VALUING DIFFERENCE, EXERCISING CARE IN OZ: THE SHAGGY MAN'S WELCOME

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I. INTRODUCTION

One cannot say that the people of Oz valued difference or valued the diversity of its people, because in Oz, difference and diversity simply were; difference and diversity simply existed.[1] It might be more accurate to say that the people in the fairy land of Oz had a practice of difference in which different people or beings of all sorts were simply accepted and embraced. Not just accepted, as in tolerated in the way someone from Kansas or the greater United States might understand it, but difference in Oz was inherent in the place, it was expected—respected—promoted—taken for granted—embraced—sometimes celebrated—but rarely condemned or rejected.[2] This practice of difference informed and was informed by a theory. But the theory was not a theory about the value of difference or the value of a diverse society. Rather, this practice was informed by a theory, philosophy, and ethic of care: care for all sentient beings.[3]

In the United States, by contrast, the rhetoric of diversity is everywhere. That is, all sorts of people can be heard to say that they value difference, or that they value diversity.[4] This rhetoric, for instance, is

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[*] Professor of Law, University at Buffalo, School of Law. This piece is dedicated to my sister, Laurie Harris Daniel, who told me that she liked the premise of this piece but felt that I needed to write clearer! In addition, with Zanita in spirit, and the ethic of care in mind, I'd like to dedicate this piece to the sibling relationship of sisterhood. It is a wonderful relation.

[1] L. Frank Baum wrote fifteen books about the Marvelous Land of Oz all of which are reprinted in THE COMPLETE BOOK OF OZ: 15-IN-1 OMNIBUS (2007). The majority of people are most familiar with the first book, *The Wonderful Wizard of Oz,* originally published in 1900. *Id.* at 5. This is so because the first book was adapted into the famous movie production, THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

[2] Oz did not start out as a story about a utopia. Rather it began as a "wonderful, magic-filled country . . . but it was not an ideal society." KATHARINE M. ROGERS, L. FRANK BAUM: CREATOR OF OZ 168 (2002). Consider that in the first book both the Munchkins and the Winkies are enslaved. However, by the fifth book *The Road to Oz*, in which the shaggy man appears and in which this Article is concerned, the Land of Oz had developed into an ideal society. L. FRANK BAUM, THE ROAD TO OZ (1909), *reprinted in* L. FRANK BAUM , THE COMPLETE BOOK OF OZ: 15-IN-1 OMNIBUS 213–64 (2007).

[3] Here I am using the term to include all those who are capable of experiencing pleasure. As such it would include animals.

[4] *See, e.g.*, SCOTT E. PAGE, THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES (Princeton Univ. Press 2007) (explaining how different views and diversity lead to better decisions and outcomes); Andra M. Voyer, Living Difference, Talking Diversity, (Aug. 11, 2006) (unpublished manuscript), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/0/5/3/0/p105308_index.html (discussing the limitations and difficulties of the discourse of diversity); Caryl M. Stern-LaRosa, *Talking to Children about Diversity; Preschool Years*, ANTI-DEFAMATION LEAGUE (2001),

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bantered around in the context of identity politics—from references to racial and sexual minorities to those disadvantaged by gender or physical and mental ability.[5] It also features in conversations about the historical value of immigrants—if they come from the right place and if they assimilate, not just by simply internalizing some overriding value system but also by becoming mini replicas of those already here.[6] This rhetoric of diversity rises in response to a history of elite white domination,[7] where difference from the norm of white privilege and control is oppressed and stigmatized. And it is the continuing normativity of whiteness and white domination as well as the actual near monopoly of access to and control over the country's resources by the white elite—who are determined to keep things this way—that renders the rhetoric and practice of diversity at best superficial while hindering the full participation of those seen as different.

Take for instance, Justice O'Connor's decision on behalf of the Court in *Grutter v. Bollinger*.[8] Justice O'Connor held that the University of Michigan's admission policy of factoring in the race of admissions applicants for the purposes of constructing a diverse class in the higher education context is both a compelling state interest and is narrowly tailored to pass constitutional muster under equal protection.[9] But Justice O'Connor stipulated that in twenty-five years it should no longer be necessary to facilitate diversity through race-conscious means.[10]

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http://www.adl.org/issue_education/hateprejudice/Prejudice3.asp (discussing the ways in which preschoolers can be taught tolerance); James A. Barnes, *Obama's Team: The Face of Diversity*, NAT'L J. MAG. (June 20, 2009), http://www.nationaljournal.com/njmagazine/nj_20090620_3869.php (last visited Sept. 16, 2010) (discussing the diversity in the Obama's administration).

[5] Also consider the range of statues implemented to ban discrimination and thereby promote inclusivity. *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.) (prohibiting discrimination based on the ground of race, color, or national origin, among other things.); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (prohibiting under certain circumstances discrimination based on disability); The Murphy Amendment, 156 Cong. Rec. H. 4025 (May 27, 2010) (repealing, if enacted, the "Don't Ask, Don't Tell" policy, which prohibits the United States military from seeking to discover the sexual orientation of those thought to be gay, lesbian, or bisexual and prohibits open gay, lesbian, or bisexuals from serving in the U.S. military).

[6] *See, e.g.*, PATRICK J. BUCHANAN, DAY OF RECKONING: HOW HUBRIS, IDEOLOGY, AND GREED ARE TEARING AMERICA APART (St. Martin's Press 2007) (arguing that the United States runs the risk of disintegration because of policies such as free trade, abortion, and the disbelief in God as well as diversity and the invasion from the south of people other than Europeans under current immigration policies). Patrick Buchanan states, "[I]ndeed it seems a truism. To hold together a multiethnic or multilingual state, either an authoritarian regime or a dominant ethnocultural core is essential." *Id.* at 3. *But see* Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb: The Reemergence of Nativism and Population Control in Anti-Immigration Policies*, 2 HARV. L. & POL'Y REV. 385 (2008) (critiquing anti-immigrant forces as trying to limit the reproductive capacity of immigrant women of color and suggesting that the immigration debate is about race); Kevin R. Johnson, *Taking Initiative on Initiatives: Examining Proposition 209 and Beyond: A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CALIF. L. REV. 1259 (2008) (examining the impact of popular initiatives on Latinos/as and noting that "[u]nfortunately, race influences the immigration debate and fuels the popular anti-immigrant initiatives . . . it also contributes to the popularity of measures to regulate the use of languages other than English); Massimo Calabresi, *Is Racism Fueling the Immigration Debate?*, TIME MAG. ONLINE (May 17, 2006), http://www.time.com/time/nation/article/0,8599,1195250,00.html#ixzz0vxhX6zEn.

[7] Elite and White are just two attributes of this dominant class. The leaders, for instance, are also overwhelming male.

[8] Grutter v. Bollinger, 539 U.S. 306 (2003).

[9] *Id.* at 343.

[10] *Id.* at 342.

Presumably, diversity will be achieved by then without recourse to race-conscious measures.[11]

It is curious, however, that considerations of race, presumably an aspect of diversity, should be prohibited in the long run. This prohibition potentially limits diversity. Is there no value to racial-ethnic diversity? But more telling, in describing the rationale for diversity, is that the Court betrayed the hidden norm of whiteness and its concern for those privileged and benefited by that normativity.[12] This calls into question whether diversity is sincerely valued or is simply a tool for maintaining the reality of white domination. Further, the Court's decision has been critiqued because in calling for the non-recognition of race in the long run, the Court eliminates a significant tool for drawing attention to and presumably challenging the patterns, structures, and relations that limit diversity and render all too many spaces overwhelmingly white in the first place: race-consciousness.[13] The likely consequence, as seems true today, is that the non-recognition of race will aid in preserving the reality of white normativity and domination.

If these critiques do not speak to the superficiality of the quest for diversity in *Grutter v. Bollinger*, the decision has been further assailed on a variety of other fronts. These include, on the one hand, a critique that the decision betrays a superficial understanding of the meaning and operation of race in the United States[14] and therefore can address racial concerns only superficially, and on the other hand, a critique in which some scholars agree that all racial considerations should be eliminated as factors in decision-making and should be replaced with considerations of class,[15] an alternative that is itself superficial.

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[11] *Id.* In fact, Justice O'Connor suggests that since the decision in *University of California v. Bakke* in 1979, the test scores and grades of minorities have increased. *Id.* Therefore, in twenty-five years there should be no need for race-conscious measures. *See* Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[12] *See infra* notes 78–90 and accompanying text.
[13] The critique of the non-recognition of race or colorblindness has raged for some thirty years now. In fact I argue that the emergence of colorblindness in law helped spur the rise and development of Critical Race Theory in the late 1970s and 1980s. See, Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 330 (2006). Neal Gotanda made one of the clearest, and relatively early statements of this critique in law. See Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 58–59 (1991). Many others have made similar arguments or expanded upon them. See *infra* notes 98–113 *See also* MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF COLOR-BLIND SOCIETY (2003); EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA (2001); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (Rowman & Littlefield Publishers, Inc. 2003).
[14] Gotanda, *supra* note 13.
[15] *See, e.g.*, Geiza Vargas-Vargas, *Articles of Ornament and Bric-A-Brac*, 20 S. CAL. INTERDISC. L.J. 121 (2010); Ronald Roach, *Class-Based Affirmative Action: Battle Over Race-Conscious Approaches Pushes Idea to the Surface—Affirmative Action Watch*, BNET, http://findarticles.com/p/articles/mi_m0KXK/is_9_20/ai_104521292 (last visited Aug. 4, 2010) (discussing the Bush administration's support for class-based affirmative action programs as race-neutral means for aiding minorities); RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (1996). The "class or race" debate is even older than the colorblindness v. race consciousness debate. In fact the class or race debate is over one hundred years old. *See generally infra* note 81, at 87–132 (discussing the "class first, race first" debate and the contradictions in black nationalism and internationalism). Again, I hope I add a small twist to it in talking about it from the perspective of the ethic of care.

This Article briefly examines the story of the shaggy man in L. Frank Baum's series of fairytales about the Wonderful Wizard and the Land of Oz.[16] This Article argues, as against the background of the debates and practices of diversity in the United States, that the people of Oz sincerely value difference and diversity, even though they do not engage the rhetoric of diversity. Instead, they value difference through an ethic of care, a moral philosophy developed by feminists long after Baum's story was imagined.[17] The Article suggests that, as seen in the story of the shaggy man, racial difference may have value for peoples of color. It argues, consistent with Ozian ethics of care, that society should recognize, respect, and respond to differences in a manner that enables participation, and is in contrast to Justice O'Connor's vision of the future. Some might argue that such a story supports Justice O'Connor's instinct that it is not essential to recognize a feature in order to capture it as an aspect of diversity. However, the practice of an ethic of care in Oz not only requires that difference actually be recognized and accepted, but also that society provide for it and include its bearers among all others in the full participation of society. Second, drawing on ethics' aim of assuring that everyone has adequate care, this Article explores the issues of class in relation to racial oppression, arguing that because the issues are intertwined and related to inadequate resources and care, they must be changed together. Finally, the Article suggests that the practice of diversity in Oz, though imperfect, is a deeper, richer, and more thoroughgoing practice than the practice of diversity in the United States.

The taken for granted acceptance and provision for difference in Oz could be examined through a number of Baum's fantastic characters. Consider the wise and living Scarecrow, or the living and loving Tin Man, or the brave but Cowardly Lion, or even Toto, not of Oz, a dog who could not talk, at least not in the way that humans do, but who is respected nonetheless. Each is a different kind of being who is the beneficiary of the care ethic and who is provided for and accepted at face value, both within the context of the story and without. This is not so surprising. After all, this is a fairy tale. But it is the shaggy man's welcome into Oz and his bid to stay and live there that demonstrates that the taken-for-granted acceptance and provision of him is a function of the care ethic, and that the care ethic is a conscious philosophical position.

