Northwestern Journal of Law & Social Policy

Spring 2011

The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations

Destiny Peery

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I.   INTRODUCTION

¶1   "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[1]   Chief Justice Roberts's statement in *Seattle Schools*[2] captures the dominant contemporary and historical legal approach to diversity that has existed since Justice Harlan's famous dissent in *Plessy v. Ferguson,*[3] introducing the concept of a colorblind Constitution.[4]   Since at least the time of *Plessy* there has been a large group of colorblind proponents that advocates that the law should be colorblind as a means to achieving equality under the law.   The legal definitions extracted from debates among legal scholars and captured in judicial opinions highlight the importance, in the minds of many, of ridding the law (and society in general) of racial categories that divide and lead to negative outcomes on the basis of these divisions.

¶2   Like judges and legal scholars, social scientists define colorblindness, doing so similarly, but somewhat more precisely than their legal counterparts.   For example, some social scientists define colorblindness has been defined as an "ideology in which all people [are] to be judged as individual human beings[] without regard to race or ethnicity."[5]   Another approach "focuses on ignoring cultural group identities or realigning them with an overarching identity."[6]   Like the definitions coming from the legal domain, these definitions highlight the importance of de-emphasizing group distinctions in order to achieve a higher good of considering all people as individuals rather than simply members of social categories like race.   The assumption underlying a colorblind approach is that as long as people do not "see" categories such as race, they cannot discriminate on the basis of them.

¶3   Not everyone agrees that colorblindness is possible or that it is the ideal approach to diversity.   In the legal field, the debate has taken the form of arguments in favor of

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[1] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).
[2] *Id.*
[3] 163 U.S. 537 (1896).
[4] *Id.* at 559 (Harlan, J., dissenting) ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.").
[5] Carey S. Ryan, Jennifer S. Hunt, Joshua A. Weible, Charles R. Peterson & Juan F. Casas, *Multicultural and Colorblind Ideology, Stereotypes, and Ethnocentrism Among Black and White Americans*, 10 GROUP PROCESSES & INTERGROUP RELS. 617, 618 (2007).
[6] Flannery G. Stevens, Victoria C. Plaut & Jeffrey Sanchez-Burks, *Unlocking the Benefits of Diversity: All-Inclusive Multiculturalism and Positive Organizational Change*, 44 J. APPLIED BEHAV. SCI. 116, 119 (2008).

either colorblindness as articulated by Justices Roberts or Harlan, for example, or in favor of race consciousness. Prominent legal scholars on the side of race consciousness have argued for the law to be race-conscious in light of the reality that people have been and remain race-conscious,[7] as well as the facts of existing racial inequalities.[8]

¶4   In the social sciences, the debate between colorblindness and race consciousness has also occurred, with an emphasis on the efficacy of colorblind and multicultural ideologies or mindsets for reducing prejudice and discrimination and improving intergroup relations.[9] In recent years, psychologists have conducted research on the psychological implications of these approaches in terms of basic psychological processes like person perception and attitudes toward social groups.

¶5   In an effort to bridge the gap between the theoretical discussion in the legal field and the empirical discussion in psychology, this Comment will review the arguments made on both sides of the legal debate, as well as the empirical evidence that suggests something about the true efficacy of colorblind versus race-conscious (or multicultural) approaches to dealing with diversity.

¶6   This Comment argues: (1) colorblindness is, under most circumstances, undesirable given its recently discovered negative outcomes, particularly for the very groups or individuals it is meant to protect; (2) true colorblindness is unrealistic given the psychological salience of race; and (3) race consciousness in the law is necessary to ensure equal treatment of racial groups in regulated domains such as housing, education, and employment.

¶7   Part II of this Comment reviews the legal debate around colorblindness and race consciousness, with an analysis of where it has been and where it currently stands. Part III reviews the psychological literature examining how we cognitively construct and use categories, with an emphasis on the salience and inevitability of racial categorization. Categories are the basis for making racial distinctions, and thus, understanding how categories operate psychologically is an important foundation for understanding the debate about colorblindness. In addition, the psychology of categories is helpful to understanding why the negative effects of colorblindness described in Part IV might occur despite the good intentions of those wishing to adopt a colorblind perspective.

¶8   Part IV reviews the psychological literature examining the efficacy of colorblind versus multicultural approaches in various realms of interracial or intergroup contact, including stereotyping, expression of prejudice, and interracial interactions. The relative advantages and disadvantages of colorblindness and multiculturalism will be explored through an examination of the empirical evidence testing these approaches.

¶9   Finally, Part V analyzes the current legal debate around colorblindness versus race consciousness in light of recent psychological research. Part V will conclude by arguing that since true colorblindness is unrealistic and undesirable in important ways, the law

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[7] *See, e.g.*, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[8] Black America Reports, *Report Sees "Sobering Statistics" on Racial Inequality*, CNN.COM, Mar. 25, 2009 [hereinafter *Sobering Statistics*], http://www.cnn.com/2009/US/03/25/black.america.report/index.html (citing statistics showing that blacks are two times as likely to be unemployed, three times as likely to live in poverty, and more than six times as likely to be imprisoned compared to whites.).

[9] *See, e.g.*, Destiny Peery & Jennifer A. Richeson, *Broadening Horizons: Considerations for Creating a More Complete Science of Diversity*, 21 PSYCH. INQUIRY 146 (2010); Victoria C. Plaut, *Diversity Science: Why and How Difference Makes a Difference*, 21 PSYCH. INQUIRY 77 (2010).

should be race-conscious in order to move society closer to achieving the racial equality so desired by proponents of colorblindness and race-consciousness alike.

II. The Law and Colorblindness

A. *Historical Case Law and Colorblindness*

¶10   The anti-discrimination principle likely led to colorblindness in the law[10] by representing a "moral principle [in the law] that prohibits discrimination."[11] Proponents of this principle argue that it was born out of the Equal Protection Clause of the Fourteenth Amendment[12] and later enshrined in the Civil Rights Act of 1964.[13] The anti-discrimination principle was once considered very much in line with the concept of colorblindness, and in fact, it was argued by some that the anti-discrimination principle necessitated a colorblind approach. The most famous example of this comes from Justice Harlan's dissent in *Plessy v. Ferguson.*[14] In stating, "Our constitution is color-blind, and neither knows nor tolerates classes among citizens,"[15] Harlan argued that the anti-discrimination principle required the Constitution and law generally to be colorblind.[16] Because the anti-discrimination principle requires the law to avoid discriminating against individuals on the basis of group or category membership when it comes to affording individuals rights and privileges guaranteed by the law, it also recommends equal treatment (in other words, color or other category blindness) when it comes to affording treatment.

¶11   Just as Justice Harlan's dissent in *Plessy* articulated the relationship between the Equal Protection Clause of the Fourteenth Amendment and the anti-discrimination principle,[17] Section 1983 of the Civil Rights Act of 1871,[18] which followed three years after the Fourteenth Amendment, also contained language aimed at putting in place a colorblind, anti-discrimination principle.[19] Section 1983, despite relying on race-neutral language like the Fourteenth Amendment,[20] has been used mostly to enforce the anti-discrimination principle by providing a basis for claims against alleged perpetrators of discrimination, particularly racial discrimination. Thus, both the Fourteenth Amendment and Section 1983 were policies that, when applied, considered race despite their technically race-neutral construction. In addition, cases leading up to the civil rights era challenging discriminatory practices in housing, education, employment, and other

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[10] *See* Andrew Kull, The Color-Blind Constitution (1992) (containing a full discussion of the history of the colorblind ideal in U.S. constitutional history, including its link to the anti-discrimination principle).

[11] John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 Fordham L. Rev. 423, 428 (2002).

[12] U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to *any person* . . . equal protection of the laws.") (emphasis added).

[13] Hasnas, *supra* note 11, at 428; *see also* Kull, *supra* note 10.

