick their fuckin' ass," and talk about how you like to "shoot shit" for fun, and still be viewed as a responsible, all-American boy (and a great son-in-law to be) rather than a thug.

White privilege is when you can attend four different colleges in six years like Sarah Palin did (one of which you basically failed out of, then returned to after making up some coursework at a community college), and no one questions your intelligence or commitment to achievement, whereas a person of color who did this would be viewed as unfit for college, and probably someone who only got in in the first place because of affirmative action.

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And finally, white privilege is the only thing that could possibly allow someone to become president when he has voted with George W. Bush 90 percent of the time, even as unemployment is skyrocketing, people are losing their homes, inflation is rising, and the U.S. is increasingly isolated from world opinion, just because white voters aren't sure about that whole "change" thing. Ya know, it's just too vague and ill-defined, unlike, say, four more years of the same, which is very concrete and certain.

White privilege is, in short, the problem.<sup>1</sup>

The essay struck a chord with a segment of the electorate who perceived not only a racial double standard in the American public's interpretation of that election cycle but who I believe also felt that this episode crystallized a much larger racial double standard in American society as a whole. It was also a kind of collective light-bulb-moment about the law in some respects: how could nearly sixty years of civil rights law since *Brown v. Board of Education* have had so little apparent impact on white privilege and have produced so little critical white race consciousness?<sup>2</sup> Had civil rights and anti-discrimination law—surely aspects of the social construction of race—actually contributed to this state of affairs, such that the racial double standard made plain in the presidential election had been to some extent enabled by the very law designed to undo race discrimination? If racial justice is about remembering racial injury, had our law made that memory impossible, erased by official colorblindness?<sup>3</sup> And why was this all happening—who precisely

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<sup>1</sup> Tim Wise, *This Is Your Nation on White Privilege*, RED ROOM, Sept. 13, 2008, <http://www.redroom.com/blog/tim-wise/this-your-nation-white-privilege-updated>.

<sup>2</sup> See e.g., Peter H. Halewood, *Whiteness*, in 5 ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 121, 121–22 (Paul Finkelman ed. 2009). White racial identity is widely viewed as characterized by privilege and racial transparency or invisibility; indeed most whites are not conscious of having a racial identity. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 110–11 (2006); Martha R. Mahoney, *The Social Construction of Whiteness*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 330, 331 (Richard Delgado & Jean Stefancic eds., 1997); Maurice R. Dyson, *When Government Is a Passive Participant in Private Discrimination: A Critical Look At White Privilege & the Tacit Return to Interposition in PICS v. Seattle School District*, 40 U. TOL. L. REV. 145, 156–57 (2008); Barbara J. Flagg, *Foreword: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 1 (2005); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970–71 (1993); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind."*, 44 STAN. L. REV. 1, 46 (1991); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1100 (2008).

<sup>3</sup> These are of course the questions which have motivated and defined critical race theory and critical white studies. See e.g., RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE*

benefits?

Though Barack Obama of course went on to be elected President, the vivid memory of reading Wise's essay remains and disrupts my post-election euphoria.<sup>4</sup> Wise interpreted a basic truth of American society. He captured a central paradox of American life: that, despite having no biological/genetic basis, race nonetheless controls the American perception of reality, and whiteness is the lens through which all interpretation ultimately is refracted. Because whiteness is largely invisible to white Americans, America's racial problem has for the most part been understood by whites as a problem of (real or imagined) black grievances. Self-congratulation on having achieved a post-racial society is both premature and suspect, for encoded in claims of post-racialism is a sort of white triumphalism, a sense that race and racism have finally been delegitimized as the basis for black grievance. Whiteness, however, continues to flourish largely unexamined, operating as it does—for whites at least—largely out of sight. Post-racialism in this sense is dangerous because it de-racinates our politics. Achieving a *post-white* society is a far more difficult goal: to create among whites a

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THEORY: AN INTRODUCTION 6–8 (2001) (discussing the major themes of critical race theory and its application); CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, at xvii–xviii (Richard Delgado & Jean Stefancic eds. 1997) (exploring whites' perception of their own racial identity). The Lat Crit movement also addresses these same concerns.