The shaggy man makes his appearance in Baum's fifth book entitled *The Road to Oz*.[18] Dorothy, the main character from the first book *The Wonderful Wizard of Oz*, meets the shaggy man on a road not far from her Kansas home, and "he is shaggy all right."[19] In the story, he appears to be

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[16] *See generally* BAUM, *supra* note 2.
[17] *See infra* Part III.
[18] BAUM, *supra* note 2.
[19] Though I interpret the shaggy man differently, Baum's biographer suggests that "the 'shaggy man' is an Ozian view of a tramp." ROGERS, *supra* note 2, at 163. And that his appearance "suggests humorous eccentricity rather than poverty or slovenliness." *Id.* Michael Riley agrees. He suggests that there are no indications that the shaggy man is forced to be who he is. Rather his shagginess is simply a reflection of his individuality. In fact, he suggests that Hobo or Bum are the wrong words to describe the shaggy man. He thinks of him as simply having dropped out; one who cares nothing for money and simply wants to wander. MICHAEL O. RILEY, OZ AND BEYOND: THE FANTASY WORLD OF L. FRANK BAUM 153

looking for the road to Butterfield and Dorothy offers to show him the way.[20] This journey begins a wondrous series of adventures through venues such as Foxville, Dunkiton, a soup kettle in which they are the featured meal, and eventually Oz.

Part II of this Article provides an overview of the shaggy man's story. Part III examines the recognition in Oz of the shaggy man's differences and uses society's treatment and acceptance of him as a basis for critiquing Justice O'Connor's goals and understandings about racial difference in *Grutter*. Part IV analyzes the philosophy of care that drives the Ozian response to the shaggy man and then returns to *Grutter* to explore the critiques calling for considerations of class instead of race. It suggests that the interlocking features of class and race limit care and participation in the United States. Part V concludes the Article by asking whether there are any lessons to be learned by taking the story of Oz and the shaggy man seriously.

II.   OVERVIEW OF THE STORY OF THE SHAGGY MAN

Dorothy meets the shaggy man on a road right outside of her house.[21] At a glance, she realizes that the man is indeed shaggy, "his clothes were shaggy, his boots were shaggy and full of holes and his hair and whiskers were shaggy. But his smile was sweet and his eyes were kind."[22] The shaggy man inquires about directions for the road to Butterfield.[23] Dorothy tries to provide him directions, but they are too complicated and the man seems too stupid to follow them,[24] so she decides to show him the way.

Dorothy accompanies the shaggy man to the road to Butterfield. But once they arrive at the road, she discovers several things, two of which are significant. First, she discovers that the shaggy man does not want to go to Butterfield. Rather, he wants to avoid the road to Butterfield.[25] This is because there is a man, he claims, living there who owes him fifteen cents and who would want to return it to him even though the shaggy man does not want the money back.[26] He explains, "Money . . . makes people proud and haughty; I don't want to be proud and haughty. All I want is to have people love me, and as long as I own the Love Magnet, everyone I meet is sure to love me dearly."[27]

When Dorothy asks what the Love Magnet is, the shaggy man shows her a "bit of metal shaped like a horseshoe [that is] dull and brown, and not

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(1997). Both Rogers and Riley suggest that the shaggy man is based on James W. Riley's poems of "Raggedy Man." *Id.* at 153; ROGERS, *supra* note 2, at 163. Riley argues that it is this book in particular where Oz begins to take shape as an ideal society. RILEY *supra* note 19, at 153–56.

[20] BAUM, *supra* note 2, at 215.

[21] *Id.* at 215.

[22] *Id.* at 217 (explaining that Dorothy has traveled some distance with the shaggy man and is looking at him more closely).

[23] *Id.* at 215.

[24] *Id.* at 215 ("'Dear me!' cried Dorothy. 'I shall have to show you the way, you're so stupid. Wait a minute till I run in the house and get my sunbonnet.'").

[25] *Id.* at 217.

[26] *Id.* at 217.

[27] *Id.* (emphasis added).

very pretty," but seems to work.[28] He tells her that an Eskimo gave him the magnet and that as soon as the Eskimo gave it away, a bear with no conscience ate him.[29]

Second, Dorothy discovers that where there had been five roads, one of which led to Butterfield, another of which led back to her home, there are now seventeen or so.[30] She recognizes none of them and realizes she is lost. After she tries to get home via several different roads, Dorothy agrees to accompany the shaggy man down the seventh road because, as the shaggy man explains, "[s]even is a lucky number for little girls named Dorothy."[31] Two other people, Button-Bright and Polychrome, the Rainbow's Daughter,[32] join them in their journey as they begin a series of adventures that end in Oz at a birthday party for Ozma, the Princess of Oz.

Their adventures take a turn for the worse when they wander into a place called Foxville, a town of talking foxes.[33] They encounter fox soldiers who intend to take the group captive.[34] But because of the shaggy man's Love Magnet, the soldiers come to love the shaggy man.[35] Instead of taking the group captive, the fox soldiers take the group to the king, whom Button-Bright calls King Dox.[36] King Dox becomes so enamored with what he believes to be Button-Bright's intellect that he changes Button-Bright's head into that of a fox.[37] King Dox reasons that Button-Bright's real head made him seem less wise and too youthful and hid his real cleverness. Therefore, he confers on him the wiser head of a fox. When the travelers complain, King Dox informs them that he did not have the power to change Button-Bright's head back to its original state.[38] After Dorothy promises to try to secure an invitation for King Dox to Princess Ozma's big birthday party, the travelers are allowed to leave town.

A similar transformation befalls the shaggy man when the travelers continue on the road through a big city called Dunkiton. It was a city of talking donkeys, who consider the very definition of donkey to mean "clever"[39] and considered Dunkiton to be "the center of the world's highest civilization."[40] When the shaggy man flatters the King Kik-a-bray, addressing him as "most novel and supreme ruler of Dunkiton," and calling

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[28] *Id.*
[29] *Id.*
[30] BAUM, *supra* note 2, at 216.
[31] *Id.* at 217. When Dorothy asks how they might determine the seventh road, the shaggy man explains the seventh "[f]rom where you begin to count." *Id.*
[32] Button-Bright, a boy a few years younger than Dorothy, with blue eyes, pretty curly blond hair, was dressed neatly in a sailor suit. *Id.* at 218. Polychrome is the Daughter of the Rainbow. *Id.* at 226. When they meet her she is dancing to keep warm on a lonely road. She was pretty, dainty and about the same height as Dorothy. *Id.*
[33] *Id.* at 220.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 223.
[37] The donkeys seem to have misperceived Button-Bright's intellect. When Dorothy and the shaggy man meet Button Bright, the only thing Buttom Bright knows is his own name, which his mother called him because his father always said he was bright as a button. *Id.* at 218–19. His answer to most questions is "I don't know," and he appears to be lost. *Id.* at 219–19. So, Dorothy and the shaggy man decided to take him with them. *See id.* at 218–19.
[38] *Id.* at 225.
[39] *Id.* at 229.
[40] *Id.* at 230.

him the "cleverest king in all the world," the King is very much pleased, undoubtedly influenced by the Love Magnet. The King states that "[o]nly a donkey should be able to use such fine, big words, and [that the shaggy man was] too wise and admirable in all ways to be a mere man . . . ."[41] So the King bestows on the shaggy man what the King considers "the greatest gift within [his] power—a donkey's head."[42] Unfortunately, like King Dox, King Kik-a-bray cannot undo his spell. He informs the shaggy man, however, that a dive into the Truth Pond, located somewhere in the Land of Oz, could reverse the spell, information that leads the group to set their travel sights squarely on Oz.[43]

The group has a series of other adventures before they make it to Oz.[44] Upon reaching Oz, however, they quickly find the Truth Pond into which both the shaggy man and Button-Bright dive. For both, their original heads are restored.[45]

Thereafter, the shaggy man, Button-Bright, and Polychrome begin to meet all sorts of the different kinds of beings that inhabit Oz (some of whom Dorothy knows). For instance, they first meet Billina, a talking chicken[46] and Tik-Tok,[47] a machine that thinks, talks and acts, but is not alive per se. Then the group travels and meets the Tin Man, a living man made of tin; Jack Pumkinhead, a living man made of wood with a pumpkin head that periodically rots and needs to be replaced; the Saw Horse, a living wooden horse; Mr. H. M. Woggle-Bug, T.E., a highly magnified, thoroughly educated large, talking bug.[48] The group also hears about a blue bear rug that is alive and causes mischief and the group is picked up and driven to the Emerald city by a "splendid golden chariot," which is drawn by two talking beasts, the Cowardly Lion and the Hungry Tiger. The latter would love to eat fat babies but his conscience will not allow him to do so.[49]

Now the shaggy man "might have been afraid if he had met the beasts alone, or in any other country; but so many were the marvels in the Land of Oz that he was no longer easily surprised . . . ."[50] Nevertheless, the shaggy man "was fairly astounded at what he saw" when he reached the Emerald City:

> [F]or the graceful and handsome buildings were covered with plates of gold and set with emeralds so splendid and valuable that

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[41] *Id.*
[42] *Id.* at 231.
[43] *Id.*
[44] *Id.* at 233–40. Thereafter they met a man who made music by simply breathing, the Musicker. *Id.* at 233. They were beaten and placed in a soup kettle to become a meal for the Scootders, creatures which were almost all black on one side and all white on the other side and which had faces on both sides of their heads, heads that could be detached and thrown at their enemies. *Id.* at 235–38. After escaping the soup kettle, the group walked until they reached the edge of the deadly desert that encircled the Land of Oz, where they contacted Johnny Dooit who built them a sand boat that allowed them to cross the desert into Oz. *Id.*
[45] *Id.* at 242–43.
[46] *Id.* at 244.
[47] *Id.*
[48] *Id.* at 246–50.
[49] *Id.* at 242–52.
[50] *Id.* at 251.

in any other part of the world any one of them would have been worth a fortune to its owner. The sidewalks were superb marble slabs polished as smooth as glass, and the curbs . . . were also set thick with clustered emeralds. There were many people on these walks . . . all dressed in handsome garments of silk or satin or velvet, with beautiful jewels. Better even than this: all seemed happy and contented.[51]

The shaggy man begins to learn, in pieces, that in Oz the people work only half of the time and play the other half. They work to build and to farm and to supply all of their needs.[52] But they do not use money. As the Tin Man explains, Oz has "no rich, and no poor; for what one wishes the others all try to give him, in order to make him happy, and no one in all Oz cares to have more than he can use."[53] He also notes that the idea of money in Oz is a "queer" idea because "[i]f we used money to buy things with, instead of love and kindness and the desire to please one another, then we should be no better than the rest of the world."[54]

When finally the shaggy man and the others reach the palace in Emerald City, the capital of Oz, and the servant Jellia Jamb welcomes them into this wondrous place, "the [s]haggy [m]an hesitat[es]."[55] Dorothy sees this. She "had never known him to be ashamed of his shaggy looks before, but now that he was surrounded by so much magnificence and splendor the shaggy man felt sadly out of place."[56] Dorothy assures him he is welcome and he then dusts off his shaggy shoes and enters the grand hall of the palace.[57] After entering, Baum elegantly explains the shaggy man's reaction:

> [T]he shaggy man stood in the great hall, his shaggy hat in his hands, wondering what would become of him. He had never been a guest in a fine palace before; perhaps he had never been a guest anywhere. In the big cold, outside world people did not invite shaggy men to their homes, and this shaggy man of ours had slept more in haylofts and stables than in comfortable rooms. When the others left the great hall . . . he expected to be ordered out, [instead a splendidly dressed servant] bowed before him as respectfully as if he had been a prince [and offered to show him to his room].[58]
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> [Upon arriving to his room the shaggy man] gazed upon all [the] luxury with silent amazement. Then he decided, being wise in his way, to take advantage of his good fortune. He removed his shaggy boots and his shaggy clothing, and bathed in the pool with rare enjoyment. After he had dried himself . . . [he] took fresh linen

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[51] *Id.*
[52] *Id.*
[53] *Id.* at 246.
[54] *Id.*
[55] *Id.* at 252.
[56] *Id.*
[57] *Id.*
[58] *Id.*

from the drawers and put it on, finding that everything fitted him exactly. He examined the contents of the closets and selected an elegant suit of clothing. Strangely enough, everything about it was shaggy, although so new and beautiful, and he sighed with contentment to realize that he could now be finely dressed and still be the shaggy man. His coat was of rose-colored velvet, trimmed with shags and bobtails, with buttons of blood-red rubies and golden shags around the edges. His vest was a shaggy satin of a delicate cream color, and his knee breeches of rose velvet trimmed like the coat. Shaggy creamy stockings of silk, and shaggy slippers of rose leather with ruby buckles, completed his costume, and when he was thus attired the shaggy man looked at himself in a long mirror with great admiration.[59]

So is the shaggy man's welcome. When Dorothy sees him "all clad in shaggy new raiment," she is very pleased.[60] When Dorothy finally introduces him to Princess Ozma, the Princess too is pleased "because she had meant the shaggy man to remain shaggy when she provided his new clothes for him."[61]

Dorothy introduces the shaggy man as the one who owns the Love Magnet. Princess Ozma then asks the shaggy man from where he got the magnet and the shaggy man tells her a story quite different from the one he had told Dorothy. The shaggy man had stolen the magnet![62] When Princess Ozma asks him why, he explains he stole it because:

> [N]o one loved me, or cared for me . . . and I wanted to be loved a great deal. It was owned by a girl in Butterfield who was loved too much, so that the young men quarreled over her, which made her unhappy. After I had stolen the Magnet from her, only one young man continued to love the girl, and she married him and regained her happiness.[63]

When asked whether he was sorry for stealing the magnet, he replies, "No, your Highness; I'm glad . . . for it has pleased me to be loved and if Dorothy had not cared for me I could not have accompanied her to this beautiful Land of Oz, or met its kind-hearted Ruler. Now that I'm here, I hope to remain . . . ."[64]

Princess Ozma explains that in Oz, people "were loved for themselves alone, and for their kindness to one another, and for their good deeds."[65] They both then agree to place the magnet over the gate at the entrance of the Emerald City.