[14] 163 U.S. 537, 552–64 (1896).

[15] *Id.* at 559.

[16] *Id.*

[17] *Id.*

[18] Civil Rights Act of 1871, 17 Stat. 13 (1871).

[19] The language of this section prohibits private parties, including individuals, from depriving other persons of rights, privileges and immunities secured by the Constitution and laws. *Id.*

[20] Both refer only to "persons," which has been construed to protect racial groups, for example, but does not require such a construal given the race-neutral construction.

domains of social life relied on the previously established link between the anti-discrimination principle and colorblindness to argue that colorblindness was required in order to remedy an explicit denial of rights in those areas.

¶12   *Brown v. Board of Education* powerfully articulated the relationship between colorblindness and the anti-discrimination principle.[21] The Court's holding in *Brown* relied strongly on the idea that the way to avoid perpetuating existing racial inequalities and racial segregation was to stop separating people on the basis of race, as doing so was inherently discriminatory.[22] Chief Justice Warren, writing for the Court in *Brown*, further advocated colorblind thinking about the Fourteenth Amendment when he wrote, "The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.'"[23] The civil rights movement and the legislation that accompanied it, namely the Civil Rights Act of 1964,[24] began to erode the relationship between the existing anti-discrimination principle and colorblindness. Up to that point, key legal decisions closely linked the ideals of anti-discrimination and colorblindness.[25] The civil rights movement began to explicitly differentiate between the two on the basis that colorblindness was insufficient to uphold equal protection under the law and to guarantee equal rights and privileges.[26] Instead, civil rights advocates argued that law and policy must take race into account in order to ensure that the implementation of legally-required colorblindness (in other words, anti-discrimination, equal rights and privileges) occurred as required by law.[27]

¶13   The conflict between the values of freedom and egalitarianism without the consideration of racial distinctions on the one hand and the reality of a historical legacy of racial bias and persistent maintenance of racial bias during this time, on the other hand, created the "new American dilemma of race."[28] This "new" dilemma, the conflict between egalitarianism and the realities of racial inequality, also created a conflict between the need to avoid seeing race to appear egalitarian and the need to see race in order to remedy inequality.[29]

B. Contemporary Case Law and Colorblindness

¶14   Contemporary considerations of the tension between egalitarianism and existing racial inequality do not resolve the tension between the anti-discrimination principle and the colorblind ideal that still exists. Three cases in particular represent the current state of the colorblind ideal in case law and the continued relevance of the conflict of ideals and

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[21] 347 U.S. 483 (1954).

[22] *Id.* at 495 ("Separate educational facilities are inherently unequal.").

[23] *Id.* at 489 (*quoting* U.S. CONST. amend. XIV); *see also id.* at 490 ("In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations on the Negro race.").

[24] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964).

[25] *See, e.g.*, KULL, *supra* note 10.

[26] *Id.* at 183.

[27] *Id.*

[28] James M. Jones, *Psychological Knowledge and the New American Dilemma of Race*, 54 J. SOC. ISSUES 641, 643, 645 (1998).

[29] *Id.*

realities identified by the new American dilemma of race. *Seattle Schools,*[30] *Grutter v. Bollinger,*[31] and *Ricci v. DeStefano*[32] all set out colorblindness as the only acceptable path to achieving racial equality despite the continued debate about colorblind versus race-conscious approaches to diversity.

¶15   The plaintiffs in *Seattle Schools*[33] challenged a program designed to integrate the public school system. Public school officials in Seattle used white and non-white classifications as factors in school assignments. In order to help balance and integrate the most popular schools, the challenged school assignment system gave some students preference for assignment to the most popular schools on the basis of their race (in other words, if a child's race or ethnicity was underrepresented, he or she was more likely to be assigned to the school than a white student).[34] Parents of children denied admission to their preferred school filed suit, claiming that the plan implemented by the district violated the guarantee of equal protection under the Fourteenth Amendment.[35]

¶16   The Supreme Court struck down the district's system for integrating its schools.[36] The crux of the Court's opinion hinges on Chief Justice Roberts's underlying theory that the way to rid society of discrimination is to stop discriminating (in other words, distinguishing in any sense) on the basis of race.[37] Justice Roberts's approach is a colorblind one. He argues that distinctions on the basis of race are inherently bad when present in a society striving for equality.[38] Roberts views race as a forbidden classification because he believes that racial categories prevent people from thinking of others as individuals rather than simply members of their racial groups.[39]

¶17   Furthermore, the majority opines that allowing the Seattle School District to consider race would interfere with the "ultimate goal" of eliminating the use of race and other "irrelevant" social categories in government decision-making.[40] Justice Thomas relies heavily on Justice Harlan's colorblind analysis in *Plessy*[41] to support the court's holding, arguing that (1) the Constitution is colorblind, and that (2) any form of racial preference or classification on the basis of race, even if meant to increase racial diversity, violates the principle of Constitutional colorblindness.[42]

¶18   The *Seattle Schools* opinion cited to *Grutter v. Bollinger,*[43] a case involving a suit by an applicant denied admission to the University of Michigan's law school. That institution's admissions policy required officials to evaluate applicants in light of test scores and GPAs, as well as "soft" variables that contribute to the student body's diversity, broadly defined.[44] In this case, the Supreme Court upheld the university's

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[30] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

[31] 539 U.S. 306 (2003).

[32] 129 S. Ct. 2658 (2009).

[33] 551 U.S. 701 (2007).

[34] *Id.* at 710.

[35] *Id.* at 710–11.

[36] *Id.* at 711.

[37] *Id.* at 748.

[38] *Id.* at 746.

[39] *Id.*

[40] *Id.* at 730.

[41] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[42] *Parents Involved in Cmty. Schs.,* 551 U.S. at 748–81 (Thomas, J., concurring).

[43] 539 U.S. 306 (2003).

[44] *Id.* at 315.

admission policies because the law school had taken a holistic approach by using a race "plus" system of consideration[45] that emphasized diversity in consideration of candidates without any particular requirements for numbers or makeup of the diverse student body desired.[46]

¶19   The majority and minority in *Grutter v. Bollinger* articulate reservations about upholding the University of Michigan Law School's admission policy, and those qualms evince their belief in a colorblind ideal.[47]   The majority suggested that while race-consciousness is necessary now, as race-neutral policies become sufficient to provide for a representative and diverse student body, race-conscious policies should be immediately terminated.[48] Justice O'Connor wrote that "we expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[49] In *Grutter v. Bollinger*, the Court reveals its optimism that racial discrimination, the wrong which affirmative action was meant to address, is becoming less prevalent.

¶20   The dissenting and concurring opinions in *Grutter* echo the reservations of the majority, although more strongly. For example, the dissenting opinions refer to the practices of Michigan's law school as "discrimination."[50] Relying on the colorblind principle first identified by Justice Harlan in *Plessy*, Justices Thomas and Scalia argue that allowing such discrimination on the basis of race weakens the colorblind ideal underlying both the Declaration of Independence[51] and the Equal Protection Clause[52] as put forth by Justice Harlan.[53]

¶21   Despite the majority allowing, for the time being, the University of Michigan to consider race in the midst of an amorphous and vague admissions policy, the majority and minority opinions converge on the idea that Michigan's policy violated the ideal principle of colorblindness.[54] All of the decisions argue that American society should strive towards achieving the colorblind ideal that would deem this type of policy unnecessary sooner rather than later.[55]

¶22   The most recent case at the Supreme Court level addressing colorblindness and the anti-discrimination principle is *Ricci v. DeStefano*.[56] In *Ricci*, white firefighters from New Haven, Connecticut, sued their employer, the New Haven Fire Department, for discrimination under Title VII of the Civil Rights Act of 1964.[57] The Fire Department decided to throw out a promotion exam because it discriminated against black and Hispanic firefighters. The white firefighters claimed that decision constituted discrimination against those white firefighters who did not receive a promotion after the Department threw out the exam.[58] The white firefighters argued that the Fire Department

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[45] *Id.* at 336, 341.

