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Whiteness as Property

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My Article investigates the relationships between concepts of race and property and reflects on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present.

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I examine the emergence of whiteness as property and trace the evolution of whiteness from color to race to status to property as a progression historically rooted in white supremacy and economic hegemony over Black and Native American peoples. The origins of whiteness as property lie in the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights. I further argue that whiteness shares the critical characteristics of property even as the meaning of property has changed over time. In particular, whiteness and property share a common premise—a conceptual nucleus—of a right to exclude. This conceptual nucleus has proven to be a powerful center around which whiteness as property has taken shape. Following the period of slavery and conquest, white identity became the basis of racialized privilege that was ratified and legitimated in law as a type of status property. After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.

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[The Article] considers the persistence of whiteness as property. I first examine how subordination is reinstituted through modern conceptions of race and identity embraced in law. Whiteness as property has taken on more subtle forms, but retains its core characteristic—the legal legitimization of expectations of power and control that enshrine the status quo as a neutral baseline, while masking the maintenance of white privilege and domination.

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The racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest. Although the systems of oppression of Blacks and Native Americans differed in form—the former involving the seizure and appropriation of labor, the latter entailing the seizure and appropriation of land—undergirding both was a racialized conception of property implemented by force and ratified by law.

The origins of property rights in the United States are rooted in racial domination. Even in the early

years of the country, it was not the concept of race alone that operated to oppress Blacks and Indians; rather, it was the interaction between conceptions of race and property that played a critical role in establishing and maintaining racial and economic subordination. The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race—only Blacks were subjugated as slaves and treated as property. Similarly, the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights. These distinct forms of exploitation each contributed in varying ways to the construction of whiteness as property.

Although the early colonists were cognizant of race, racial lines were neither consistently nor sharply delineated among or within all social groups. Captured Africans sold in the Americas were distinguished from the population of indentured or bond servants—“unfree” white labor—but it was not an irrefutable presumption that all Africans were “slaves” or that slavery was the only appropriate status for them. The distinction between African and white indentured labor grew, however, as decreasing terms of service were introduced for white bond servants. Simultaneously, the demand for labor intensified, resulting in a greater reliance on African labor and a rapid increase in the number of Africans imported into the colonies.

The construction of white identity and the ideology of racial hierarchy also were intimately tied to the evolution and expansion of the system of chattel slavery. The further entrenchment of plantation slavery was in part an answer to a social crisis produced by the eroding capacity of the landed class to control the white labor population. The dominant paradigm of social relations, however, was that, although not all Africans were slaves, virtually all slaves were not white. It was their racial otherness that came to justify the subordinated status of Blacks. The result was a classification system that “key[ed] official rules of descent to national origin” so that “[m]embership in the new social category of ‘Negro’ became itself sufficient justification for enslavability.” Although the cause of the increasing gap between the status of African and white labor is contested by historians, it is clear that “[t]he economic and political interests defending Black slavery were far more powerful than those defending indentured servitude.”

By the 1660s, the especially degraded status of Blacks as chattel slaves was recognized by law. Between 1680 and 1682, the first slave codes appeared, codifying the extreme deprivations of liberty already existing in social practice. Many laws parceled out differential treatment based on racial categories: Blacks were not permitted to travel without permits, to own property, to assemble publicly, or to own weapons; nor were they to be educated. Racial identity was further merged with stratified social and legal status: “Black” racial identity marked who was subject to enslavement; “white” racial identity marked who was “free” or, at minimum, not a slave. The ideological and rhetorical move from “slave” and “free” to “Black” and “white” as polar constructs marked an important step in the social construction of race.

The social relations that produced racial identity as a justification for slavery also had implications for the conceptualization of property. This result was predictable, as the institution of slavery, lying at the very core of economic relations, was bound up with the idea of property. Through slavery,

race and economic domination were fused. Slavery produced a peculiar, mixed category of property and humanity—a hybrid possessing inherent instabilities that were reflected in its treatment and ratification by the law. The dual and contradictory character of slaves as property and persons was exemplified in the Representation Clause of the Constitution. Representation in the House of Representatives was apportioned on the basis of population computed by counting all persons and “three-fifths of all other persons”—slaves.

Gouverneur Morris’s remarks before the Constitutional Convention posed the essential question: “Upon what principle is it that slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?” The cruel tension between property and humanity was also reflected in the law’s legitimation of the use of Blackwomen’s bodies as a means of increasing property. In 1662, the Virginia colonial assembly provided that “[c]hildren got by an Englishman upon a Negro woman shall be bond or free according to the condition of the mother. . . .” In reversing the usual common law presumption that the status of the child was determined by the father, the rule facilitated the reproduction of one’s own labor force.

Because the children of Blackwomen assumed the status of their mother, slaves were bred through Blackwomen’s bodies. The economic significance of this form of exploitation of female slaves should not be underestimated. Despite Thomas Jefferson’s belief that slavery should be abolished, like other slaveholders, he viewed slaves as economic assets, noting that their value could be realized more efficiently from breeding than from labor. A letter he wrote in 1805 stated: “I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man.”