Afterwards, there are magnificent celebrations for Princess Ozma's birthday, in which everybody participates. When the celebrations are finished, and almost all of the guests, including Button-Bright and

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[59] *Id.* at 253 (emphasis added).
[60] *Id.* at 254.
[61] *Id.* at 254.
[62] *Id.*
[63] *Id.* at 254–55.
[64] *Id.* at 255.
[65] *Id.*

Polychrome have returned home, Princess Ozma "decide[s] to allow [Shaggy man] to live in Oz for a time, at least. If he prove[s] honest and true she promise[s] to let him live there always, and the shaggy man [is] anxious to earn this reward."[66]

It seems he is well on his way to earning this reward when he advises Princess Ozma that "self-preservation [is] the first law of nature."[67] Nonetheless, the Shaggy man decides to remain by her side, along with others, when she refuses to fight to save her kingdom and herself from imminent attack and destruction.[68]

III.   THE SHAGGY MAN'S WELCOME: RECOGNIZING DIFFERENCE

> . . . and he sighed with contentment to realize that he could now be
> finely dressed and still be the shaggy man.
> – L. Frank Baum, *The Road to Oz*[69]

Justice O'Connor suggested that twenty-five years from the day *Grutter v. Bollinger* was decided, racial difference should no longer be recognized. In Oz, however, the shaggy man gets to be fully himself. And to be fully himself, his full self must be recognized. And it is recognized, so much so, that when the shaggy man reaches his room, he is welcomed with clothes that fit not only his body, his physical self, but which also reflect and reinforce who he is, who he has become, and who he chooses to be. That is, the clothes demonstrate a society that recognizes, embraces, and facilitates his way of being and his style, both culturally and spiritually, even if they appear different from the rest of society. The shaggy man sighs "with contentment to realize he could now be finely dressed and still be the shaggy man."[70]

The shaggy man's shagginess could be seen as a racial identity.[71] That is, the shaggy man's shagginess says something about how the shaggy man looks.[72] But like all socially constructed racial identities, his shagginess

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[66] *Id.* at 264.

[67] L. FRANK BAUM, THE EMERALD CITY OF OZ (1912), *reprinted in* THE COMPLETE BOOK OF OZ: 15-IN-1 OMNIBUS 265, 329 (2007).

[68] *Id.*

[69] BAUM, *supra* note 2, at 253.

[70] *Id.*

[71] Racial identities are complex social constructs that inform and structure multiple dimensions of existence and experience through reference to how people look. *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d. ed. 1994). People then must themselves structure and carve out their identities, decide who they are or who they want to be in reaction to these ascribed traits, and in the process create together with others complex social and cultural ways of surviving and living. *See* Athena D. Mutua, *Theorizing Progressive Black Masculinities*, *in* Progressive Masculinities, *in* PROGRESSIVE BLACK MASCULINITIES 3, 14 (Athena Mutua ed., 2006) (suggesting that masculine identities similarly are both internalized and enacted as well as constructed and chosen by individuals).

[72] Although his shaggy feature does not appear to be connected to a group, which is fundamental to racial identity. *See*, Rolanda L. Johnson, *Racial Identity from an African American Perspective*, J. CULTURAL DIVERSITY (Fall 2002), *available at* http://findarticles.com/p/articles/mi_m0MJU/is_3_9/ai_94639401/ (noting that "racial identity is defined as the degree to which a person feels connected to or shares commonalities with an ethnic-racial group).

also says something about how he exists in the world and the way that existence, both culturally and spiritually, is shaped and informed not only by who he is and chooses to be, but also by how he is seen and treated in the world.[73] For instance, the shaggy man is a wanderer. He explains, "I've been a rover all my life, and although Princess Ozma has given me a suite of beautiful rooms in her palace I still get the wandering fever once in a while and start out to roam the country over."[74] While it is not clear whether the shaggy man is shaggy because he was a wanderer and potentially poor[75] or whether he was a wanderer because he is shaggy, it is clear that he values his identity as a shaggy man.[76]

The shaggy man's identity would not be appreciated in the United States where his looks and ways of being would render him uncared for and unlovable.[77] Baum explains, "in the big cold, outside world people did not invite shaggy men to their homes, and this shaggy man of ours had slept more in hay-lofts and stables than in comfortable rooms."[78] In addition, the shaggy man had to steal the Love Magnet in order to be provided love and care. This is because the shaggy man was not perceived and appreciated as unique, but rather perceived as different from an established norm, a norm that rendered him different and unlovable, while rendering others detested. Nor were the shaggy man's looks valued in Dunkiton—which is outside of Oz—where to be fully appreciated he was made to look like a donkey.

This is in contrast to his experience in Oz. He is appreciated in Oz because in Oz, people care about sentient beings of all sorts. The shaggy man's aspects of personhood, like his shaggy wandering spirit, were first recognized, then embraced and facilitated. The shaggy man's welcome and acceptance suggests that Justice O'Connor has misdiagnosed the problem of racism on two fronts. First, the problem is not one of recognition as she suggests, but is one of lack of appreciation and oppression. Her error is made more dangerous because Justice O'Connor ignores white normativity and domination, which defines difference and structures oppression, reinforcing them both. Second, she has misunderstood the complexity of racial identity. The history and continuing predominance of white normatively and domination in part give rise and passion to the diversity discourse, but they also ground Justice O'Connor's perspective and various missteps.

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[73] In fact all identities are in some ways shaped this way. *See* Mutua, *supra* note 71, at 13–15.

[74] L. FRANK BAUM, THE PATCHWORK GIRL OF OZ (1913), *reprinted in* THE COMPLETE BOOK OF OZ: 15-IN-1 OMNIBUS 339, 365 (2007).

[75] This is simply one interpretation of who the shaggy man might be. *See supra* note 19 (understanding the shaggy man as a tramp as opposed to a hobo or hum).

[76] BAUM, *supra* note 2, at 253 (describing shaggy man sighing when he realizes he can still be shaggy). These are not the only parts of Shaggy man's identity.

[77] It is not clear that the shaggy man originates or lives in Kansas as Dorothy does. For example, not only does the shaggy man ask Dorothy for directions but he also explains that he is "a stranger in these parts." *Id.* at 216. While this could simply mean that he is from another part of Kansas, the reader never really learns exactly where in the United States he was born or lives. In fact it is not clear that the shaggy man lives in any particular place.

[78] *Id.* at 253.

A.   DIVERSITY: OUT OF HISTORICAL OPPRESSION

> Here on the first day that matters, dominance was achieved,
> probably by force. By the second day, division along the same lines
> had to be relatively firmly in place. On the third day, if not sooner,
> differences were demarcated, together with social systems to
> exaggerate them in perception and in fact, because the
> systematically differential delivery of benefits and deprivations
> required making no mistake about who was who.
> – Catherine MacKinnon, *On Difference and Dominance*[79]

Justice O'Connor located the problem of racial oppression with the recognition of race. But diversity, at least racial diversity, requires the recognition of race and racial difference. This is a conundrum. But the concept of diversity can only be understood against the historical background of white domination and oppression of non-whites. The conundrum is created in part by the continuing practice of that domination as well as Justice O'Connor's and other's misdiagnosis of the problem as a problem of recognition of race.

The United States was and is not so different from Oz. One could argue that human and group differences and uniqueness have always existed. Historically, the Native American populations were quite diverse, speaking a host of different languages and living in a plethora of different ways. With the arrival of various groups from around the world, the number of these differences increased. But the differences between the United States and Oz is not that the United States was inhabited by a host of different peoples, each noting and recognizing each others' uniqueness, but rather that these peoples came to be dominated by one group, in law and in practice, Europeans, who demarcated Native Americans, among others, as different and inferior to themselves.[80] Europeans established a hierarchy for the purpose of extracting from others and monopolizing for themselves, the resources of the country and later the world.[81]

According to Jared Diamond, the rise of Europe approximately 500 years ago marked a change in the status of a people who for most of their history remained the intellectual and economic backwater of Asia.[82] They struck out into the world as a seafaring people with a combination of steel, guns, and germs,[83] which allowed them not only to explore and trade with other peoples of the world, but also to conquer, subdue, and exploit other

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[79] CATHARINE MACKINNON, *On Difference and Dominance*, *in* FEMINISM UNMODIFIED (1987), *reprinted in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 241, 247 (Leslie Bender & Daan Braveman eds., 1995).

[80] *See generally* RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA (1993).

[81] Bush, like others, argues that white supremacy is a global order. *See* RODERICK D. BUSH, THE END OF WHITE WORLD SUPREMACY: BLACK INTERNATIONALISM AND THE PROBLEM OF THE COLOR LINE 7–8 (2009).

[82] JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 409-10 (1997). *See also* CHARLES MILLS, RACIAL CONTRACT 33 (1999) (making a similar point).

[83] DIAMOND *supra* note 82 at 354-75 (comparing the landscapes and historical endowments of Eurasia and America from which Europeans and Native Americans originate).

people. And they did so with genocidal expertise while claiming the knowledge and resources of these peoples as their own.[84]

In the Americas, the Europeans nearly wiped out the Amerindian population[85] and seized, built on, and exploited their land with the labor and expertise of enslaved Africans, among others, all while claiming the blessings of a Christian God and purporting to share those blessings.[86] In short order, they claimed themselves as white and superior to all others, demarcating the presumed differences between themselves and the colored others, as well as the differences among the others and all the while assigning themselves their most virtuous and valued traits.[87] As virtuous free men, Europeans became the top of the hierarchy and designated the enslaved Africans, as depraved and on the bottom of the hierarchy. The other colored groups fell in-between.[88] Domination, however, is never absolute and the colored groups resisted white oppression even as they continued to adopt and intertwine white cultural practices with their own and to develop alternative cultural practices and understandings, even of imposed religions.[89] They thereby created new cultures and ways of being.

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[84] *See* Charles Miller, *White Supremacy as Sociopolitical System: A Philosophical Perspective, in* WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM 35, 45 (Ashley W. Doane & Eduardo Bonilla-Silva eds., 2003) (discussing cultural appropriation of others' knowledge without acknowledging its origins, a feature of white supremacy). This history, one summarized in this Article with the author's own emphasis, is currently being repeatedly retold. *See, e.g.*, JOE FEAGIN, THE WHITE RACIAL FRAME: CENTURIES OF RACIAL FRAMING AND COUNTER-FRAMING (2010) (telling the story for the purposes of explaining the creation and development of the frame); David Roediger, HOW RACE SURVIVED U.S. HISTORY: FROM SETTLEMENT AND SLAVERY TO THE OBAMA PHENOMENON (2008).

[85] *See* DAVID STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD, at X (1992) (arguing that "[t]he destruction of the Indians of the Americas was, far and away, the most massive act of genocide in the history of the world," with almost 100 million Amerindians killed in what he calls the American Holocaust). *But see* Guenter Lewy, *Were American Indians the Victims of Genocide?*, HIST. NEWS NETWORK (Nov. 22, 2004), http://hnn.us/articles/7302.html (suggesting that most of the American Indians died from disease).

[86] *See, e.g.*, FEAGIN, *supra* note 84, at 25 (discussing the meaning of "Manifest Destiny").

[87] *Id.* at 11, 56 (noting that "whites have long viewed themselves as . . . good-looking physically, intelligent, and culturally and morally superior, as the virtuous Americans").