[46] *Id.* at 335–36.

[47] *Id.* at 338.

[48] *Id.* at 342–43.

[49] *Id.* at 343.

[50] *See, e.g., id.* at 387–95 (Kennedy, J., dissenting).

[51] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("[A]ll men are created equal.").

[52] *See* source cited *supra* note 12.

[53] *Grutter*, 539 U.S. at 378 (Thomas & Scalia, JJ., dissenting in part).

[54] *Id.* at 306.

[55] *Id.*

[56] 129 S. Ct. 2658 (2009).

[57] 42 U.S.C. § 2000e (1964).

[58] *Ricci*, 129 S. Ct. 2658.

intentionally discriminated against them on the basis of their race.[59] Specifically, the white firefighters asserted that but for their race, the exam would not have been thrown out and they would not have been denied promotions.[60] The Fire Department, for its part, stated that it threw out the exam to avoid a Title VII discrimination claim by the black firefighters under a theory of disparate impact.[61]

¶23   Justice Kennedy, delivering the Court's opinion, opined that the fire department's actions were impermissible, unless it could show "a strong basis"[62] that a disparate impact claim was possible and thus needed to be avoided.[63] Kennedy's opinion pitted disparate treatment claims against disparate impact claims,[64] suggesting that employers must be aware of racial disparities in employment outcomes (for example, promotions and hiring), but employers cannot address those disparities unless it is relatively certain that they will be held liable for them.[65] The Court explicitly said, "the City was not entitled to disregard the tests based solely on the racial disparity in the results."[66]

¶24   The decision in *Ricci* represents a reemergence of the strong relationship between the colorblind ideal and the anti-discrimination principle observed prior to the civil rights era. This shift back toward a strong association between these two principles endangers contemporary approaches to the anti-discrimination principle as it challenges the ability to use race in order to remedy racial inequalities.[67] Furthermore, the majority in *Ricci* created a new standard ("strong basis")[68] for addressing racial disparities in the workplace, but not without creating fear of possible legal liability from either action or inaction. By pushing a colorblind approach, the new standard confuses those making a good faith effort to avoid discrimination by prohibiting them from preventing discrimination against one group out of fear of discriminating against another.

C. Contemporary Legal Scholars and Colorblindness

¶25   Despite contemporary case law's advocacy for the colorblind ideal, legal scholars continue to debate whether colorblindness or race-consciousness best addresses racial inequalities. The primary argument of those who advocate for race-consciousness is the same one that was prominent during the civil rights movement. Namely, they argue that race-consciousness is necessary to achieve equal treatment (in other words, colorblindness in practice) in key areas of ongoing inequality. However, legal scholars in favor of the colorblind ideal argue that it is race-consciousness itself that leads to continued racial inequalities.

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[59] *Id.*

[60] *Id.*

[61] *Id*. at 2664.

[62] *Id.* at 2662.

[63] *Id*.

[64] Disparate treatment claims are brought on the basis of explicit unequal treatment between different groups, whereas disparate impact claims are brought on the basis of differential outcomes between different groups resulting from a facially-neutral policy or procedure. *See* Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1964); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[65] *Ricci*, 129 S. Ct. at 2662.

[66] *Id.*

[67] *Id.*

[68] *Id*. at 2662.

¶26   One argument made for race-consciousness, as suggested above, is that race-conscious law is necessary to monitor our commitment to colorblindness with respect to equal access to resources like housing, education, and employment.[69] This argument asserts that legal mechanisms can only prevent discrimination on the basis of race in these regulated domains and address institutionalized inequalities resulting from historical discrimination if it is possible to monitor race and hold liable those who discriminate on the basis of race.[70] For example, Professors Alexander Aleinikoff and Cheryl Harris argue that instituting a colorblind approach permits American society to ignore or excuse the existing racial inequality in part because monitoring would be disallowed in a colorblind system.[71] In other words, if the law prohibits classification on the basis of race, which presumably could prohibit recording any information about race (for example, census counts of racial group membership), it would be impossible to prevent ongoing and future discrimination even in those domains where race predicts disparate outcomes because no action would be possible without some monitoring for ongoing discrimination.

¶27   Another argument for race-consciousness is that it avoids the problem of denial of discrimination. In other words, it prevents complete denial of the history and legacy of discrimination and its effects on those minority groups who have long suffered from its detrimental effects. For example, Professor John Duncan argues that it is the denial of this legacy that, in part, makes a colorblind approach so unappealing to minority groups, as it represents a denial of an identity that is influenced by a history of discrimination.[72]

¶28   Finally, those in favor of race-consciousness argue that colorblindness is a strategy by which the majority can protect and maintain its status by maintaining the discriminatory status quo in its favor.[73] Majority group members may be motivated, in part, to advocate for a colorblind approach because it allows them to avoid acknowledging or remedying inequalities while maintaining their relative advantages. For example, Professor Reva Siegel argues that colorblindness allows individuals, particularly those in the majority, to rationalize the status quo, even one with observable inequalities.[74]

D. Where Does the Law Stand?

¶29   While legal academics continue to debate amongst themselves about the virtues of the colorblind ideal, the Supreme Court has moved firmly in the direction of advocating for a resurgence of the colorblind ideal as the only means to truly eradicating racial discrimination and disparities.[75] The Supreme Court may be motivated both by the desire to enforce the anti-discrimination principle and by a desire to view the admittedly great

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[69] *See, e.g.*, Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL L. REV. 907 (2006); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991).

[70] *See, e.g.,* sources cited *supra* note 69.

[71] *Id.*

[72] John C. Duncan, Jr., *The American "Legal" Dilemma: Colorblind I/Colorblind II—The Rules Have Changed Again: A Semantic Permutation*, 7 VA. J. SOC. POL'Y & L. 315 (2000).

[73] *See, e.g.,* Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000).

[74] *Id.*

[75] Ricci v. DeStefano, 129 S. Ct. 2658 (2009); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Grutter v. Bollinger, 539 U.S. 306 (2003).

strides already made toward racial equality as sufficient to begin dismantling the very system of law that made those strides possible. The Court even goes so far as to claim that American society's progress towards racial equality is on track now to achieve further equality without intervention by the courts in the form of race-conscious law and policy.

¶30   Unfortunately, the Court has not fully considered whether colorblindness actually leads to the racial equality it is intended to produce and support. A review of the empirical social psychological literature suggests that the story of colorblindness is more complicated than that presented by the optimistic, and possibly overly idealistic, judges who favor this approach.

III. THE PSYCHOLOGY OF CATEGORIES: HOW AND WHY WE SEE RACE IN THE FIRST PLACE

¶31   To put it simply, people are not colorblind. Basic cognitive and social psychological research demonstrates that people use many types of social categories, including race, and the use of categories is adaptive and functional when dealing with the complex, social world in which we all live.[76] In other words, it is necessary for people to use relatively simple categories to aid efficient navigation of life's complexities.

¶32   In his research focused on understanding the creation and hierarchies of categories generally, Professor Gregory Jones has studied the distinction between basic and non-basic categories, and found that basic categories, in particular, aid in making cognitive processing easier.[77] Basic categories are those that are sufficiently inclusive (in other words, they do not include or exclude too many potential category members) and those that have multiple common attributes that make sorting people (or objects) into those categories possible by comparing the number of shared attributes between the group and the potential category member.[78] In addition, basic social categories, like race and gender, are often automatically activated upon encountering social targets (in other words, other people) and allow for easier processing of the social world.[79]

¶33   This research suggests that categories are not inherently bad as has been argued by Supreme Court Justices like Roberts and Thomas. Rather, this research suggests that categories are a necessary part of human cognitive processing of the world around them. It is certainly the case, as suggested by Chief Justice Roberts,[80] that people cannot discriminate against people belonging to different groups if there is no recognition of different groups, but it is not the recognition of groups in and of itself that leads to discrimination. For example, positive outcomes for intergroup contact have been observed where approaches to diversity that recognize and appreciate differences are utilized. This research suggests that even when the groups interacting are historically socially-stratified, such as racial groups, it is not inherently problematic to notice or even

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[76] *See, e.g.*, C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93 (2000).

