

## **COLOR BLINDNESS AS COLOR CONSCIOUSNESS**

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At the turn of the last century, African-American leader and scholar, W.E.B. Du Bois, declared that the "problem of the 20<sup>th</sup> century" was "the problem of the color line." Today, as a new century begins, race is still a pervasive and troubling fault line running through American life. What divides Americans is profound disagreement over the legacy of the civil rights movement. At the core of our national debate are very different opinions about two issues. What is the meaning of race in contemporary America and what are the prospects for racial equality in the future.

The crude racial prejudice of the Jim Crow era has been discredited and replaced by a new understanding of race and racial inequality. Bobo calls this “laissez faire” racism. This new perspective is the context for Prop 54. Without it, there would be no Prop 54.

This new view of race began with a backlash to the Great Society which took hold after the Reagan-Bush revolution in the 1980s. It rests on three tenets held by many white Americans. First, they believe the civil rights revolution was successful, and they wholeheartedly accept the principles enshrined in civil rights laws. They assume civil rights laws ended racial inequality by striking down legal segregation and outlawing discrimination against workers and voters. They think racism has been eradicated.

They also believe that if vestiges of racial inequality persist, that is because blacks and Latinos have failed to take advantage of opportunities created by the civil rights revolution. In their view, if blacks and Latinos are less successful than

whites, it is not because America is still a racist society. Rather, a substantial majority believes that black and Latino Americans do not try hard enough to succeed; that "with the connivance of government, they take what they have not earned."

Finally, most white Americans believe the United States is rapidly becoming a color-blind society. Thus, they see little need or justification for affirmative action or other color conscious policies. Inspired by the ideals so eloquently expressed in Martin Luther King, Jr.'s "I have a dream speech," they embrace his vision of a color-blind America and look forward to the day when race will not determine one's fate; when Americans are evaluated, in King's words, by the content of one's character rather than the color of one's skin. This is how they justify eliminating racial categories on government forms and controlling racial and ethnic data.

Let me quickly point out that I have no quarrel with King's vision. The goal of a color-blind America is an old and cherished idea. When segregation was legal and racial classification determined where one sat or drank or worked or lived or went to school, color-blind meant abolishing the color-coded laws of southern apartheid. Color-blind was the opposite of Jim Crow. It was a progressive vision. And thirty-five years ago many Americans inspired by the civil rights movement's transcendent vision of an inclusive society, passionately searched for color blind solutions to the problem of racial inequality. Liberal architects of color-blind politics were optimistic and confident that this approach would generate greater equality between the races.

The triumph of the civil rights movement, however, exposed the limits of color-blind social policy: what good were civil rights if one was too poor to use them? As Martin Luther King, Jr. told his aide Bayard Rustin after the explosion

in Watts, “I worked to get these people the right to eat hamburgers, and now I’ve got to do something . . . to help them get the money to buy it.”

With the clarity of hindsight, we can now see that it was naïve to believe America could wipe out 300 years of physical, legal, cultural, spiritual and political oppression based on race in a mere 30 years. The belief, even the hope, that the nation would glide into color-blindness was foolish. And as I will argue this morning, there are good reasons to believe the current goal of a color-blind society is at least as naïve as the optimism of the 1960s. It also conveniently masks color-coded privileges.

How does color blindness mask color-coded privileges? How is the color blindness which Prop 54 seeks to establish really *color-consciousness*?

According to a well-known philosophical maxim, the last thing a fish notices is the water. Things that are unproblematic seem “natural;” they tend to go unnoticed. We take them for granted. We don’t see them. Fish take the water they swim in for granted just like European Americans take their race as a given, as normal. White Americans may face difficulties in life, they may have problems with money, religion, or family. But race is not one of them. White Americans can be sanguine about racial matters because their race is not (until recently) visible to the society in which they live. They cannot see how this society produces advantages for them because these benefits seem so “natural” that they are taken for granted, experienced as wholly legitimate. They literally do not see how race permeates America’s institutions—the very rules of the game—and its

distribution of opportunities and wealth. They are literally “color-blind.” More accurately, they are blind to color.

Like the fish, apostles of color-blindness are blind to modern expressions of persistent racial inequality because they insist that racism is primarily a thing of the past. They cannot see racial inequality because their world is filtered through an outdated, discredited understanding of racism. They think of racism as intentional and obvious, located in individuals. Many white Americans and American institutions, including the current Supreme Court majority, see the world through these lenses. And because proponents of color blindness ignore the variability of racial reality in America, they do not recognize that racism is lodged in the structure of society, that it permeates the workings of the economic, political, educational and legal institutions of the United States. Without that recognition, however, Americans will be unable to resolve the pernicious problems of race that confront us.