[88] I have argued that one of the meanings of the black/white paradigm is that it places other minorities, such as Latinos, Latinas and Asian Americans, in between blacks and whites. The paradigm has been under serious attack for a number of years because it appears to ignore these and other minorities. *See* Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm,* 53 U. MIAMI L. REV. 1177 (1999). *See also, e.g.*, Richard Delgado, *The Current Landscape of Race: Old Targets, New Opportunities*,104 MICH. L. REV. 1269, 1272 (2006); Rachel F. Moran, *Neither Black Nor White,* 2 HARV. LATINO L. REV. 61, 81–82 (1997); Juan R. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought,* 85 CALIF. L. REV. 1213, 1220, 1254 (1997) (arguing that the black/white paradigm promotes the invisibility and marginalized Latina/o experiences). Devon W. Carbado has surveyed and examined a variety of these critiques. *See* Devon W. Carbado, *Race to the Bottom,* 49 UCLA L. REV. 1283, 1305–12 (2002).

[89] *See* OMI & WINANT, *supra* note 71, at 79–80 (citing EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE (1976) (1972)) (noting "Even at its most oppressive, the racial order was unable to arrogate to itself the entire capacity for the production of racial meaning, of racial subjects. Racial minorities were always able to counter pose their own culture traditions, their own forms of organization and identity . . . [a]s the voluminous literature on black culture under slavery shows, black slaves developed cultures of resistance based on music, religion, African traditions and family ties . . . ."); JULIUS LESTER, TO BE A SLAVE (7th prtg. 1980); Vincent Harding, *Religion and Resistance Among Antebellum Negroes, 1800–1860, in* 1 THE MAKING OF BLACK AMERICA, THE ORIGINS OF BLACK AMERICANS 179 (August Meier & Elliott Rudwick eds., 1969); GEORGE P. RAWICK, 1 FROM SUNDOWN TO SUNUP: THE MAKING OF THE BLACK COMMUNITY (1972); HERBERT GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM (1976)). *See also* JAMES H. CONE, A BLACK THEOLOGY OF LIBERATION (1986) (originally published in 1970 and understanding the Bible and Christianity through the interpretative lens of the African American experience).

While they resisted, the world also changed and slavery was soon abolished.[90]

But Europeans in America and abroad, having enhanced their wealth and power with the previous extractive and oppressive systems, created new systems out of the ashes of the old to maintain their dominance.[91] They also more clearly articulated, enshrined in culture and in law, and institutionalized the ideology of white supremacy. This period, called the Jim Crow period, was, from a black perspective, the second phase of the racial order that the white elite imposed.[92] Here, the white elite clearly recognized race and recognized difference, but they did so for the continuing purpose of privileging some at the expense of others.

Nevertheless, people of color developed social movements of resistance and change, drawing on their cultural and historical practices, as well as on stories that whites tell about their commitment to freedom, liberty, fairness, and democracy—secondary social stories that belie the reality of racial, gendered, and ethnic hierarchies and philosophies.[93] Together with other changes in the world,[94] these social movements, by the mid-twentieth century, began to transform in many ways the status quo of blatant racial oppression and usher in the third and current period of the white dominated racial order.

It is in the current period that the rhetoric of diversity has arisen. Whites, in reaction to the social movements of the different colored groups and to the changes in the world, move to demonstrate their commitment to values of freedom, democracy, and fairness: ideas they claim to have long-practiced, but which are belied by reality.[95] Consequently, they are forced to better incorporate the peoples of color into the polity. They are also forced to eliminate the notions and practices of white superiority in law. They initiate affirmative action policies, which promote the token appearance of

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[90] U.S. CONST. amend XIII (abolishing slavery in the United States in 1865 and prohibiting its existence except as punishment for a crime).

[91] *See, e.g.*, DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008) (discussing sharecropping and the other mechanisms used to re-enslave black people after the civil war).

[92] The period of official legal racial segregation in the United States is commonly referred to as the Jim Crow system. Although segregation laws appear on the books of many states before 1877, Woodard dates the period beginning in 1877 with the compromise between Republicans and Southern Democrats that made Rutherford B. Hayes president. It ended in 1965 after the enactment of the Civil Rights Act of 1964, PUB. L. No. 88-352, 78 STAT. 241 and the National Voting Rights Act of 1965 42 U.S.C. §§ 1973–1973aa-6 (2010). C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 52–53, 192–94 (Commemorative ed. 2001).

[93] FEAGIN, *supra* note 84, at 18–19, 155–58 (explaining that in addition to the white racial frame there is a "white-crafted liberty and justice frame that is mostly rhetorical for most white Americans although over time a very small minority of whites has taken it seriously; for example white abolitionists during slavery or the miniscule numbers of whites who participated in the civil rights movement."). *See also* MILLS, *supra* note 82 (suggesting, as a philosophical matter that the social contract including notions of fairness and justice implemented in American society was limited to whites and that the real social contract as between whites and non-whites is that of a racial hierarchy, the racial order in which injustice, inequity, and white domination, exploitation, and genocide against nonwhites are the foundational principles).

[94] *See, e.g.*, Derrick A. Bell, Jr.,Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2002) (discussing the changes in the world that affect United States domestic policy and arguing in part that the *Brown* decision came about because of its value to whites in sending a signal to the world about American democracy).

[95] DUDZIAK, *supra* note 94, at 116–18, 250–51 (discussing Brown v. Board of Education, 347 U.S. 483 (1954)).

peoples of color in American institutions. But they do not destroy the bureaucratic, institutional, or even the silent but ideological practices of white supremacy that maintain their domination. For instance, they rename white cultural practices, domination, and privileges merit, forcing others to abandon their cultural practices of life and resistance in order to merit inclusion.[96] In other words, they force assimilation to the norms they dictate by their domination as the price of token inclusion and thereby continue to assign to themselves the lion's share of the country's wealth.[97]

In the process, whites, like Justice O'Connor, assigned the blame of the historical racial oppression and the maldistribution of resources along racial lines to the historic recognition of difference as opposed to the historic, continuing, structural, and ideological practice of white domination and oppression. Difference surely existed before white domination and oppression, but it was the assignment of difference with the maldistribution of goods along racial lines, after the achievement and at the behest of white domination, that structured the problem of white racial privilege through the oppression and disadvantage of colored people.

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[96] *See, e.g.*, Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CALIF. L. REV. 1449, 1475–94 (discussing the formulation of merit standards and the historical development of the LSAT, a development meant to exclude Eastern and Southern Europeans from the practice of law); John Hayakawa Torok, *LatCrit VII: Coalitional Theory and Praxis: Social Justice Movements and LatCrit Community: Progressive Pedagogy: Challenging Master Narratives with Racial and Ethnic Curricular and Faculty Diversity: The Story of "Towards Asian American Jurisprudence" and Its Implications for Latinas/os in American Law Schools*, 13 LA RAZA L.J. 271 (2002) (discussing "meritocratic fundamentalism" which suggests that grades and tests measure merit and citing Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, DUKE L. J. 705, 707–12, 719–21 (1990) (addressing colorblind meritocratic fundamentalism and destabilizing attitudes about merit and race)). For a discussion of cultural bias, racially-biased validating practices, and institutional racism in standardized testing, see William C. Kidder, *Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions, and Diversity Research*, 12 LA RAZA L.J. 173 (2001); Jay Rosner, *Disparate Outcomes By Design: University Admissions Tests*, 112 LA RAZA L.J. 377, 379, 383–84 (2001); David M. White, *The Requirement of Race-Conscious Evaluation of LSAT Scores for Equitable Law School Admissions*, 12 LA RAZA L.J. 399 (2001). *See also* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 957 (1996) (criticizing reliance on standardized tests).

The debate over multiculturalism is in part a debate about the Eurocentrism (and patriarchy) of the standard curriculum and also is a critique of what constitutes merit. *See, e.g.*, Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies* (Wellesley C. Center Res. on Women, Working Paper No.189, 1988) (discussing the maleness of the curriculum as a starting point for analyzing racial privilege); CHRISTINE E. SLEETER, UN-STANDARDIZING CURRICULUM: MULTICULTURAL TEACHING IN THE STANDARDS-BASED CLASSROOM 150–52, 167–82 (2005); William C. Welburn, *Multicultural Curriculum in Higher Education*, 27: 1 J. OF LIBR. ADMIN. 157 (1999).

Work being done on the issue of whether meritocracy is a myth shows that wealth is the determining factor of performance on tests. *See, e.g.*, Ross Douthat, *Does Meritocracy Work?*, ATLANTIC MONTHLY (Nov. 2005), http://www.theatlantic.com/magazine/archive/2005/11/does-meritocracy-work/4305/; Interview by Rebecca Parish with Lani Guinier, *in* DOLLARS AND SENSE, Jan./Feb. 2006, *available at* http://www.nathanielturner.com/meritocracymyth.htm. Though Peter Schmidt's book is primarily concerned with class, it is a discussion of class that is really a discussion about race—white racial privilege. That is, it is primarily concerned about poor and middleclass whites and written for their benefit. It sees white elites simply using race and affirmative action to protect elite's advantages. *See* PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION (2007*). See also* STEPHEN J. MCNAMEE & ROBERT K. MILLER JR., THE MERITOCRACY MYTH (Rowman & Littlefield Publishers, Inc. 2d. ed. 2009) (arguing in part that the notion of meritocracy is an ideology meant to mask but perpetuate inequality).

[97] *See supra* note 96. *See also* McIntosh, *supra* note 96; SLEETER, *supra* note 96; Wellborn, *supra* note 96 (discussing multicultural education).

B. NON-RECOGNITION OF RACE AND WHITE NORMATIVITY IN GRUTTER

In the *Grutter v. Bollinger* opinion, Justice O'Connor recognized that race still matters.[98] She explains that "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."[99] But Justice O'Connor's explanation, and indeed her opinion, reveal at least two different understandings of race. One understanding is that in creating diversity, racial minority identity may represent or be a proxy for different cultural practices, ideas, and viewpoints,[100] even though minority individuals may not always or even consistently express some characteristic minority view or partake in some characteristic practice.[101] On the other hand, Justice O'Connor finds the fact that race still matters unfortunate. Here, she understands race simply as a reflection of unequal power and historic inequality. Ultimately, this latter view triumphs in her opinion and her hope is that in the future all people will be treated equally, without regard to their racial identity.[102] But, Why do people's racial identities need to be disregarded in order for them to be treated equally? Why should diversity, racial diversity in particular, matter now and not in the future? Finally, Why should diversity occur in the absence of the recognition of race in the future when Justice O'Connor's reasoning, and the equal protection case law that followed *Grutter*,[103] does nothing to change the underlying structures and practices that result in the lack of diversity now and in the first place?

Justice O'Connor's perspective, a perspective of non-recognition, of blindness, could be interpreted as a well-meaning attempt to rectify and correct the racial hierarchy created by whites. But this attempt, and the hungering for colorblindness, nevertheless, reflect a white power perspective[104] in which the power of those who dominate can and do remain invisible as a race and invisible as a privileged race even to themselves. One consequence of this invisible power is that they understand and see themselves as "the generic, the universal, [and] the generalizable";[105] they see themselves as the norm. They believe that their

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[98] Grutter v. Bollinger, 539 U.S. 306, 327–29, 333 (2003).
[99] *Id.* at 333.
[100] *Id.* at 330–31 (discussing value of diversity in a global marketplace).
[101] *Id.* at 333.
[102] *See generally id.*
[103] *See, e.g.*, Girardeau A. Spann, *Disintegration*, 46 U. LOUISVILLE L. REV. 565, 565–567 (2008) (discussing the Supreme Court case *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).
[104] *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970–73 (1993).
[105] Michael Kimmel, *Toward a Pedagogy of the Oppressor*, *in* PROGRESSIVE BLACK MASCULINITIES, *supra* note 71, at 63. Kimmel explains the politics of invisibility and notes: "Invisibility is a privilege in a double sense—hiding the power relations that are kept in place by the very dynamics of invisibility, and in the sense of privilege as luxury. It is a luxury that only white people have in our society not to think about race every minute of their lives." *Id.* at 65. Kimmel gives another example of how dominance and invisibility works:

You have probably noticed that there is one big difference between e-mail addresses in the United States and e-mail addresses of people in other countries: Their addresses have country

way of "not admitting to seeing race" is the correct solution to the problem of racial oppression. That is, this perspective informs their views on how the issue of racial oppression and inequality should be handled. However, the imposition of this view, whether well-intentioned or not, remains an imposition, a prerogative of power. But it has other benefits as well.