[77] Gregory V. Jones, *Identifying Basic Categories*, 94 PSYCHOL. BULL. 423, 423 (1983).

[78] James E. Corter & Mark A. Gluck, *Explaining Basic Categories: Feature Predictability and Information*, 111 PSYCHOL. BULL. 291, 301 (1992).

[79] C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Categorical Person Perception*, 92 BRITISH J. PSYCHOL. 239 (2001).

[80] *Parents Involved in Cmty. Schs.*, 551 U.S. at 748 ("The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.").

use race as information in social interactions.[81] In addition, children (even babies) have been shown to notice and sort people into categories on the basis of skin color long before they are aware of the stigma that may be attached to particular group memberships.[82]

¶34   In addition to using categories adaptively to navigate our social worlds, it is likely nearly impossible to avoid noticing basic social categories like race and gender, regardless of whether it is adaptive or not. That is, even if a social category is not relevant for a particular interaction, the categories are still processed by social perceivers. Further, visible social categories such as race and gender are particularly likely to be noticed quickly and automatically,[83] and this makes such recognition relatively immune to disruption even with the good intentions that may accompany a colorblind approach.[84] Research at the neurological level shows that race is cognitively processed the fastest of all categories—even more quickly than gender—occurring in mere fractions of a second.[85] Again, it is important to remember that this basic process, particularly when it occurs automatically and quickly, is not the underlying issue, as suggested by proponents of colorblindness. Rather, racial categorization serves as a starting point that may lead to prejudice and discrimination, but this path to prejudice and discrimination is not automatic.

¶35   In addition to the psychological realities of racial salience, race is just as salient a social and cultural phenomenon. Much of U.S. history is characterized by stratification on the basis of race and conflicts over racial and ethnic identity, group status, and access to resources. Thus, race continues to predict key social outcomes in areas such as housing, education and employment where government intervention has long sought to remedy this stratification.[86] Some groups tend to fare better than others, and the maintenance of racial inequalities leads to the continued salience of race. As a result, minority group members continue to feel the often negative impact of their racial backgrounds on their identities, life experiences, and outcomes, while majority group members continue to receive privileges on the basis of theirs.[87]

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[81] *See, e.g.,* Evan P. Apfelbaum, Samuel R. Sommers & Michael I. Norton, *Seeing Race and Seeming Racist? Evaluating Colorblindness in Social Interaction*, 95 J. PERSONALITY & SOC. PSYCHOL. 918 (2008).

[82] *See, e.g.,* D. J. Kelly, P. C. Quinn, A. M. Slater, K. Lee, L. Ge & O. Pascalis, *The Other-Race Effect Develops During Infancy: Evidence of Perceptual Narrowing*, 18 PSYCHOL. SCI. 1084 (2007); MARGUERITE A. WRIGHT, I'M CHOCOLATE, YOU'RE VANILLA: RAISING HEALTHY BLACK AND BIRACIAL CHILDREN IN A RACE-CONSCIOUS WORLD (1998).

[83] Tiffany A. Ito & Geoffrey R. Urland, *Race and Gender on the Brain: Electrocortical Measures of Attention to the Race and Gender of Multiply Categorizable Individuals*, 85 J. PERSONALITY & SOC. PSYCHOL. 616 (2003).

[84] *See, e.g., id.* (demonstrating that it takes mere milliseconds for the brain to register the category memberships of social targets along dimensions of race, which are unlikely to be disrupted by motivational intentions).

[85] *Id.*

[86] *Sobering Statistics*, *supra* note 8.

[87] *See, e.g.,* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, July/August1989, http://www.libary.wisc.edu/EDVRC/docs/public/pdfs/LIReading/InvisibleKnapsack.pdf.

IV. THE PSYCHOLOGY OF COLORBLINDNESS

¶36   For several decades, social institutions, such as the educational system and legal and political domains, have been interested in learning to build tolerance across group lines and eradicate prejudice and discrimination directed at minority groups.[88] While the interest is often construed broadly in terms of how to deal with diversity of any kind, in the United States, concerns about diversity are rooted in a history of racial strife characterized by institutionalized inequalities that have only been erased at blatant levels in the last couple decades. Many years at this point have been dedicated to the development and testing of diversity programming aimed at fostering positive intergroup relations and decreasing intergroup bias.[89] Only recently has the field of psychology taken up the task of considering the psychological implications of these diversity measures. Within the last ten to fifteen years, psychologists have become interested in examining the psychological effects that different approaches to diversity have on subsequent intergroup contact.[90]

¶37   The two major approaches to dealing with diversity have been colorblindness and multiculturalism, as discussed throughout this Comment. The research comparing these two approaches has largely considered how much each approach reduces expressions of prejudice and stereotyping, given that this is a primary aim of diversity ideology generally.[91] More recent research, however, has considered the distinction between explicit and implicit forms of bias,[92] as well as the effects these ideologies have on actual interracial interactions from the perspective of participants (both majority and minority group members).[93] A review of this literature will highlight the differences between colorblindness and multiculturalism not only in terms of the tenets of the two approaches, but also in terms of their collective effects on intergroup contact. This review should inform the debate about colorblindness and race-consciousness in the law by supplementing the intuitions of legal scholars with empirical data showing the actual efficacy of these two approaches in eradicating racial inequality and improving race relations.

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[88] *See, e.g.*, J. W. Schofield, *The Colorblind Perspective in School: Causes and Consequences*, *in* MULTICULTURAL EDUCATION: ISSUES AND PERSPECTIVES (J. A. Banks & C. A. McGee Banks eds., 2007); D. W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139 (2008); J. M. Jones, *Psychological Knowledge and the New America Dilemma of Race*, 54 J. SOCIAL ISSUES 641 (1998).

[89] *See, e.g.,* STEVEN BREWSTER, MOLLY BUCKLEY, PHILLIP COX & LOUISE GRIEP, PLAN: NET LIMITED, DIVERSITY EDUCATION RESEARCH PROJECT: LITERATURE REVIEW (2002), http://culture.alberta.ca/humanrights/publications/docs/LiteratureReview.pdf.

[90] *See* studies cited *infra* Part IV.A.

[91] *See, e.g.,* Christopher Wolsko, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 J. PERS. & SOC. PSYCHOL. 635 (2000), *available at* http://faculty.chicagobooth.edu/bernd.wittenbrink/research/pdf/wpjw00.pdf.

[92] Implicit bias refers to bias resulting from automatic cognitive processes and often occurs outside of awareness. Explicit bias refers to bias that is conscious and explicitly stated by the holder of that bias. *See, e.g.,* Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004).

[93] *See, e.g.,* Michael I. Norton, Samuel R. Sommers, Evan P. Apfelbaum, Natassia Pura & Dan Ariely, *Colorblindness and Interracial Interaction: Playing the Political Correctness Game*, 17 PSYCHOL. SCI. 949 (2006).