<sup>4</sup> The election cycle itself was layered with multiple deployments and denials of whiteness, e.g., the criticism of Obama's bowling (traditionally a white, working class pastime), Hillary Clinton's claim in the primary that she represents "white Americans, working Americans," John Edwards' suggestion that only a candidate "like him" could win the South, Obama's "highbrow" refusal to eat junk food and drink beer, the implicit accusation that Obama lacked "testicular fortitude" by a union official supporting Hillary Clinton in the primary, Ralph Nader's accusation of him as "talking white," Sarah Palin's statement that she represented the "real America" with "small town values," the bizarre media spectacle of the pregnant teen daughter of Sarah Palin and her thuggish fiance representing family values at the Republican Convention, the whispered smears about Obama's secret Muslim "otherness," which presumably allowed him to "pal around with terrorists." Perhaps the most direct example of deploying whiteness against Obama was Kathleen Parker's piece in which she extolled the virtues of "full-blooded" American values in the campaign, suggesting that

"ordinary Americans" . . . know . . . that their forefathers fought and died for an America that has worked pretty well for more than 200 years [slavery aside?]. What they sense is that their heritage is being swept under the carpet while multiculturalism becomes the new national narrative. And they fear what else might get lost in the remodeling of America. . . . Hillary Clinton has figured it out. *And, the truth is, Clinton's own DNA is cobbled with many of the same values that rural and small-town Americans cling to. She understands viscerally what Obama has to study.*

Kathleen Parker, *Full-Blooded American: Clinton 'Gets' Heritage, Family Roots*, MYRTLE BEACH SUN NEWS, May 18, 2008, at D5 (emphasis added). Amy Goodman pointed out the racial poignancy of the bowling episode: as recently as 1968, when Barack Obama was a child, three black men were murdered in Orangeburg, South Carolina for protesting a segregated bowling alley. Amy Goodman, *The Orangeburg Massacre*, TRUTHDIG, Apr. 16, 2008, [www.truthdig.com/report/item/20080416\\_the\\_orangeburg\\_massacre/](http://www.truthdig.com/report/item/20080416_the_orangeburg_massacre/).

critical self-awareness of white privilege and white racial identity would challenge the epistemic and interpretive pillars of whiteness, chiefly objectivity and normalcy, that have guaranteed the massive material subsidies that have accompanied whiteness from slavery forward—wealth, power, and control of the means of reproduction of those assets.<sup>5</sup>

These material benefits are at the core of this system but not emphasized often enough; racism ultimately advances the interests of capital and wealth by instituting and maintaining a system of racial reward and preference. Behind the obvious racialization of American life lies the equally obvious but often less controversial reality of massive economic inequality. Capital and elite interests are very unlikely to relinquish the advantages of this system and Barack Obama's election alone does not signal a change in that equation. And decades of civil rights law culminating in the hegemony of colorblindness in constitutional theory may have unwittingly contributed to this state of affairs. These same decades, after all, have seen a rapid and pronounced expansion of economic inequality here, lending considerable credence to the critical race theory view that formal equality models leave untouched or even reinforce substantive inequality. Colorblindness and post-racialism may also contribute to this inequality. What then is the relation of law to post-racialism and to post-whiteness, and what critical readings of law can we offer to disturb the racial-industrial complex?