The beauty of labeling the problem of oppression as one of racial recognition is that whites have been able to remove the stain of the term white supremacy while maintaining the institutions and habits that structure white dominance and hinder diversity. It maintains the institutions and habits of racial oppression by eliminating a crucial way of recognizing it (that is, through race consciousness) and makes it appear as if the non-recognition of race solves the problem of racial oppression, thereby justifying the preclusion of more radical measures to intervene and change these structures and habits. As a consequence, the institutions and habits of white dominance and privilege are left in place undetected so that they operate as a hidden norm against which others are measured.

The hidden normativity of whiteness becomes evident in Justice O'Connor's decision. She advocates for diversity, but the diversity sought as she encourages the admission of minority students appears to be for the benefit of white students.[106] Justice O'Connor suggests that admitting minorities into a school contributes to a diverse educational environment. Presumably, this new educational environment is for whites.[107] Furthermore, she argues that minorities' presence in the classroom "augment[s] a robust exchange of ideas demonstrating that there is no minority viewpoint,"[108] again, presumably for the benefit of white students. She also believes it is important to have minorities in the legal profession, not so that they might help structure better laws or that they might meet the legal needs of their communities,[109] but so that they might "visibly lend legitimacy to the system by signifying that the path to leadership is open to talented and qualified individuals of every race and ethnicity,"[110] even if the system is neither open nor legitimate. Behind each of her rationales stands the concern for white people and the normativity of whiteness. Her rationales reinforce this norm, while her goal of non-recognition of race in the future imposes a white perspective that furthers this norm.

The non-recognition of race also allows whites to equate and to smear the practices of colored people's cultural expression and resistance with the same brush rightly used to smear the practices of white violence and

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codes at the end of the address. So, for example, if you are writing to someone in South Africa, you put "za" at the end, or "jp" for Japan . . . . [This] is because when you are the dominant power in the world, everyone else needs to be named. When you are in power, you need not draw attention to yourself . . . .

Id. at 65–66.

[106] Sheldon Zedeck et al., *Who Gets In? The Quest for Diversity After* Grutter, Panel, *in* 52 Buff. L. Rev. 531, 590–94 (2004) (moderated by Athena D. Mutua); Daria Roithmayr, *Tacking Left: A Radical Critique of* Grutter, 21 Const. Comment. 191, 207 (2004).

[107] Zedeck, *supra* note 106, at 592 (moderator Athena Mutua making this same argument).

[108] Grutter v. Bollinger*,* 539 U.S. 306, 324 (2003).

[109] *See generally id.* O'Connor relies on *University of California v. Bakke* in noting that although the goal of having minorities meet the underserved needs of their communities might be important, it is not enough to justify the use of race as a factor in admissions decisions; it is not legal.

[110] *Id.* at 332.

domination by stigmatizing racial consciousness itself, and thereby stigmatizing and perhaps hindering colored people's resistance.[111] The result is that the non-recognition of race allows whites to ignore their continuing domination and privilege. At the same time, whites can demean the race-consciousness and solidarity of other groups, which hinders their ability to dismantle the apparatus of white supremacy. The non-recognition of race, combined with the continuation of white domination and normativity, leaves white power intact and unchallenged to reign for another day.[112]

Recognizing racial difference, on the other hand, allows the society to see the continuing forced assimilation to and operation of white control, as well as the resistance to it. It also potentially allows the elevation and equality of alternative insights and cultural expressions. In short it may allow people of color to be themselves, or what they choose to be outside of white dictates.

C. RECOGNIZING COMPLEXITY: FREE TO BE ME

While Justice O'Connor recognizes that racial identity and the racial formation process may be more than simply a reflection of unequal power,

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[111] *See* Gary Peller, *Race Consciousness*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 127 (Kimberleé Crenshaw et al. eds., 1995). A host of scholars have analyzed and commented on the ridiculousness of the claim that black resistance is the same as white oppression. *See, e.g.*, Ian Haney López, *A Nation of Minorities: Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987 (2007) (citing J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994)) (noting that the equation of efforts to advance equality with efforts to subjugate would "merit[] . . . derision" except that "the Supreme Court . . . has moved ever closer to a full embrace" of it as a basis for "contemporary constitutional antidiscrimination law;" and noting that most prominent scholars reject this anti-classification approach in favor of a anti-subordination approach to antidiscrimination law). Justice Stevens also commented on this equivalency in his dissent in *Adarand Constructors* by stating:

> The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. . . . The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.

Adarand Constructors v. Pena, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

[112] There has been an ongoing debate not just between whites and people of color but also among scholars of color as to whether race consciousness and thus racial identities should be retained. *See* PAUL GILROY, AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE 29 (2000); K. ANTHONY APPIAH & AMY GUTMAN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 32 (1996) ("If we are to move beyond racism we shall have, in the end, to move beyond current racial identities."). *Cf.* Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 232–33 (2000) (arguing that race does not exist beyond its historical and social contexts); Sharon Hoffman, *Is There a Place for "Race" as a Legal Concept?*, 36 ARIZ. ST. L.J. 1093 (2004) (suggesting that we begin to use more specific terms such as color, national origin, etc instead of racial categories). *But cf.* Darren Lenoard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1458 (2002) (demonstrating the pitfalls of non-recognition of race); Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 490 (2003) (seeking a compromise in the short term but ultimately seeking the elimination of race consciousness).

she ultimately imposes a worldview that speaks only to this aspect of the racial order. That is, she does not appreciate the complexity of racial identity, and may not even understand the complexity of her own identity. Said differently, she may not see that her perspective, in all too many ways, reflects her privileged white racial identity and its basis in the prerogatives of power.[113] But many scholars have analyzed the multitude of meanings that the term race conveys, even in court cases.[114] Others have discussed the complexity and multidimensionality of racial identity.[115] To the extent that Justice O'Connor ignores this complexity, she crafts at best a superficial solution to the problem of racial oppression and diversity.

Her perspective, while potentially acknowledging the fact that whites created a racial order for their own aggrandizement, fails to capture the reality that history did not stop at the point when the racial order was formed. Nor does it capture the fact that people of color continue to live and create philosophical traditions, alternative understandings of the world, and human relations and culture after the imposition of that order—both in response to it and despite it. Further, Justice O'Connor's opinion does not appear to contemplate the fact that people of color through their own lives and circumstances might have imbued racial identity with meanings, including cultural meanings, other than those of oppression and exploitation and might, therefore, find something of real value in those meanings. In fact, they have. Neil Gotanda notes in reference to African Americans:

> [A] substantial literature has developed that recognizes the existence of a distinctly Black culture and its contributions to American life. While the emergence of Black literary criticism has been perhaps the most dramatic example, there has been a corresponding recognition of "minority" critiques in many areas,

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[113] Justice O'Connor may have been operating from a white racial frame. Feagin argues that a "white racial frame has become part of most whites' *character structure*, a character structure habitually operated out of, with individual variations, in everyday life." FEAGIN, *supra* note 84, at 15. That is, a white racial frame is part of whites' racial identity. This frame combines "(1.) racial stereotypes (a beliefs aspect); (2.) racial narratives and interpretations (integrating cognitive aspects); (3.) racial images (a visual aspect) and language accents(an auditory aspect); (4.) racialized emotions (a 'feelings aspect'); and (5.) inclinations to discriminatory action." *Id.* at 10–11. It also encompasses a positive orientation toward whites and whiteness and a negative one toward people of color. *Id.* at 13–18. It operates at both an emotional and cognitive level in ways that denigrate people of color and their cultures and dehumanize institutions.

[114] Gotanda, *supra* note 13.

[115] *See, e.g.*, Hutchinson, *supra* note 112, at 1467–72 (discussing the relationship between racial identity and resistance and the multidimensionality of racial identity and subordination); Johnson, *supra* note 72 (noting that "contrary to previous thought, racial identity is a multidimensional construct"); Rav Ravinder Barn, *Care Leavers and Social Capital: Understanding and Negotiating Racial and Ethnic Identity*, 33 ETHNIC & RACIAL STUD. 5, 2010 at 832, 832–50 (May, 2010) (explaining: "Racial and ethnic identity have also been defined in specific ways. Racial identity has been defined as 'a sense of group or collective identity based on one's perception that he or she shares a common racial heritage with a particular racial group . . . .' Ethnic identity refers to 'one's sense of belonging to an ethnic group and the part of one's thinking, perception, feelings, and behaviour that is due to ethnic group membership . . . .' Thus, aspects such as a shared history, common values and beliefs, and customs are important in ethnic group membership, and a sense of belonging to a racial group predominates in racial group identification. Thus, a person may define their racial identity as Asian, but may choose to define their ethnic identity according to ethnicity, for example as Indian, or Punjabi. It has been argued that race and ethnicity are highly salient for all minority groups throughout their life span . . ." (internal citations omitted)). It is important to recognize, however, that the complexities of racial and ethnic identity should not be reduced to race/colour, or cultural simplifications.

> including legal scholarship. In popular culture as well, there has been a belated recognition of the importance of Black culture. . . . . [T]here is no consensus that a color-blind norm, the racial non-recognition advocated for public sphere constitutional discourse, is the desired social norm for general application in the private sphere. . . . The adoption of a strong version of color-blindness and a refusal to permit culture-race in the public sphere implicitly promotes white cultural dominance.[116]

Nevertheless, many have decried "Black culture" as deficient; while some simply point out its faults,[117] others use critiques of culture as a more acceptable way to continue to denigrate black people.[118] Although critiques of Black culture have always been a part of white America's denigration and oppression of black people,[119] in the past, tales of black inferiority were linked more directly to their bodies, or their "race," as it were. As the idea of race as a biological feature has been gradually discredited,[120] the critiques in this current period of the racial order have moved steadily toward critiques of black and other people of color's culture. For instance, poor family structure or false consciousness about racism are often said to be the primary causes of black people's disproportionate poverty and other problems.[121] It appears that almost anything other than four hundred years of oppression (which includes one hundred years of segregation, which still exists today in new forms) explains their situation. Denigration of black and other people's looks, however, has not disappeared entirely. Culturally affirming dress, hairstyles, and orientation—ways of being that inform the way people look—still continue to be judged as unacceptable in certain spaces.[122]

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[116] Gotanda, *supra* note 13, at 58–59.

[117] Consider for instance the controversy over Bill Cosby's comments about black culture and black poor people. *See* MICHAEL ERIC DYSON, IS BILL COSBY RIGHT?: OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND? (2005).

[118] The modern denigration of black culture is situated in the critique of black families, a family structure that Moynihan saw as deviantly matriarchal. This deviance together with government policies, so the argument goes, has resulted in low marriage rates, high levels of out-of-wedlock childbirth which leads to poverty, lack of family values, poor educational results and lack of value for education, and criminality. *See* BUSH, *supra* note 81, at 136–43 (describing the reassertion of patriarchy, the Moynihan report, and black feminism). But the notion of black culture and people as criminals has a much longer history. For instance, Feagin notes that laws and constitutions in the 1600s refer to the slaves as "barbarous, wild and savage," terms which he argues serve a double purpose: "They not only conjure up notions of African Americans as uncivilized, the early cultural stereotyping, but also views [them] as dangerous, rebellious, and criminal, a distinctive legal and moral stereotyping relating to emotional white concerns of African American rebelling against enslavement, against good 'laws and orders.'" FEAGIN, *supra* note 84, at 47. He also notes that six of the ten anti-black stereotypes that whites hold are cultural. These include: (1) uncivilized, alien, foreign; (2) immoral, criminal, and dangerous; (3) lazy; (4) oversexed; (5) ungrateful and rebellious; and (6) disorganized families. *Id.* at 56.

[119] *See* FEAGIN, *supra* note 84, at 4; MILLS, *supra* note 82, at 44–45.

[120] In favor of understanding race as a social construction that might have favorable attributes as well as negative ones, see Hutchinson, *supra* note 112, at 1466 (discussing the way in which scholars of color who advocate colorblindness essentialize race and see it as inherently negative).

[121] *See generally* Robinson *supra* note 112. *See also* Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329 (2006) (discussing the focus on postmodern discourse and the social construction of race and discussing Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1365–66 (2004)).

[122] *See, e.g.*, Michelle L. Turner, *The Braided Uproar: A Defense of My Sister's Hair and Contemporary Indictment of* Rogers v. American Airlines, 7 CARDOZO WOMEN'S L.J. 115, 117 (2001).