A. *The Ease and Efficacy of Colorblind Versus Multicultural (Race-Conscious) Approaches to Diversity*

¶38   Many laypersons and courts consider colorblindness a comparatively easy strategy to adopt because it purportedly only requires that one not "see" race.[94] In addition, one can simply claim to not see race and then not mention race, and the illusion of colorblindness is created. The introductory quote by Justice Roberts is illustrative. Roberts suggests that the best way to avoid negative intergroup divisions is to avoid intergroup divisions in the first place.[95]

¶39   On the other hand, multicultural approaches require greater effort. They require acknowledging both similarities and differences, while simultaneously avoiding the negative effects that may stem from noticing differences between groups.[96] While colorblindness is an intuitively easier strategy for many people to conceptualize and utilize at a superficial level,[97] it is in fact far more difficult to put into practice than people tend to realize. People are not, after all, colorblind and wishing that were the case does not make it so.[98] With this premise in mind, research has investigated just how colorblind people actually are when encountering intergroup contact situations.

¶40   Professor Christopher Wolsko and his colleagues conducted one of the first psychological experiments comparing colorblind and multicultural ideologies and their effects on subsequent judgments of same race and other race groups and individuals.[99] They first randomly assigned participants in the study to a colorblind or multicultural mindset, which was induced by having them read a short article advocating for either a colorblind approach that favors seeing all people as individuals or a multicultural approach that favors acknowledging and appreciating racial group differences. They then wrote five points in favor of adopting a colorblind versus multicultural approach depending on the condition they were assigned to.[100] Wolsko found that those in both colorblind and multicultural conditions showed less ingroup favoritism[101] in the form of less positive ratings for the participant's own group compared to a control group that did not adopt either a colorblind or multicultural mindset.[102] There were differences between those in the colorblind and multicultural conditions though, as the colorblind group expressed lower levels of stereotypicality[103] of blacks. Simply put, those in the colorblind condition associated blacks less strongly with typical black stereotypes,

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[94] *Id.* at 649 (explaining that colorblindness is a means to demonstrating that one is not a racist by adopting that perspective that "If I do not notice race, then I cannot be racist").

[95] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discrimination on the basis of race.").

[96] Wolsko et al.*, supra* note 91 (demonstrating that multiculturalism can have the ironic effect of increasing stereotyping).

[97] Colorblindness only requires that people avoid noticing and mentioning race as opposed to noticing and appreciating the similarities and differences between racial groups, as is required by multiculturalism.

[98] In fact, people automatically see and sort others into social categories, particularly race but also gender and age groups, within milliseconds. *See* Ito & Urland, *supra* note 83.

[99] Wolsko et al., *supra* note 91.

[100] *Id.* at 638.

[101] Marilyn B. Brewer, *Ingroup Bias in the Minimal Intergroup Situation: A Cognitive—Motivational Analysis*, 86 PSYCHOL. BULLETIN 207 (1979) (defining in-group favoritism as "attitudinal and perceptual biases in favor of members of one's own group over members of other groups").

[102] Wolsko et al., *supra* note 91, at 639 tbl.2.

[103] Stereotypicality is the tendency to perceive individuals as prototypical of a general stereotype.

whereas those in the multicultural group expressed higher levels of stereotypicality of blacks on both positive and negative stereotypes.[104] That is, those participants in the multicultural condition perceived black targets to be more prototypical of a stereotypical black person (for example, less intelligent and more athletic) than those participants in the colorblind condition.

¶41   In two additional studies, Wolsko and his colleagues found additional effects such that those in a colorblind mindset thought that the goals of blacks and whites were more similar than those in the multicultural mindset.[105] Those in a colorblind mindset ignored racial category membership when forming impressions of target people, whereas those in the multicultural mindset did not ignore this information.[106] It might seem fair to conclude that the individuals in the colorblind mindset were performing better with regard to the task of appearing tolerant and not letting race influence their judgments, but additional findings from this same research suggest that the use of racial category information by those in the multicultural condition made them more accurate in their judgments, in part because race was at times useful information, rather than simply evidence of bias.[107]

¶42   Researchers conducted another study using children's performance in a "guess-who" game that requires the use of visual characteristics to narrow down a pool of potential matches to one.[108] The game was set up as either race-neutral or race-relevant, such that in one version (the race-neutral version), the race of the people in the pool was not helpful in differentiating between individuals, and in the other version (the race-relevant version), it was useful.[109] The study compared the performance of younger and older children to demonstrate that the older children, being more likely to have internalized the colorblind norms of society, would perform worse in the race-relevant version of the game because they would be reluctant to use relevant race information during the game. In fact, Professor Evan Apfelbaum and his colleagues did find that older students took longer to play the game (i.e., they had to ask more questions to arrive at the correct target) than younger students, thereby performing worse when racial information was relevant.[110] Taken together, the research of Professors Wolsko and Apfelbaum suggests that accuracy and performance in a social task or interaction may be impaired by a colorblind approach that inhibits the use of race even when it is relevant information in a social interaction.

¶43   Research continues to tease apart the relative advantages and disadvantages of colorblindness and multiculturalism for interracial interactions. For example, Professor Apfelbaum and his colleagues have argued that people use colorblindness strategically to avoid talking about race when they think it may make them appear racist, such as in interracial interactions.[111] In three studies, they examined the efficacy of this "strategic

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[104] Wolsko et al., *supra* note 91, at 639 tbl.1.

[105] *Id.* at 644 tbl.4.

[106] *Id.* at 647 tbl.6.

[107] *Id.* at 643, 648.

[108] Evan P. Apfelbaum, Kristin Pauker, Nalini Ambady, Samuel R. Sommers & Michal I. Norton, *Learning (Not) to Talk About Race: When Older Children Underperform in Social Categorization*, 44 DEVELOPMENTAL PSYCHOL. 1513 (2008).

[109] *Id.* at 1514 fig.1.

[110] *Id.* at 1515 fig.2.

[111] Apfelbaum et al., *supra* note 81.

colorblindness"[112] for fostering racial tolerance. In their first study, white participants who were most concerned about appearing prejudiced were also the most likely to adopt a colorblind approach, yet this had the ironic effect of making these same individuals appear less friendly to the black interaction partners they completed a "guess-who" game similar to the one described above with,[113] increasing the chance that their black interaction partners might think their unfriendly behavior was due to bias.[114]

¶44   A second study found that adopting a colorblind approach and avoiding the topic of race required cognitive resources. When using this strategy in an interracial interaction, it depleted the individuals of valuable cognitive resources necessary for exhibiting positive nonverbal behaviors.[115] This made them less able to monitor their actual behaviors to ensure a friendly interaction.[116] Whites who were most likely to adopt a colorblind approach also believed that those who exhibit colorblindness are less prejudiced than those who acknowledge race for any reason, as demonstrated in a third study.[117] Unfortunately, this stood in sharp contrast to the perceptions of the black interaction partners of these individuals. While those who presented themselves as colorblind believed they appeared the most non-prejudiced (compared to those who acknowledged race), their interaction partners interpreted their attitude as evidence of racial bias rather than evidence of non-bias.[118]

¶45   In a final study, a qualifying condition of the backlash effect (in other words, the effect that those who thought they were the most non-biased were perceived as the most biased) was found.[119] In situations where race was relatively less relevant or completely irrelevant to the interaction, colorblindness corresponded to perceptions of less bias. That is, when race was irrelevant, individuals taking a colorblind approach in the interaction were perceived as the least biased, in accordance with their views of themselves as non-biased. This finding highlights that colorblindness is not entirely bad and can be effective under particular conditions.[120] As was the case in this study, when it did not make sense to bring up the topic of race during the interaction, those who avoided doing so (by adopting a colorblind approach) were perceived as less biased.[121] Unfortunately, given the salience of race, there are many times when race is, in fact, relevant. Ignoring the relevance of race at those times, then, is clearly detrimental.

¶46   The ironic effects of colorblindness in interracial interactions have also been demonstrated by Professor Jennifer Richeson and her colleagues. They, too, have demonstrated that the desire to appear unprejudiced, which presumably includes appearing colorblind for many people, ironically negatively impacts interracial

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[112] *Id.* at 918.

[113] *Id.* at 922.

[114] *Id.* at 926.