If whiteness is the ideology, then corrective justice, formal equality, negative rights, and color blindness have been the jurisprudential tools that implement and operationalize it. Thus distributive justice, substantive equality, positive rights, and race consciousness are likely to threaten it. Post-racialism, for its part, cements the former tool set and marginalizes the latter. De-racination, as a goal of politics and public policy, rewards and solidifies whiteness because whiteness is seen and experienced by whites as a non-racial form of identity—it is merely a constellation of reified and “naturally occurring” privileges. It is an open question whether our law can be bent to the purpose of revealing those contradictions and the self-interest endemic in the de-

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<sup>5</sup> On the epistemic dimensions of whiteness, see generally Peter Halewood, *White Men Can't Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship*, 7 YALE J.L. & FEMINISM 1 (1995) (analyzing epistemic problems with white study of race subordination).

racination or post-racial legal project.<sup>6</sup> Liberal legalism and the modern liberal state are oriented along a set of assumptions that systematically and doctrinally favor whiteness: universality over particularity, objectivity over perspective, neutrality over partiality, form over substance, principle over pragmatism. Whiteness—like maleness, in Catharine MacKinnon’s view—assumes the “point of view is the standard for point-of-viewlessness” and benefits by being identified with the first term in each of the forgoing dyads, i.e., universality, objectivity, neutrality, formality, and principle.<sup>7</sup> Non-whiteness is then by definition particular, perspectival, partial, informal, and unprincipled, making it jurisprudentially inferior.

Post-modern critiques of law have done a lot to dismantle the former strong consensus around the liberal legal project. Critical legal studies, feminist legal theory, and critical race theory have torn at the edges of liberal legalism such that it is no longer possible to merely assert it without argumentation. But we are nonetheless a long way from being able to assert the existence of a new consensus around the opposite principles, i.e. substantive equality, distributive justice, positive rights, and race consciousness. A sustained and unflinching “look to the bottom,” on the model of critical race theory, may yield that new consensus and be able to resist the shortsighted urge to de-racinate our law. Looking to the bottom is the jurisprudential method by which the law seeks to ground claims to justice in the material reality of oppression which nonwhites experience in our society.<sup>8</sup> It is a corrective to the metaphorical overflight that law has traditionally done on these matters, pronouncing on oppression from an altitude of 30,000 feet.

Were we to measure inequality substantively rather than formally, to quantify subordination as an impact on real people rather than seek only to identify impermissible discrimination, to

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<sup>6</sup> In Barack Obama’s speech on race during the campaign, he hinted at the distance between reality and the formal promise of law:

And yet words on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens . . . What would be needed were Americans . . . willing to do their part – through protests and struggle, on the streets and in the courts, through a civil war and civil disobedience and always at great risk – to narrow that gap between the promise of our ideals and the reality of their time.

Senator Barack Obama, A More Perfect Union (Mar. 18, 2008), in HUFFINGTON POST, Mar. 18, 2008, [http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th\\_n\\_92077.html](http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html).

<sup>7</sup> Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 638–39 (1983).

<sup>8</sup> Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987).

measure whether distributions of social goods are just overall rather than focusing on whether discrete transactions were fair, then we would be looking to the bottom and making place and perspective in the hierarchy of American civil rights discourse count for something. No longer would we discount the material facts of oppression in favor of a narrative of neutral, colorblind fairness that maintains racial hierarchy in the interest of capital accumulation.

Law and the modern state have achieved legitimacy by deploying the liberal ideology of universal values and objectivity, strenuously objected to by critical legal theory. Garden variety mind/body dualism allows liberal legalism to privilege disembodied and decontextualized interpretations of law and society, key to maintaining the hegemonic discourse of neutral, objective principle.<sup>9</sup> This has been accomplished at the cost of repressing a whole discourse around group experiences of oppression and disparate impact, and policy options for redressing that oppression, that do not comport with the legalism of the modern liberal state. The persistence of whiteness and white privilege combined now with claims to post-racialism and de-racination is a potent and dangerous mixture. The debate will continue to be about whether we should further privatize responses to subordination, leaving them to the market and jettisoning even the meager state protections we still have, or whether we build a new and robust public commitment to progressive legalism and substantive measures of social justice. We just do not know whether law is up to the task.

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<sup>9</sup> See generally, Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1348–49 (1996) (arguing that the structure of property rights results in a particular construction of the human body).