In other words, cultural inferiority is the mainstay of criticism today. There have been, however, those who have fought for blacks and other minority groups.[123] Although their words are all too often used to justify continued black exclusion and oppression,[124] these heroes' entire lives have been a testament to a critical but deeply felt respect and love for people of color, even as they have assessed the problems in their communities with piercing insight.[125] A critical reading of some of these assessments provides a way to critically engage those community problems without malice and exclusionary results.[126] Every community has its problems; it would be miraculous if communities as despised and abused as black communities had no problems at all. Yet these heroes recognized that while communities of color have their problems, the communities themselves were not the problem.[127] Instead, a people who have embraced a philosophy and system of greed, self-centeredness, and racial hierarchy, and have claimed themselves, like the Donkeys of Dunkiton to be the highest of all civilizations, might just be the problem in the world.

Ultimately, black and other minorities' cultures have been shaped in part by oppression, and their psychologies have been shaped by the white population's aversion to the mere existence of their bodies and lives. This shaping also informs their racial identities. Such is the complexity of racial identity. Nevertheless, they have continued to live and draw on their own historical practices and insights, as well as more modern ideas, to produce great things. Said differently, their life experiences, their epistemological insights, and their cultural practices have created world renowned music and art forms, literary traditions that celebrate living despite their suffering, redemptive religious practices and beliefs, and insights on the partiality of perspective.[128] They learned how to live fully within their culture and contribute to the articulation of one of the most powerful social movements

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[123] Consider such people as Martin Luther King, Malcolm X, Caeser Chavez, Delores Huerta, Fanny Lou Hamer, A. Randolph Phillips, Angela Davis, Barnard Rustin, Ida B. Wells, Elijah Mohammed, W.E.B. Du Bois, Marcus Garvey, and innumerable others.

[124] *See* Justice Thomas using Fredrick Douglass' words in *Grutter*. Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting).

[125] This includes Martin Luther King, Pauli Murray, W.E.B. Du Bois, James Baldwin, Mary Church Terrell, Zora Neale Hurston, Marcus Garvey, Ida B. Wells, and Fredrick Douglass, among others.

[126] *See, e.g.*, W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (Dover Publ'ns. 1994); ZORA NEALE HURSTON, THEIR EYES WERE WATCHING GOD, (Perennial Library 1990).

[127] Here I am thinking of Du Bois's question: "How does it feel to be a problem?" DU BOIS, *supra* note 126, at 1. My answer is much like his, black people are not the problem.

[128] Both hip hop and Jazz have been black music art forms that are world renowned. *See, e.g.*, NELSON GEORGE, HIP HOP AMERICA, at ix (2005) (commenting on how hip hop and a hip hop aesthetic has impacted the world); Gerald Early, *Jazz and the African American Literary Tradition*, NATIONAL HUMANITIES CENTER TEACHERSERVE, http://nationalhumanitiescenter.org/tserve/freedom/1917beyond/essays/jazz.htm (last visited Nov. 7, 2010). For more commentary on African American literary traditions, see THE CAMBRIDGE COMPANION TO THE AFRICAN AMERICAN SLAVE NARRATIVE (Audrey A. Fisch ed., 2007) (discussing the African American literary tradition); Khem Guragain, *African American Literary Tradition and Toni Morrison's Aesthetic Perspectives,* THE AFRICAN EXECUTIVE (May 6, 2009), http://www.africanexecutive.com/modules/magazine/articles.php?article=4324. On redemptive religious practices, see Cone, *supra* note 89. On partial perspectives see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT, 234–35 (2d. ed. 2000).

in the last century the world has ever seen.[129] As Roderick Bush notes, these "captive people locked in a stolen land . . . articulated an internationalist and egalitarian vision that . . . had its own logic," was built on their own insights,[130] and which challenged the heart of the white order. Because of their cultural experiences, there exist alternative ways of viewing the world and they may yet continue to make contributions to the world.

But, it is so easy to despise a despised people. This takes no great act of bravery at all and too many people engage in it. Consequently, it would not be surprising that black people and other people of color, like the shaggy man, might breathe a sigh of contentment if they could live well in a society in which they could still be people of color,[131] with all the philosophical, cultural, and alternative understandings that it entails.[132] Their jubilance over President Obama's election was likely a part of this wistfulness.

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[129] *See* Athena D. Mutua, *Restoring Justice to Civil Rights Movement Activists?: New Historiography and the "Long Civil Rights Era* (Buffalo Legal Studies Research Paper No. 2008-12), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133130.

[130] BUSH, *supra* note 81, at 91 (commenting on the class first v. race first debate and noting that it was not the Euro-North American workers movement but the long civil rights movement in which such a vision arose).

[131] *See* John P. McQueen & Arthur L. Whaley, *Evaluating Cohort and Intervention Effects on Black Adolescents' Ethnic-Racial Identity: A Cognitive-Cultural Approach*, 33 EVALUATION & PROGRAM PLAN., no. 4, 2010 at 436, 436–45 (2010) (arguing that given their racial-ethnic identity black youth may do better in school if schooling is framed as a way for them to help their communities. The authors argue: "In the cognitive–cultural model . . . ethnic–racial identity in Black populations is defined as cognitive schemata consisting of beliefs, attitudes, values and behaviors that reflect a positive association with people of African descent. That is, the individual's identity is composed of cognitive schemata representing the individual self, the cultural self, and social roles. The individual self embodies those personal qualities that ensure successful functioning in the mainstream of society. The cultural self includes knowledge, attitudes, and behaviors that ground the individual in Black culture. Broadly speaking, these components of the African American self-system reflect the values of individualism and collectivism, respectively. Social roles are activities, functions and positions that allow the individual of African descent to integrate the individual and cultural aspects of the self. For African American youth, the social role of student or scholar serves this function. Schooling or academic achievement is an individualistic endeavor for Black youth, as it is for those of other ethnic/racial groups. From the cognitive–cultural perspective, if African-descended youth are encouraged through ethnic–racial or Africentric socialization to link their achievement to the collective needs of the larger Black community, they are more likely to have a balanced identity and better psychosocial functioning" (internal cites omitted)).

[132] BUSH, *supra* note 81, at 129, 139 (citing Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM S. 533, 533–580 (2000)) (explaining that Anibal Quijano suggests that the first step in depriving the "colonialist of power is epistemological decolonization"—to clear the way for new intercultural communication: "It is the very height of irrationality for some group to insist that its own cosmic vision should be taken as a universal rationality. This is nothing but an attempt to impose a provincialism as universalism. This is an attempt to liberate intercultural relations from the prison of coloniality [understood relations of domination better Europeans and non-Europeans] as inequality decimation, exploitation and domination. South people are free 'to choose between various cultural orientations, and above all the freedom to produce, criticize, change, and exchange culture and society. This liberation is part of the process of liberation from all power organized as inequality discrimination, exploitation and domination.'").
While Bush agrees with Quijano, he also agrees with Walter Mignolo, who thinks there must be "identity in politics" from which people of color can speak in order to "de-naturalize the imperial and racial construction of identity in the modern world system." *Id.* at 129 (citing Walter Mignolo, *The Decolonial Option and the Meaning of Identity in Politics*, 9:10 ANALES N. E. 43–72 (2007)).

IV.   PROVIDING FOR DIFFERENCE: AN ETHIC OF CARE

And when she finally introduced him to Princess Ozma, Ozma "nodded brightly because she had meant the shaggy man to remain shaggy when she provided his new clothes."
– L. Frank Baum, *The Road to Oz*[133]

Virginia Held notes that if we cared about people and "took care seriously, . . . [i]nstead of [being] a society dominated by conflict restrained by law and preoccupied with economic gain, we might have a society that saw as its most important task the flourishing of children and the development of caring relations, not only in personal contexts but among citizens and using governmental institutions."[134] The ethic of care, as developed by feminists, long after Princess Ozma's fictional action, is grounded in the universal experience of being cared for as children and grows out of the observations of the relationships of care between mother and child.[135]

The response in Oz to the shaggy man's difference is not born out of a theory of difference and diversity, but rather, out of an ethic of care.[136] In Oz, people care about beings, particularly sentient beings; they recognize and respect differences in these living beings, and they accommodate and respond to these differences by providing for them.[137] The key here is that they provide for them. They provide for the shaggy man, they facilitate his uniqueness, and they provide for all others.[138] They do so, not "regardless of" his racial, class, immigration status, or ethnic difference, but in relation to his different, specific needs and ways of being, whether those ways are biologically or culturally driven.[139]

Some scholars have agreed with Justice O'Connor that all considerations of racial difference should be eliminated from decision-making.[140] They argue, instead, that racial considerations should be replaced with considerations of class difference.[141] They appear to sense

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[133] BAUM, *supra* note 2, at 254.

[134] VIRGINIA HELD, THE ETHICS OF CARE: PERSONAL, POLITICAL AND GLOBAL 18 (2006).

[135] The ethic of care revives its first impetus from the work of Carol Gilligan who suggested that while addressing moral problems, girls seemed to be more concerned with relationships and context rather than focusing on abstract rules. *See* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Though the perceived differences between girls' and boys' moral reasoning was challenged, it suggested alternative approaches to moral reasoning. *Id.* at 27.

[136] *See generally* HELD, *supra* note 134; NEL NODDINGS, STARTING AT HOME: CARING AND SOCIAL POLICY (2002) [hereinafter NODDINGS, STARTING AT HOME]; NEL NODDINGS, CARING; A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (1986) [hereinafter NODDINGS, CARING]; MICHAEL SLOTE, THE ETHICS AND CARE OF EMPATHY (2007).

[137] BAUM, *supra* note 2, at 253. (describing the accommodations and clothes provided for the shaggy man; clothes that fit both his body and his shaggy style). *See also infra* notes 158–169 and accompanying text.

[138] *See infra* notes 158–169 and accompanying text.

[139] *See infra* notes 158–169 and accompanying text.

[140] *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 251–53 (1991) (critiquing affirmative action based on race and advocating class-based affirmative action); RICHARD D. KAHLENBERG, GETTING BEYOND RACIAL PREFERENCES: THE CLASS-BASED COMPROMISE 45 AM. U.L. REV. 721 (1996).

[141] *See supra* notes 15, 140.

that the system in place not only cares little for the welfare of minorities, and therefore works to exclude them, but also cares little for the welfare of poor people and excludes them as well, which limits economic diversity.[142] Their solution, nevertheless, seeks to include some (poor people), at the expense of others (people of color). This is unlike the situation in Oz, where the society not only cares for everyone by providing for everyone, but also provides for them in a way that aids and enables their inclusion and participation.