[115] *Id.* at 924.

[116] *Id.* at 925.

[117] *Id.* at 927 fig.3.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 929 fig.4. Professor Correll and his colleagues also suggest that whether a situation is characterized by high or low conflict may also make colorblindness a more or less efficacious strategy for dealing with intergroup relations in these circumstances. Joshua Correll, Bernadette Park & J. Allegra Smith, *Colorblind and Multicultural Prejudice Reduction Strategies in High-Conflict Situation*, 11 GROUP PROCESSES & INTERGROUP RELS. 471 (2008).

[121] Apfelbaum et al., *supra* note 81, at 928.

interactions by leading to more negative reactions from other race interaction partners, as well as increased perceptions of bias for the white participants who are the most motivated to appear non-prejudiced.[122] In a set of studies pitting a multicultural approach against a colorblind approach, those who adopted a colorblind approach to interracial interactions also exhibited higher levels of racial bias on both explicit (self-reported, deliberative responses) and implicit (automatic responses) measures of prejudice.[123] These results are directly counter to the goals of colorblindness espoused by many who adopt the approach as a means to decrease bias.

¶47   Professor Jacquie Vorauer and her colleagues have examined the relationship between multicultural and colorblind approaches and their effects on interracial contact from the perspective of both interaction partners as well.[124] In two studies, Professor Vorauer showed that a multicultural approach, which she argues caused people in interactions to focus more on their interaction partners, led to more positive interracial interactions than a colorblind approach, which led people to be self-focused in order to monitor their thoughts and behavior in the interaction.[125] Thus, again, research suggests that colorblindness in an interracial interaction is cognitively taxing and possibly prevents positive interracial interactions from occurring.

¶48   However, Professors Nicole Shelton and Jennifer Richeson demonstrated a possible ironic effect in favor of colorblindness when they demonstrated that high-bias whites interacting with black partners were better liked than low-bias whites.[126] They argue that this appears to occur because high-bias whites try harder to overcome their bias in interactions with people of other races (with strategies including behaving in a colorblind manner) in order to avoid appearing prejudiced. Low-bias whites, however, may make less of an effort because they believe it is apparent to their black interaction partner that they are low in bias.[127] Taken together, these studies suggest that colorblindness may be an effective strategy for some under certain conditions, but they largely highlight that a colorblind approach can be problematic in the very situations it is supposed to be most useful for.

¶49   Psychologists, in light of the research discussed above, have also been interested in the underlying variables leading to the often negative effects of colorblindness. One such variable underlying the negative effects observed in interracial interactions may be a within-person divergence between what an individual explicitly communicates about their racial bias and the implicit bias operating outside of one's conscious control. Colorblindness may lead one to express less bias explicitly but may actually exacerbate bias implicitly. A study of bias at these two levels (explicit and implicit) found that individuals in a colorblind mindset in a high-intergroup conflict situation (in other words, a situation involving intergroup competition for scarce resources) expressed less bias

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[122] *See* Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 PERS. & SOC. PSYCHOL. REV. 243 (2009); J. Nicole Shelton, Jennifer A. Richeson, Jessica Salvatore & Sophie Trawalter, *Ironic Effects of Racial Bias During Interracial Interactions*, 16 PSYCHOL. SCI. 397 (2005); Richeson & Nussbaum, *supra* note 92.

[123] Richeson & Nussbaum, *supra* note 92.

[124] Jacquie D. Vorauer, Annette Gagnon & Stacey J. Sasaki, *Salient Intergroup Ideology and Intergroup Interaction*, 20 PSYCHOL. SCI. 838 (2009).

[125] *Id.*

[126] Shelton et al., *supra* note 122.

[127] *Id.* at 5.

explicitly (as measured by questions gauging explicit self-reported feelings toward another group), but exhibited greater bias at an implicit level (as measured by a task that captures automatic responses).[128] Implicit bias, regardless of explicit, self-reported bias, can affect subsequent behaviors and judgments in negative ways, producing displays of prejudice and leading to discrimination much in the way it is assumed that explicit prejudice does.[129]

¶50   In addition, they found that the same colorblind participants who expressed less explicit bias during the high-conflict situation experienced a rebound effect such that twenty minutes later they expressed greater explicit bias than their baseline.[130] For those participants in a multicultural mindset, their level of bias of both kinds (explicit, self-report and automatic, implicit associations) increased in the high-conflict situation and decreased slightly twenty minutes after considering the situation, demonstrating a correspondence between the two levels of bias, as well as an absence of the ironic effect that led colorblind individuals to express greater bias after the fact.[131]

¶51   As some of the research discussed above has suggested, it is important to consider the effect that various approaches to diversity have on those they are meant to protect and benefit. The interracial interaction studies discussed above suggest that the perceptions of whites and blacks in interracial interactions can diverge significantly. Whites often leave interactions feeling good about their ability to behave in a non-biased way and the positivity of their other race partner's perceptions of them, whereas blacks participating in the same interactions see many of the same behaviors as evidence of racial bias and find their other race partners unfriendly.

B. Preferences for Diversity Ideology

¶52   There are other ways in which reactions to colorblindness and multiculturalism diverge. For example, majority and minority groups tend to differ in terms of their overall preferences for one approach or the other. Presumably this is because of different motivations for adopting a particular approach and different life experiences that lead one to value different aspects of the two approaches.[132] In addition, majority and minority group status, as well as preferences for colorblindness versus multiculturalism, may also lead to differences in perceptions of issues around race and equality, which creates problems when working toward resolving the racial inequalities that still exist.[133]

¶53   Using a sample of participants in a diversity workshop (a situation with a likely selection effect such that those in the diversity workshop were already more likely to care about diversity issues and possibly were likely to exhibit less intergroup bias), Professor

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[128] *Id.* at 487.

[129] *See, e.g.,* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

[130] Correll et al., *supra* note 120, at 487; *see also* C. Neil Macrae, Galen V. Bodenhausen, A. B. Milne & J. Jetten, *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808 (1994) (demonstrating that suppressing stereotypes or biased thoughts that come to mind leads them to re-emerge stronger than before they were suppressed, leading to even more bias).

[131] Correll et al., *supra* note 120, at 487.

[132] *See, e.g.*, Ryan et al., *supra* note 5; Andrew R. Todd & Adam Galinsky, The Intimate Connection Between Self-Regulatory and Ideological Approaches to Managing Diversity (Nov. 9, 2009) (unpublished manuscript) (on file with author).

[133] Todd & Galinsky, *supra* note 132.

Carey Ryan and her colleagues investigated relative preferences for colorblind versus multicultural approaches between white majority group members and black minority group members.[134] In the first study, Professor Ryan found that white participants were more likely to endorse a colorblind ideology than black participants, and that black participants were more likely to endorse a multicultural ideology than a colorblind ideology.[135] Further, they found that whereas whites who endorsed a colorblind ideology perceived more similarities between blacks and whites, blacks who endorsed a multicultural ideology showed a similar effect, suggesting that the different approaches produce similar results for different groups of people.[136]

¶54   In a second study, black participants thought that a multicultural approach would lead to more positive interactions, whereas white participants thought that a colorblind approach would lead to more positive intergroup interactions.[137] Professor Ryan argues that colorblindness is preferred by majority groups because it is easy and justifies the status quo,[138] making it unnecessary to deal with the continuing presence of racial prejudice and inequality.[139] This same argument has been made by proponents of race-consciousness in the law.[140]

¶55   Similar group preferences for colorblindness and multiculturalism exist in the business context. Professor Flannery Stevens and her colleagues argue that minority group members prefer workplaces and diversity ideologies in the workplace that are multicultural, allowing them to utilize and express the different perspectives that may result from their experience as members of non-majority social groups.[141] Furthermore, researchers have also demonstrated that the psychological engagement of minority group members in the workplace is greater in a setting where dominant group members prefer multiculturalism to colorblindness.[142] On the other hand, majority group members dislike multicultural approaches, at least those that seem to exclude majority group culture, because they feel overlooked as unimportant contributors to diversity.[143] Instead, as suggested by the research above, whites prefer a colorblind approach that de-emphasizes social group membership.[144]

C. Perpetuating Prejudice

¶56   If colorblindness can be seen as a means to avoid addressing issues of race, then it is also informative as to whether adopting a colorblind or multicultural mindset is likely to affect one's perceptions of discrimination and bias. While it has been argued that the use of racial categories must be avoided in order to avoid discriminating on the basis of

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[134] Ryan et al., *supra* note 5.