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Slavery as a system of property facilitated the merger of white identity and property. Because the system of slavery was contingent on and conflated with racial identity, it became crucial to be “white,” to be identified as white, to have the property of being white. Whiteness was the characteristic, the attribute, the property of free human beings.

Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property. Similarly, the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the “race” of the Native Americans rendered their first possession rights invisible and justified conquest. This racist formulation embedded the fact of white privilege into the very definition of property, marking another stage in the evolution of the property interest in whiteness. Possession—the act necessary to lay the basis for rights in property—was defined to include only the cultural practices of whites. This definition laid the foundation for the idea that whiteness—that which whites alone possess—is valuable and is property.

Although the Indians were the first occupants and possessors of the land of the New World, their racial and cultural otherness allowed this fact to be reinterpreted and ultimately erased as a basis for

asserting rights in land. Because the land had been left in its natural state, untilled and unmarked by human hands, it was “waste” and, therefore, the appropriate object of settlement and appropriation. Thus, the possession maintained by the Indians was not “true” possession and could safely be ignored. This interpretation of the rule of first possession effectively rendered the rights of first possessors contingent on the race of the possessor. Only particular forms of possession—those that were characteristic of white settlement—would be recognized and legitimated. Indian forms of possession were perceived to be too ambiguous and unclear.

The conquest and occupation of Indian land was wrapped in the rule of law. The law provided not only a defense of conquest and colonization, but also a naturalized regime of rights and disabilities, power and disadvantage that flowed from it, so that no further justifications or rationalizations were required. A key decision defending the right of conquest was *Johnson and Graham’s Lessee v. M’Intosh*, in which both parties to the action claimed the same land through title descendant from different Indian tribes. The issue specifically presented was not merely whether Indians had the power to convey title, but to whom the conveyance could be made—to individuals or to the government that “discovered” land.

In holding that Indians could only convey to the latter, the Court reasoned that Indian title was subordinate to the absolute title of the sovereign that was achieved by conquest because “[c]onquest gives a title which the Courts of the conqueror cannot deny. . . .” If property is understood as a delegation of sovereign power—the product of the power of the state—then a fair reading of history reveals the racial oppression of Indians inherent in the American regime of property.

In *Johnson* and similar cases, courts established whiteness as a prerequisite to the exercise of enforceable property rights. Not all first possession or labor gave rise to property rights; rather, the rules of first possession and labor as a basis for property rights were qualified by race. This fact infused whiteness with significance and value because it was solely through being white that property could be acquired and secured under law. Only whites possessed whiteness, a highly valued and exclusive form of property.

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Whiteness fits the broad historical concept of property described by classical theorists. In James Madison’s view, for example, property “embraces every thing to which a man may attach a value and have a right,” referring to all of a person’s legal rights. Property as conceived in the founding era included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.

Whiteness defined the legal status of a person as slave or free. White identity conferred tangible and economically valuable benefits and was jealously guarded as a valued possession, allowed only to those who met a strict standard of proof. Whiteness—the right to white identity as embraced by the law—is property if by property one means all of a person’s legal rights. Other traditional theories of property emphasize that the “natural” character of property is derivative of custom, contrary to the

notion that property is the product of a delegation of sovereign power. This “bottom up” theory holds that the law of property merely codifies existing customs and social relations.

Under that view, government-created rights such as social welfare payments cannot constitute legitimate property interests because they are positivistic in nature. Other theorists have challenged this conception, and argued that even the most basic of “customary” property rights—the rule of first possession, for example—is dependent on its acceptance or rejection in particular instances by the government. Citing custom as a source of property law begs the central question: whose custom? Rather than remaining within the bipolar confines of custom or command, it is crucial to recognize the dynamic and multifaceted relationship among custom, command, and law, as well as the extent to which positionality determines how each may be experienced and understood. Indian custom was obliterated by force and replaced with the regimes of common law that embodied the customs of the conquerors. The assumption of American law as it related to Native Americans was that conquest did give rise to sovereignty. Indians experienced the property laws of the colonizers and the emergent American nation as acts of violence perpetuated by the exercise of power and ratified through the rule of law. At the same time, these laws were perceived as custom and “common sense” by the colonizers.

The Founders, for instance, so thoroughly embraced Lockean labor theory as the basis for a right of acquisition because it affirmed the right of the New World settlers to settle on and acquire the frontier. It confirmed and ratified their experience. The law’s interpretation of those encounters between whites and Native Americans not only inflicted vastly different results on them, but also established a pattern—a custom—of valorizing whiteness. As the forms of racialized property were perfected, the value and protection extended to whiteness increased. Regardless of which theory of property one adopts, the concept of whiteness—established by centuries of custom (illegitimate custom, but custom nonetheless) and codified by law—may be understood as a property interest.

Although property in the classical sense refers to everything that is valued and to which a person has a right, the modern concept of property focuses on its function and the social relations reflected therein. In this sense, modern property doctrine emphasizes the more contingent nature of property and has been the basis for the argument that property rights should be expanded.