A. ETHIC OF CARE: PROVIDING FOR ALL

[T]he [E]thic[] of care is based on the universal experience . . . of being cared for.
– Virginia Held, *The Ethics of Care: Personal, Political and Global*[143]

1. *Ethic of Care*

The ethic of care, as developed by feminists, centers on relations between people and understands these relations, rather than individual people, to be the basis of existence.[144] They suggest instead that social ties constitute individuals, who are relational, interdependent, and historically situated.[145] Ultimately, an ethic of care seeks to cultivate caring relations between people (as well as among people and the environment and things) and to create the conditions for these relationships to flourish.[146]

According to Virginia Held, care itself is both a "practice and value."[147] "[C]are involves work and the expenditure of energy" by the one providing care.[148] She explains that practices of care are multitudinous, including, for example, taking care of a child, bandaging a wound to avoid infection, or arranging food aid to families across the world.[149] But all care, she notes, involves "attentiveness, sensitivity and responding to needs."[150] Caring is a value in and of itself, but it also revolves around a "cluster of moral considerations, such as sensitivity, trust," and receptivity, by which practices of care are evaluated.[151] Nel Noddings also suggests that caring involves certain attitudes, such as "[c]lose attention to the feelings, needs, desires, and thoughts of those cared for, and a skill in understanding a situation from that person's point of view . . . ."[152]

Held also explains that an ethic of care has four other characteristics in addition to seeing the individual as interdependent. These are: (1) "Attending to [and meeting the needs of] particular persons and actual

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[142] *See supra* notes 169–171.
[143] HELD, *supra* note 134, at 132.
[144] NODDINGS, STARTING AT HOME, *supra* note 136, at xiv.
[145] HELD, *supra* note 134, 13–15. I remember years ago hearing a story about a frustrated music teacher insisting that there was no such thing as a baby, only a caretaker-baby unit. He emphasized that this was true because without the caretaker there would be no baby. The baby would die.
[146] NODDINGS, STARTING AT HOME, *supra* note 136, at xiv.
[147] HELD, *supra* note 134, at 39.
[148] *Id.* at 30.
[149] *Id.* at 39.
[150] *Id.* at 37.
[151] *Id.* at 38.
[152] *Id.* at 31(citing NODDINGS, CARING, *supra* note 136 at 14–19).

contexts in all their diversity"; (2) valuing emotion; (3) respecting the claims of particular others with whom actual shared relationships exist, as opposed to distancing ourselves through abstract reasoning; and (4) re-conceptualizing traditional notions about the public and private spheres.[153]

Joan Tronto and Held, among others, have argued for the social and political applications of an ethic of care. They suggest that the aim of social and political institutions under such an ethic would be "to assure 'that all people are [] cared for . . . .'"[154] Tronto notes that this is "not a utopian question, but one which immediately suggests answers about employment policies, nondiscrimination, equalizing expenditures for schools, providing adequate access to health care, and so forth."[155] Held agrees, suggesting that:

> [A] society that cultivates caring relations between its members might limit rather than expand the kinds of activities, from health care to child care to cultural production, that it leaves to be determined by the market, where individual self-interests prevails. And a society with well-functioning governmental practices to care for its members' needs would be able to expend far fewer of its resources and attention on legal remedies for illegal actions.[156]

2. *Care and Provision in Oz*

Princess Ozma perceives and recognizes the importance of the shaggy man remaining shaggy. She also perceives it, however, by providing him new clothes that are shaggy. In doing so, Princess Ozma, representing the state, is operating out of the central understanding of an ethic of care, which is "attending to and meeting the needs [whether physical or cultural] of the particular others for whom [she is taking] responsibility."[157] The society, through Princess Ozma, is responding to the shaggy man's uniqueness not because it values diversity, but because it cares about people.

The ethic of care in Oz is a clear, conscious position and it is noteworthy that so many of Oz's leaders are women. First, Princess Ozma informs the shaggy man that in Oz, people are "loved for themselves alone, and for their kindness to one another, and for their good deeds."[158] Second, this ethic of care shapes the way the people of Oz engage difference. Ozians accept and facilitate difference by providing for it. Princess Ozma is "pleased when she saw [the shaggy man in his new clothes] because she meant the shaggy man to be shaggy when she provided his new clothes."[159] The clothes not only fit his physical needs by covering and fitting his physical size and shape, but they also fit his cultural style and sense of self.

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[153] *Id.* at 31.
[154] *Id.* at 130 (quoting JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 145 (1993)).
[155] *Id.*
[156] *Id.*
[157] *Id.* at 10.
[158] BAUM, *supra* note 2, at 155.
[159] *Id.* at 154.

Further, the clothes are provided even though the shaggy man is not a national, a citizen. Thus Oz's philosophy of care is not limited to only a select group. Everyone who exists in Oz is cared for and shares in the abundance of the society. Third, the ethic of care binds the shaggy man and limits his bid to stay in Oz. Baum notes that Princess Ozma "decides to allow [the shaggy man] to live in Oz for a time, at least. If he proved honest and true she promised to let him live there always, and the [s]haggy [m]an was anxious to earn this reward."[160] In this sense, though the shaggy man is seeking to immigrate to Oz, he is not required to assimilate—to become something or someone else.[161] The ethic of care actually facilitates his being more fully his shaggy self, and as a philosophy, he is encouraged to embrace others as he has been embraced.

The ethic of care seems imperfect, however, in some small way, even though it promotes relationships and, perhaps, society more generally. The ethic of care that binds the shaggy man's actions also binds the actions of others in a way that seems to impinge on their very being. So, for instance, the Hungry Tiger hungers for fat babies,[162] but he does not eat them because his conscience will not allow him to do so.[163] Said differently, he has been socialized in Oz to believe that it is immoral to hurt others and to not care for others. Thus, although the Ozians embrace all kinds of sentient beings and facilitate them in the fullness of themselves, their ethic of care limits the actions of those inclined to hurt others.

Finally in Oz, the ethic of care also encourages abundance and the sharing of abundance. Like the United States, Oz has an abundance of resources (enough to provide the shaggy man with new shaggy clothes). Unlike the United States, however, Oz has a vision of both creating and sharing that abundance that begins and ends with the ethic of care. The people of Oz work only half the year and are socialized to use only what they need.[164] That is, greed and acquisitiveness are not valued. This likely contributes to social abundance, feelings of having abundance, and maintaining that abundance. In addition, this orientation likely makes whatever they have easier to share. Furthermore, the ethic of care is complimented by a philosophy and cultivated interest on the part of individuals to serve others and to make others happy. As such, the philosophy of care allows everyone to live, and to live relatively well.

3. *Participation and Inclusion*

When the shaggy man arrives in Oz, he meets a host of strange and wondrous characters. All of these characters fully participate in the life of Oz. Baum provides a clear picture of this at Princess Ozma's birthday party celebration. In attendance at the grand banquet are all of these beings:

> I wish I could tell you how fine the company was that assembled that evening at Ozma's royal banquet. A long table was spread in the center of the gardening-hall of the palace and the splendor of

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[160] *Id.* at 264.
[161] *Id.* at 153.
[162] *Id.* at 250.
[163] *Id.*
[164] *Id.* at 246.

> the decorations and the blaze of lights and jewels were . . . magnificent.
>
> . . . .
> Santa Claus . . . was given the seat of honor at one end of the table while at the other end sat Princess Ozma, the hostess.
>
> . . . .
> At the upper end of the banquet room was a separate table provided for the animals. Toto sat at one end of this table with a bib tied around his neck and a silver platter to eat from. At the other end was placed a small stand, with a low rail around the edge of it, for Billina and her chicks.
>
> . . . .
> At the lower end of the great room was another table, at which sat the Ryls and Knooks who had come with Santa Claus [and] the wooden soldiers . . . .[165]

Many of these beings approximate human beings. That is, almost all of them act like people and almost all are sentient beings in some narrow sense. This includes the talking animals, like the Cowardly Lion, the Hungry Tiger, Billina the Talking Chicken, and Eureka the talking kitten. It also includes sentient "thing-beings," such as the Scarecrow, the Tin Man, Jack Pumpkin Head, and the Sawhorse. But it also seems to include, to a lesser degree, regular animals that cannot talk, like Toto.[166] These beings could be understood as sentient in that they feel pleasure and pain.[167]

All the creatures participate in the party and in everyday life, as does the shaggy man, a person who is not originally from Oz. One might argue, however, that there is some rank order in their participation and that humanness, at lease in physical form, constitutes a hidden norm. Consider that all the animals, whether they can talk or not, sit at one table in the banquet hall while many of the other human-like creatures sit at the table with Princess Ozma.[168] Further, there is the question of the palace servants who presumably attend the party but are working. In this sense, even the Land of Oz is not perfect though its practices of diversity are both richer and deeper.

In addition, however, their differences are noticed and provided for, for the purpose of enabling their participation. So, for instance, the shaggy man is made comfortable with fine clothes that, like he, are shaggy. Toto is provided a plate to eat off of, while Billina and her chicks are placed in a stand with a rail around to keep them safe. Being attentive to their specific needs enables their participation in the day and the day is grand.

In the end, the shaggy man appears to earn his reward of staying in Oz when he and others face almost certain death. Embracing the ethic of care, participating in the life of the country, the shaggy man decides to stay with

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[165] BAUM, *supra* note 2, at 261.
[166] Toto is also seated at the table with his bib. *Id.* at 161.
[167] MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2004) defines sentient as responsive to or conscious of sense perceptions.
[168] *See id.* at 261.

Princess Ozma who refuses to hurt those who are attacking Oz, intent on its destruction.

B. INTERLOCKING DIFFERENCES OF RACE AND CLASS

Those who argue for class-related considerations in decision-making (as opposed to racial considerations) in reaction to Justice O'Connor's *Grutter v. Bollinger* opinion may well sense that not only is economic diversity lacking in too many places, but that also, in fact, elite schools, among other institutions, do not care about including poor people—they do not care about them, do not adequately provide for them, and therefore do not enable their participation. For instance, most students who drop out of school do so because they must work.[169] Scholars who argue for class based consideration may sense that the society cares about, and provides more opportunities to, minorities.[170] Other scholars may believe that if class considerations are used, minorities will be included (although this has been shown not to be the case).[171] Still others may think that racial issues will disappear if the society moves toward a social democratic order, whereby all people have access to the necessities of life.

They all may be on to something. However, their insights are limited in several significant ways. The problem of exclusion is much deeper than the first two critiques allow. A significant part of the problem is in the provision and distribution (as well as production) of resources—in economic relations and class. But even these revolve around racial identity, where the society is supposedly organized to care for some at the expense of others, but in reality society cares for very few.

First, the idea that class considerations should replace racial ones entails a rather superficial understanding of the mechanisms that limit poor people's access to resources, including resources such as admission to elite schools. The problem of accessing educational opportunities lies not with the admission of students of color (who take "white places") but with the

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[169] Held notes that in the issue of elite schools and the poor, there is a difference between caring or exercising care and "caring about" something. *See, eg.*, *Reactions: Is It Time for Class-Based Affirmative Action?*, THE CHRON. OF HIGHER EDUC. (Dec. 16, 2009), http://chronicle.com/article/Reactions-Is-It-Time-for/62615/ (explaining that several experts reacting to the fact that most students drop out of school because they have to work and discussing class based affirmative action and race based affirmative action). Nevertheless, she allows that if you "care about" something you might be motivated to do something about it. HELD, *supra* note 134, at 30.

[170] *See, e.g.*, Ronald Roach, *Class-based affirmative action: battle over race-conscious approaches pushes idea to the surface - Affirmative Action Watch*, BLACK ISSUES IN HIGHER EDUCATION, June 19, 2003, *available at* http://diverseeducation.com/article/3029/ (discussing among other things, a report "commissioned by the Century Foundation entitled 'Socioeconomic Status, Race/Ethnicity and Selective College Admissions'" that found that "at the most selective 146 colleges and universities 3 percent of the undergraduates at those schools are from families in the bottom quartile for socioeconomic status and 10 percent are from the bottom half. Though Blacks and Latinos were 28 percent of all 18 year olds in 1995, they represent only 12 percent of the freshmen students attending the top 146 colleges, according to the report." Dr. Anthony P. Carnevale, one of the authors of the report "thinks the wholesale replacement of race-conscious affirmative action by class-based programs would be a devastating move given that Blacks and Latinos are fast growing segments of the U.S. population. In 2015, Black and Latinos are expected to be 29 percent of the college population, which is a 5 percent increase over the 2000 total, according to Carnevale. Given that class-based programs would result in a decrease in Black and Latino representation at the top 146 schools, "we'd be going backwards."); SCHMIDT, *supra* note 96. The text could be read as implying such an argument.

[171] *See Reactions: Is It Time for Class-Based Affirmative Action?*, *supra* note 169; Roach, *supra* note 170.

maldistribution of resources that allow the few to monopolize such resources at the expense of the many. That is, both people of color and less affluent whites often lack adequate resources to meet their needs. In the context of higher education, less affluent whites often cannot afford the preparatory tools that render admission accessible.[172] That is, the problem is not that they cannot afford to attend these institutions, a problem that financial aid is supposed to fix. But rather, it is that they do not have enough money to prepare at the level that will even allow them to gain admission in the first instance.[173] In other words, the construction of merit is very much related to access and to money,[174] and not unrelated to race. Although white supremacy theoretically allows all whites to participate fully in everyday life, historically trying to limit the access to schools to those considered white enough, white elites designed tests that screened out those too new to the country and those too poor from accessing the information that might make passing entrance tests possible.[175] The effect of those policies even today, in the current post-civil rights period, the third period of this racial order, is that many minorities and poor people of all sorts cannot access a good education. This then impacts their access to good jobs and the cycle of exclusion begins anew.