[135] *Id.* at 623 tbl.2.

[136] *Id.* at 624 fig.1.

[137] *Id.* at 631.

[138] *Id.* at 632.

[139] *Id.* at 619.

[140] *See, e.g.,* Siegel, *supra* note 73.

[141] Stevens et al., *supra* note 6.

[142] Victoria C. Plaut, Kecia M. Thomas & Matt J. Goren, *Is Multiculturalism or Color Blindness Better for Minorities?*, 20 PSYCHOL. SCI. 444, 445 (2009).

[143] Stevens et al., *supra* note 6, at 121.

[144] *Id.* at 120.

race, it is also possible that avoiding racial categories could perpetuate continuing prejudice and discrimination.

¶57   Colorblindness has been shown to lead children to recount situations involving racial bias in ways that downplay the relevance or seriousness of race and racial bias, even in situations where its relevance is blatant.[145] In their study, they put children in either a colorblind or multicultural (or "value-diversity")[146] mindset by exposing them to messages advocating for one approach or the other.[147] They then exposed them to interactions between students involving no-bias, ambiguous bias, or blatant bias. In the blatant bias situation, the children learned that a white child engaged in an unprovoked physical assault of a black child based on the stereotype that blacks are aggressive. Of those in the multicultural mindset, 77 percent of them perceived bias in the blatant bias scenario, whereas only 50 percent of those in the colorblind mindset did.[148]

¶58   In addition, when students were asked to explain what happened in these scenarios, those in a colorblind mindset were less likely to mention race or to describe the incident as serious enough to warrant teacher intervention, suggesting a downplaying (intentional or not) of the blatant racial bias aspect contained in the scenario.[149]

¶59   Professors Andrew Todd and Adam Galinsky conducted related research with adults investigating the effect that colorblind versus multicultural ideologies have on perceptions of racial progress and prevalence of ongoing discrimination.[150] In this research, Professor Todd demonstrated that white study participants who took the perspective of a Latino person during the course of the experiment, thus adopting a perspective that made racial differences more salient (including differences in likelihood of experiencing prejudice and discrimination), increased the white participants' perceptions of racial inequality and increased their support for social policies directed at redressing historical and contemporary racial biases.[151] Further, in another study, Professor Todd found that white study participants who were primed with a multicultural approach to diversity compared to a colorblind approach were also more likely to report greater perceptions of racial inequality and support for social policies directed at redressing historical and contemporary racial inequalities, such as affirmative action.[152]

D. When Colorblindness is Beneficial

¶60   As alluded to above, it is unfair to say that adopting a colorblind approach is completely ineffective as a strategy for dealing with diversity issues. For example, where race is irrelevant, taking a colorblind approach and avoiding mention of race has positive effects for both parties in the interaction.[153] In addition, in high conflict situations (those involving high levels of potential intergroup conflict or competition), it may be beneficial

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[145] Evan P. Apfelbaum, Kristin Pauker, Samuel R. Sommers & Nalini Ambady, *In Blind Pursuit of Racial Equality?*, 21 PSYCHOL. SCI. 1587 (2010).

[146] *Id.* at 1588.

[147] *Id.*

[148] *Id.* at 1589–90.

[149] *Id.* at 1590.

[150] Todd & Galinsky, *supra* note 132.

[151] *Id.* at 16–17.

[152] *Id.* at 18.

[153] Apfelbaum et al., *supra* note 81.

to take a colorblind approach because it leads to decreased expressions of explicit bias in the midst of the high conflict intergroup situation, which may serve to smooth over the situation in the moment.[154]

¶61   In general, however, research suggests that under many circumstances colorblindness is detrimental to everyone involved. For majority group members or others adopting this approach, it can lead to increased likelihood of being seen as biased in interracial interactions,[155] as well as decreases in efficiency, performance,[156] and awareness of social realities of inequality.[157] For minority groups, the effects are equally negative, as individuals in these groups may face unfriendly interactions with people perceived to be biased against them,[158] denial of social realities of inequality that affect their lives,[159] denial of social identities that are important to them[160] and their well-being,[161] and even increased experiences of bias.[162]

¶62   Given this, the best approach to dealing with diversity in society as a whole and the domain of law specifically is unlikely to be colorblindness. True colorblindness does not exist and it may not even be desirable if it were to exist.[163]

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[154] *See* Correll et al., *supra* note 120, at 488.

[155] *See*, *e.g.*, Apfelbaum et al., *supra* note 81 (showing that those who failed to mention race when race was relevant, thus adopting a colorblind approach, were also more likely to exhibit unfriendly nonverbal behaviors that were noticed and perceived negatively by their interaction partners); Richeson & Nussbaum, *supra* note 92.

[156] *See*, *e.g.*, Apfelbaum et al., *supra* note 108, at 1515–16 (showing that children who played a matching game where race was a useful identifying characteristic but failed to use race took significantly longer to play the game than those who mentioned race); Apfelbaum et al., *supra* note 81 (showing that adults who completed a photo identification task where race was a useful identifying characteristic but failed to use race suffered cognitive depletion after completing the task, and this depletion subsequently impaired their ability to interact positively with an other race partner).

[157] *See*, *e.g.*, Apfelbaum et al., *supra* note 145 (showing that children describe incidents of blatant racial bias in ways that decrease the likelihood of teacher intervention and downplay the severity when in a colorblind mindset compared to a mindset that values diversity); Stevens, *supra* note 6, at 120 (explaining that a colorblind perspective can lead to a tendency to ignore evidence of discrimination in the form of differential outcomes for majority versus minority group); Todd & Galinsky, *supra* note 132 (showing that people report perceiving that discrimination is less of problem and that progress toward racial equality has been greater when in a colorblind mindset compared to those in a multicultural mindset).

[158] *See*, *e.g.*, Vorauer et al., *supra* note 124 (showing that Aboriginal people interacting with whites with a colorblind approach regarded the interactions more negatively than those interacting with whites with a multicultural approach); Apfelbaum et al., *supra* note 81 (showing that black people interacting with whites with a colorblind approach perceived their interaction partners as less friendly and regarded them and the interaction more negatively).

[159] *See*, *e.g.*, Todd & Galinsky, *supra* note 132 (describing the downplaying of social inequality by majority group members adopting a colorblind approach).

[160] *See, e.g.,* Robert M. Sellers, Cleopatra H. Caldwell, Karen H. Schmeelk-Cone & Marc A. Zimmerman, *Racial Identity, Racial Discrimination, Perceived Stress, and Psychological Distress among African American Young Adults*, 43 J. HEALTH & SOC. BEHAV. 302 (2003) (demonstrating that the centrality of racial identity for minorities is both a stressor and buffer against stress).

[161] *Id.*

[162] *See*, *e.g.*, Richeson & Nussbaum, *supra* note 92.

[163] *See* Jones, *supra* note 28, at 658.

V. CAN THE PURSUIT OF RACIAL EQUALITY BE COLORBLIND?

¶63   Can the pursuit of racial equality, under the law and in society more generally, be racially blind? Assuming the best intentions for those committed to the colorblind ideal, the evidence indicates that colorblindness is neither entirely possible in its most simplistic form, nor is it desirable for achieving the goals underlying any approach to diversity: eliminating bias and improving intergroup relations.