Modern theories of property reject the assumption that property is “objectively definable or identifiable, apart from social context.” Charles Reich’s ground-breaking work, *The New Property*, was an early effort to focus on the function of property and note the changing social relations reflected and constructed by new forms of property derived from the government. Property in this broader sense encompassed jobs, entitlements, occupational licenses, contracts, subsidies, and indeed a whole host of intangibles that are the product of labor, time, and creativity, such as intellectual property, business goodwill, and enhanced earning potential from graduate degrees.

Notwithstanding the dilution of new property since *Goldberg v. Kelly* and its progeny as well as continued attacks on the concept, the legacy of new property infuses the concept of property with questions of power, selection, and allocation. Reich’s argument that property is not a natural right but a construction by society resonates in current theories of property that describe the allocation of property rights as a series of choices. This construction directs attention toward issues of relative power and social relations inherent in any definition of property.

“Property is nothing but the basis of expectation,” according to Bentham, “consist[ing] in an established expectation, in the persuasion of being able to draw such and such advantage from the thing possessed.” The relationship between expectations and property remains highly significant, as the law “has recognized and protected even the expectation of rights as actual legal property.” This theory does not suggest that all value or all expectations give rise to property, but those expectations in tangible or intangible things that are valued and protected by the law are property.

In fact, the difficulty lies not in identifying expectations as a part of property, but in distinguishing which expectations are reasonable and therefore merit the protection of the law as property. Although the existence of certain property rights may seem self-evident and the protection of certain expectations may seem essential for social stability, property is a legal construct by which selected private interests are protected and upheld. In creating property “rights,” the law draws boundaries and enforces or reorders existing regimes of power. The inequalities that are produced and reproduced are not givens or inevitabilities, but rather are conscious selections regarding the structuring of social relations. In this sense, it is contended that property rights and interests are not “natural,” but are “creation[s] of law.”

In a society structured on racial subordination, white privilege became an expectation and, to apply Margaret Radin’s concept, whiteness became the quintessential property for personhood. The law constructed “whiteness” as an objective fact, although in reality it is an ideological proposition imposed through subordination. This move is the central feature of “reification”: “Its basis is that a relation between people takes on the character of a thing and thus acquires a ‘phantom objectivity,’ an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.” Whiteness was an “object” over which continued control was—and is—expected. The protection of these expectations is central because, as Radin notes: “If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.”

Because the law recognized and protected expectations grounded in white privilege (albeit not explicitly in all instances), these expectations became tantamount to property that could not permissibly be intruded upon without consent. As the law explicitly ratified those expectations in continued privilege or extended ongoing protection to those illegitimate expectations by failing to expose or to radically disturb them, the dominant and subordinate positions within the racial hierarchy were reified in law. When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.

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Even as the capacity of whiteness to deliver is arguably diminished by the elimination of rigid racial stratifications, whiteness continues to be perceived as materially significant. Because real power and wealth never have been accessible to more than a narrowly defined ruling elite, for many whites the benefits of whiteness as property, in the absence of legislated privilege, may have been reduced to a

claim of relative privilege only in comparison to people of color. Nevertheless, whiteness retains its value as a “consolation prize”: it does not mean that all whites will win, but simply that they will not lose, if losing is defined as being on the bottom of the social and economic hierarchy—the position to which Blacks have been consigned. Andrew Hacker, in his 1992 book *Two Nations*, recounts the results of a recent exercise that probed the value of whiteness according to the perceptions of whites. The study asked a group of white students how much money they would seek if they were changed from white to Black. “Most seemed to feel that it would not be out of place to ask for \$50 million, or \$1 million for each coming black year.” Whether this figure represents an accurate amortization of the societal cost of being Black in the United States, it is clear that whiteness is still perceived to be valuable.

The wages of whiteness are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth. It is the relative political advantages extended to whites, rather than actual economic gains, that are crucial to white workers. Thus, as Kimberle’ Crenshaw points out, whites have an actual stake in racism. Because Blacks are held to be inferior, although no longer on the basis of science as antecedent determinant, but by virtue of their position at the bottom, it allows whites—all whites—to “include themselves in the dominant circle.

[Although most whites] hold no real power, [all can claim] their privileged racial identity.” White workers often identify primarily as white rather than as workers because it is through their whiteness that they are afforded access to a host of public, private, and psychological benefits. It is through the concept of whiteness that class consciousness among white workers is subordinated and attention is diverted from class oppression.

Although dominant societal norms have embraced the idea of fairness and nondiscrimination, removal of privilege and anti-subordination principles are actively rejected or at best ambiguously received because expectations of white privilege are bound up with what is considered essential for self-realization.

Among whites, the idea persists that their whiteness is meaningful. Whiteness is an aspect of racial identity surely, but it is much more; it remains a concept based on relations of power, a social construct predicated on white dominance and Black subordination.

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The questions pertaining to definitions of race then are not principally biological or genetic, but social and political: what must be addressed is who is defining, how is the definition constructed, and why is the definition being propounded. Because definition is so often a central part of domination, critical thinking about these issues must precede and adjoin any definition. The law has not attended to these questions. Instead, identity of “the other” is still objectified, the complex, negotiated quality of identity is ignored, and the impact of inequitable power on identity is masked.