Second, the conversation about class in the higher education context is often distorted by race, such that talk about class is really a conversation about white racial privilege.[176] In other words, class is a proxy for whiteness in which the hidden refrain is that people of color should not take the places to which whites are entitled. Or, all whites should be accommodated and have access to social goods before any people of color. Although these statements are publicly qualified with the idea that unqualified people of color should not take the place of qualified whites, both the intent and result are the same. Whites are presumed qualified, people of color are not, and whites then should be admitted to schools over, and instead of, people of color. It rarely occurs to anyone that in some elite institutions the only economic diversity that exists results from the admission of minorities,[177] or that efforts that seek to exclude colored people also often work to exclude poor whites. Consider the case of voting. In order to limit blacks' voting rights, white supremacists did not simply block blacks from voting, they established literaracy rules and poll taxes that had the effect of not just simply blocking blacks' access, but also keeping poor white people from voting and participating.[178]

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[172] *See supra* note 96.

[173] *See* sources cited *supra* note 96.

[174] *See* sources cited *supra* note 96.

[175] *See* Roithmayr, *supra* note 96.

[176] *See generally* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003); Athena D. Mutua, *Introducing ClassCrits: From Class blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 910–11 (2008) (summarizing Mahoney's insight on this issue and noting "the white working class' [sic] 'economic' interests are primarily concerns about race status[].").

[177] *See* Interview by Rebecca Parish with Lani Guinier, *supra* note 96.

[178] *See* Breedlove v. Suttles, 302 U.S. 277 (1937). A suit was brought by a white man challenging a Georgia provision requiring payment of a poll tax as a prerequisite for voting. *Breedlove* was overruled by *Harper v. Va. State Bd of Elections*, 383 U.S. 663 (1966).

This is not to say that poor whites and people of color are situated the same. They are not.[179] But it is to say that "although race and social class are conceptually separate,"[180] they are, in social practice, always intertwined.[181] Capitalism began the process of marking and demarcating peoples as races,[182] but it was the exploitation of people of color and their vast resources that made global capitalism work. That is, capitalism underwrote race, but race also underpinned capitalism. As Minkah Makalani, in rejecting the position that pursuing socialism first would lead to the liberation of people of color, points out:

> '[T]he national liberation of India was central to breaking down the British Empire and capitalism.' In contrast to the notion that socialist revolution would lead automatically to the liberation of the colonies as Engels had argued in 1882, [others] held that it was the existence of the colonies in Asia and Africa which allowed the imperialist bourgeoisie to maintain social control over workers in the metropole, and that it would not therefore be possible to overthrow the capitalist system in Europe without the breaking up of the colonial empire. . . . [This] . . . placed the liberation of Africa and Asia (and . . . Blacks in the U.S.[183]) at the center of the world socialist revolution.[184]

Further, "the social classes under capitalism have always been differentially distributed among the populations of the earth on the basis of the coloniality of power . . . ."[185] Certain classes have existed "in the Euro-core" and similar, but additional, classes, including slaves and serfs, have existed in the periphery.[186] Anibal Quijano suggests that it has been "precisely this set of power relations that has allowed the capitalists to shape and finance the loyalty of the exploited or dominated whites against the other 'races.'"[187] W.E.B. Du Bois is even clearer in situating dominated white workers in relation to people of color and demonstrating the ways in which class and race are intertwined.[188] He suggested "workers of color were the true proletariat of the world-system, while white workers occupied an intermediate position in the world division of labor. The psychological sop of racism undermined the commitment to equality among white

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[179] *See* John A. Powell, *Post-Racialism or Targeted Universalism*, 86 DENV. U. L. REV. 785 (2009) (explaining the ways in which these groups are situated in a way that allows whites much greater access to social goods).

[180] BUSH, *supra* note 81, at 90.

[181] William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 16 (1999).

[182] Anthony Farley, *The Colorline as Capitalist* Accumulation, 56 BUFF. L. REV. 953 (2008).

[183] Bush expanded "liberation" to include Blacks in America. BUSH, *supra* note 81, at 103.

[184] BUSH, *supra* note 81, at 103 (citing Minkah Makalani, For the Liberation of Black People Everywhere: The African Blood Brotherhood, Black Radicalism, and Pan-African Liberation in the New Negro Movement, 1917–1936 (2004) (unpublished Ph. D. dissertation, University of Illinois at Urbana-Champaign (2004)).

[185] BUSH, *supra* note 81, at 90 (citing Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America,* 1 NEPANTLA: VIEWS FROM S. 533–80 (2000)).

[186] *Id.* (citing Quijano, *supra* note 185) (explaining that Quijano suggests that in the south exist "tributary capitalists, dependent associates, slaves, serfs, small independent mercantile producers, reciprocal workers, wage workers, middle classes, and peasants in the colonial periphery").

[187] *Id.*

[188] BUSH, *supra* at note 81, at 93.

workers, who instead guarded their position of relative privilege, acting as police over 'niggers.'"[189]

It is this differential in social class between whites and people of color that all too often renders the third idea—a quick transition to some sort of social democratic order, which could end all our problems—merely wishful thinking. The idea is that if there is more social provisioning of goods, such as health care, food, housing, childcare, etc., and these are more equally distributed, as in Oz, then racial oppression will be eliminated. It will be eliminated in part because the material basis that supports the ideology of white entitlement, poverty among people of color and segregation, will disappear, and therefore the ideology itself will also disappear. In such a society perhaps everyone would go to a good school.

The problem with this idea is two-fold. First, as Noddings notes, Americans dread communism even though they have not sorted or adapted the current worth of the idea and they have an uncritical acceptance that competition, whether moderate or extreme, is good.[190] Second, race—which has become a semi-autonomous system—and in particular, white racial positioning, hinders movement toward more social cooperation and provision of goods and services, like universal health care. This is because whites fear that blacks, other people of color, and immigrants, will somehow get something that they do not deserve, or will get more than they.[191] Whites do so, in part, because they participate and live in a system where often their own needs are barely met.[192] They figure—buying into capitalist white supremacist ideologies—that it is better for no one to get anything, rather than for whites to lose out. If they, however, can be guaranteed first dibs, or better yet, guaranteed to get something, while people of color get little or nothing at all, then their opposition decreases, as did Southern Democrats' opposition to New Deal policies once the majority of black workers were precluded from benefiting under them[193].

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[189] *Id.*

[190] NODDINGS, STARTING AT HOME, *supra* note 136, at 233.

[191] *See, e.g.*, MICHAEL K. BROWN ET AL., WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 2 (2003) (discussing three tenets that white Americans tend to believe that support white racial resentment and the move toward colorblindness and noting "in an era when economic inequality is growing, when many families stand still financially despite earning two and three incomes these beliefs [about racism being dead and minorities not working hard enough to benefit from civil rights movement, etc] provide a convenient explanation of their circumstances. Historically class inequality has exacerbated racial inequality and the present is no different. The idea that lazy blacks get government handouts inflames white men whose real wages barely increased during the 1990s economic boom. And for whites turned away from elite [schools] . . . that accept African Americans, these notions provide a deep outlet for resentment."); Rich Benjamin *White Racial Resentment Bubbles Under the Surface of the Tea Party Movement*, ALTERNET (Feb. 5, 2010), http://www.alternet.org/story/145560/--.

[192] *See* BROWN, *supra* note 191.

[193] *Id.* at 27–32. During the era of the New Deal three laws passed that augmented racial stratification even though they could be thought of as race neutral universal/inclusive laws. *Id.* These were the Social Security Act, The Wagner Act and the Federal Housing Act, all of which "led to the accumulation of wealth in white households" while laying the seeds for the urban ghetto and producing a "welfare system in which recipients would be disproportionately black." *Id.* at 27. Under the first two acts blacks initially would not receive the old age pensions or unemployment because Southern Democrats insisted that agricultural and domestic workers be excluded from these Acts' provisions. *Id.* 27–32. At the time blacks worked overwhelmingly in these spheres). For further examples, see generally Adam Gordon, *The Creation Of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible To Whites And Out Of Reach For Blacks*, 115 YALE L.J. 186 (2006);

This of course suits white capitalists just fine, in part because often they are deeply racist and in part because while proclaiming allegiance to liberty and freedom, they do not want anyone other than themselves to be liberated and free from want. They recognize that "a person who has nothing can be made to do anything,"[194] and such people can be coerced to work for pennies and contribute to profits, which makes capitalism go round. And so elites feather the bed of an ideology that says you keep what you accumulate—no matter how you accumulate it—and only the smart, talented, and lucky are rich. This justifies their own positions and allows them to continue to ensure that the rules favor their preservation. In this way, white supremacy and capitalism walk hand in hand. To get rid of one, it is almost certain that you have to get rid of the other or severely curtail both their operations. Said differently, accepting and providing for all in ways that enable their participation or promoting both those marked as racially different and poor may be a way out.

V.   CONCLUSION: CARING, SHARING, AND BEING OURSELVES

There is a stark difference between Oz and the United States. In Oz, the people value difference not out of a theory of difference and diversity, but rather out of an ethic of care. In Oz, people care about beings. They recognize and respect differences in these living beings, they accommodate and respond to these differences, and they provide for them. In the United States, by contrast, there is a lot of talk about difference and diversity. But the society either oppresses difference—or those considered different—for the purposes of elevating some and not others, or the society attempts to ignore difference, which given society's organization, becomes another tool of oppression.

Given the preceding dreary picture, How might we get out of this mess and how might we better engage difference and deepen our practices of diversity? That is, How do we get from where we are to where Oz is? Of course, if the answer to this question were easy, both in conception and implementation, somebody else would have already thought of it! But continuing with the exploration of Oz, the shaggy man's story in Oz suggests that we move toward caring and sharing and being ourselves. And though this sounds rather "mamby pamby," this is no easy task. Instead, it is a fight—one, in some ways, in which we are already engaged.

First, to move toward an ethic of care, most of us would have to learn a great deal more about what constitutes an ethic of care, and likely participate in further developing it in ourselves and others. Then we would have to really evaluate and potentially restructure our relations to ensure

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IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2005); Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 U. PA. L. REV. 1351 (1995).

[194] Athena D. Mutua, *Introducing ClassCrits: From Class blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 895 (2008) (explaining "that economic deprivation is coercive and [despite the country's commitment to liberty and freedom] [] it is difficult to be self-sufficient and to implement individual choice when one does have the resources to do so").

that we provide care, attentively and concretely, for those with whom we are in relation.

Past the private sphere, however, scholars such as Held and Noddings have already provided some indication as to what commitments to an ethic of care might be required at the social level. These include such things as a focus on ensuring that all children flourish, universal health care, housing, and a host of activities and other pursuits in which many of us are already involved. Even so, we would need to reevaluate these activities and relationships as well. As Tronto suggests, more definitive answers to some of our most vexing questions, including resource questions, might be found once we begin moving toward an ethic of care.

However, the struggle over the recently enacted healthcare insurance bill[195] provides some clues as to the kind of struggle and the nature of the forces arrayed against efforts that seek to render all manner of people less desperate and which would require access to the United States' vast resources, access which only the few have. Trying to engage and dialogue through an ethic of care might spur more listening and engagement, but these sorts of ideas and measures are likely to engender resistance from the powerful, and vulnerable alike, for reasons already discussed.

Similarly, a move toward a philosophy of sharing such as the one in Oz, which operates from the standpoint of felt abundance and sharing, is likely to generate conversations and reevaluations of a host of issues such as scarcity, land use, production, executive pay, abundance, and other fiscal priorities and issues. Foreshadowed by a move toward an ethic of care, which involves social provision, the idea again would be to align the issues with intentions and plans that would "assure all people are cared for." This kind of movement is sure to garner fierce opposition and debate. But this is necessary work. In fact, success around these kinds of efforts, piece by piece, might lay a better foundation for our engagement with difference.

But our engagement with difference must proceed simultaneously. While we are advocating for economic care (empowerment) for all, we should ensure that the specific care needs of those perceived, structured, or those who have chosen to be different, are attended to and met. This is important because we know "universal" benefits have not always been universal. In this sense, the issue in *Grutter v. Bollinger* should likely not be race or class, but rather race and class, a situation which will make a small dent. Further, struggles about resource allocation inevitably bring out struggles about race, immigration status, and other differences, usually in a negative way. Thus, like the shaggy man, people of color, whether finely dressed or not, would do well to be themselves. That is, they should tell their stories, write their history, raise their children in relation to themselves and the communities around them, and act with others. They should perhaps do this from an ethic of care, informed by a jazz aesthetic and the injunction of love that Martin Luther King, Jr. taught, using the tools of their own consciousness, their own sight, to see the hidden norms, structures, exercises of power, and missteps, which do them harm.

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[195] Health Care and Education Reconciliation Act of 2010, Pub.L. 111-152, 124 Stat. 1029.