A. Benefits to the Majority Group

¶64   First and foremost, the psychological evidence reviewed above demonstrates the many negative consequences of a colorblind ideology for both majority and minority group members. In general, any benefit derived from a colorblind ideology tends to favor the majority group, which fails to serve the very goals of any diversity ideology. The fact that this approach favors the majority group in a number of important ways is even offered as a reason why majority groups tend to favor such an approach to dealing with diversity, undermining the egalitarian goals of diversity approaches.

¶65   Many legal and psychological scholars alike agree that the primary benefit of a colorblind approach to racial diversity is experienced by whites. While minority groups disfavor a colorblind approach because it denies their non-majority identities, majority group members prefer such a strategy because it affords them the opportunity to avoid dealing with racial issues.[164] In addition, majority group members may also prefer colorblindness because it serves as a means to maintain the status quo by obstructing efforts to monitor existing inequalities that work largely in their favor as the majority.[165] Empirical evidence from psychological research demonstrates majority group preferences for colorblindness compared to minority group members. For example, even among individuals voluntarily participating in a diversity workshop (thus presumably predisposed toward less bias and more interest in positive intergroup relations), whites favored a colorblind approach more than blacks did, while blacks favored a multicultural approach.[166] These groups disagreed on which approach would lead to more positive intergroup interaction, with each group favoring their own preference as the best means to achieve racial harmony.[167]

¶66   The theory behind the preferences of majority and minority groups demonstrated in these empirical studies are echoed in the discussions of legal scholars. That is, majority group members prefer the colorblind approach because, for example, they are motivated to maintain their own higher social status, they are motivated to avoid the threat of being faced with the realities of racial disparities resulting from racial distinctions, and they are afraid that even mentioning race could lead others to believe they are racist.[168]

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[164] *See* Duncan, Jr., *supra* note 72.

[165] Siegel, *supra* note 73.

[166] Ryan, *supra* note 5.

[167] *Id.*

[168] The belief that mentioning race in any circumstance could lead to accusations (implicitly or explicitly) of prejudice seem to underlie the findings in Apfelbaum et al., *supra* note 81 and Apfelbaum et al., *supra* note 111, with both studies demonstrating the willingness to avoid even a mention of race despite the usefulness of that information for the task at hand.

B. Negative Consequences for Interracial Contact

¶67   Empirical evidence suggests that adopting a colorblind approach in interracial interactions, the very interactions where colorblind proponents believe it is most beneficial, can actually lead to negative outcomes. For example, those that adopted a colorblind approach in an interaction involving a task where race was relevant, although neutral, also exhibited less friendly non-verbal behaviors toward their partners.[169] These negative non-verbal behaviors led their other race interaction partners to perceive them as less friendly.[170] In addition, individuals who were most committed to appearing non-prejudiced were also more likely to be disliked by their interaction partners.[171] In fact, these interactions sometimes resulted in prejudiced individuals being more liked by their other race interaction partners than those who were less prejudiced.[172] Ironically, those who were most set on demonstrating their lack of prejudice by adopting a colorblind approach, interacted in a more negative way with their other race partners compared to those who were not concerned with their level of prejudice (regardless of level) because their heightened concerns about how they appeared led them to be less comfortable in the interaction.[173] At the same time, these white participants were not aware of the ironic effect that their adherence to colorblindness had on their black interaction partner's perceptions. Instead, these white participants often believed that these interactions had gone smoothly, that their black partners had liked them, and that they had appeared non-prejudiced.[174] Thus, not only did the interactions sour from the perspective of the people who the "colorblind" whites sought to impress but these white participants did not know they in fact offended their black interaction partners.

C. Awareness of the Reality of Inequality

¶68   Empirical evidence supports the theory of legal scholars that colorblindness obscures racial inequalities. A colorblind mindset may lead individuals to perceive less racial inequality and show less support for social policies directed at remedying social inequalities.[175] In addition, the default mindset of many majority group members is colorblindness, suggesting that they tend to see less racial inequality and show less support for social policies directed at addressing it than other groups, particularly minority groups for whom existing racial inequality is a more salient concern.[176]

D. Race Consciousness is Required

¶69   Despite the great strides toward racial equality, we are by no means living in a post-racial society. Racial inequality persists throughout American society,[177] either as a

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[169] Apfelbaum et al., *supra* note 81.

[170] *Id*. at 633.

[171] *See* Richeson & Nussbaum, *supra* note 92.

[172] *See id*.

[173] Apfelbaum et al., *supra* note 81; Richeson & Nussbaum, *supra* note 92.

[174] Richeson & Nussbaum, *supra* note 92.

[175] Todd & Galinsky, *supra* note 132.

[176] *Id*.

[177] *Sobering Statistics*, *supra* note 8 (noting that blacks are twice as likely to be unemployed, three times as likely to live in poverty, and more than six times as likely to be imprisoned).

result of historical legacy and institutional perpetuation or as a result of continued contemporary racial biases that result in experiences of prejudice and discrimination in the everyday lives of racial minorities. In addition, recent social psychological research helps reveal the ways in which racial biases, regardless of intentionality, may impact society generally and the legal domain in particular. For example, Professor Jennifer Eberhardt and her colleagues showed, using real-world data from death penalty cases, that defendants with more afrocentric (more stereotypically black) features were more likely to get the death penalty.[178] In addition to demonstrating the continued importance of race, this research serves as a reminder that the data necessary to discover this biased pattern would not be possible if there was an effort to be colorblind, as a colorblind approach could preclude collection of data about racial group membership for any reason. Thus, in a truly colorblind world, no one could argue that racial sentencing disparities exist, for example, because race would no longer be recognized as a valid category that bias could derive from.

E. Conclusion

¶70   Despite recent court cases, such as *Ricci v. DeStefano,*[179] which have sought a return to the anti-discrimination principle as interpreted in the nineteenth century, a commitment to anti-discrimination requires a commitment to race-consciousness, not colorblindness. The courts and society at large should give up the dream of the colorblind ideal as the approach best able to address the realities of race relations in the United States. The colorblind ideal now serves simply to distract society from achieving true equality, which results not from avoiding seeing differences, but from appreciating those differences in a way that does not disadvantage one group relative to another. As long as racial inequalities exist, adherence to the anti-discrimination principle requires monitoring of the relative social status of different racial groups in order to track progress toward equality, as well as to avoid reverting back to old patterns.

¶71   Despite the emphasis on the comparison between colorblindness and multiculturalism as strategies for contending with a diverse society, giving up on colorblindness does not necessarily require adopting a multicultural approach. Rather, the law should remain race-conscious, because, as this Comment demonstrates, race-consciousness reflects the reality of the social world. In arguing for race-consciousness, it is not necessary to argue for changes in procedure that recognize different cultural practices, as might be required by a true multicultural approach. Rather, the emphasis should be on maintaining an awareness of the realities of race in a legal system and society that faces pervasive stratification on the basis of race every day.[180]

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[178] Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns & Sheri L. Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2004).

[179] 129 S. Ct. 2658 (2009).

[180] This would require using a "behavioral realist" approach to law as advocated by Jerry Kang and Kristin Lane. This approach requires consideration of what scientific research suggests about the realities of human behavior and decision-making, how these finding relate to latent theories of human behavior represented in law, and asks that discrepancies between these two be addressed. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 490 (2010).

¶72   The continued attack on anti-discrimination law and affirmative action is likely to keep the debate about colorblindness versus race-consciousness alive. Hopefully, lawyers and judges will look to empirical realities to ground arguments for race-consciousness. In addition, if the voices for race-consciousness can speak loudly and persuasively, it may be enough to push back the erosion that has long been underway of an anti-discrimination principle that recognizes the continuing reality of inequality and provides the means to continue to address this reality.