Let me give you an example of how colorblind lenses make white Americans blind to color. Because proponents of colorblindness attribute unemployment among black men to bad behavior or not taking advantage of opportunities for higher education, they are unable to see how race operates in the job market.

But think about the following: Unemployment rose for all black men relative to white workers in the 1980s. And it rose especially high for the *most educated* black workers. Some context: the ratio of unemployed college-educated black workers to similarly unemployed white workers at the end of the 1960s (right after the civil rights movement) was the same. There was no difference. This was a stunning reversal of the unemployment patterns found by economists in the 1950s and early '60s. By the 1980s, however, college educated black workers were once again at an employment disadvantage relative to college educated whites. In fact they were almost *three times* as likely to be unemployed as college educated white workers. And they were more likely to be unemployed than black *high school drop outs!* While black high school drop outs experienced high unemployment rates in the 1980s, they were just one and one-half times more likely to be unemployed than white high school drop outs.

Obviously, race matters more than merit on the job market. Clearly, racism still operates when the decision is made to lay off highly educated workers. But because the apostles of colorblindness attribute black unemployment to “bad” behavior, they literally cannot see it.

Current law embraces another feature of colorblind ideology. Like the advocates of colorblindness, the law views racism as intentional individual prejudice. In equal protection cases, for example, the Supreme Court has

increasingly emphasized invidious intention as a necessary element for finding actionable discrimination.

I would like to advance the proposition this morning that the law and legal institutions normalize white advantage by articulating the principles of color blindness and authoritatively enforcing them. At first, this seems odd. After all, in the 1950s and 1960s, federal courts helped dismantle state-sanctioned racism. More recently, however, the courts have been ineffective in addressing contemporary racial inequality because colorblind canon and equal protection doctrine treat individual bigotry as the core of racism. The law's insistence that intention is the *sine qua non* of race discrimination matches the opinion of many Americans. But this search for individual blame is psychologically and sociological naïve. It obscures the complex sources and relationships that produce racial inequality.

By rejecting race-conscious classifications or remedies, the Court adheres to a jurisprudence of color-blindness. In the 1950s and 60s, when segregation was legal and based on a rigid system of racial classification, a color-blind jurisprudence made sense. It undermined and transformed that system. But fifty years later, when state-sanctioned racial segregation is illegal and people of color have still to achieve truly equal opportunity with white Americans, the color-blind ideal actually impedes efforts necessary to eliminate racial inequality. Formal

color-blindness fails to recognize or address the deeply rooted institutional practices and privileges that sustain racial inequality. Color-blind ideology is no longer a weapon that challenges racial inequality. Instead, it has become a powerful sword and a near-impenetrable shield, almost a civic religion that actually promotes the unequal racial *status quo*.

Don't get me wrong: the law and legal culture remain critical tools for dismantling racial inequality. But despite its aspirations, the law today does not speak from a genuinely color-blind vantagepoint. Despite having completed the vital task of eliminating Jim Crow racial classifications, legal institutions still operate with a perspective that remains perceptually, analytically, and functionally color-coded. The color is white.

Some examples can illustrate how the justice system remains color-coded. Taken-for-granted, invisible white privilege explains how an unusually public-spirited citizen could refuse to vote for someone she saw as an extraordinarily qualified young black attorney who was running for judge. The election took place in a community whose population is over half minority but where all sitting judges and magistrates were white. What was the citizen's reason? She feared the candidate would be "biased toward the community." The fact that all the sitting judges were white was "normal" and therefore invisible to this white voter. The

candidate's black skin and the majority-black community, on the other hand, were palpable.

Invisible white advantage also explains how a white “gum-chewing, tennis shoe wearing” clerk in an exclusive Manhattan shop could feel it was appropriate to refuse to “buzz in” an elegant African American law professor doing her Christmas shopping. The editors of the journal that published the law professor's shopping story insisted on omitting all references to personal traits like skin color. Their grounds? They believed that not mentioning race (being “color-blind”) was necessary to being objective. The irony, of course, is that the story made no sense unless the parties' races were identified.

Other examples show that the experience, perspective, and privilege of white Americans permeate substantive law and policy. Lawyers, particularly influential lawyers, are overwhelmingly white. The law these (white) lawyers have created has important strengths but it also reflects their (white) perspective on the world. Lawyers articulate and apply concepts like “reasonableness,” “harm,” “culpability,” “desert,” and “merit.” While their perspectives on these important ideas are shaped in part by their experience, it is filtered through the lens of their white perspective. This standpoint then shapes their view of what voting arrangements are “fair.” It shapes the analysis and criteria of “relevance” for just administration of the death penalty. It shapes the priority accorded to hate speech

as compared to “fire-crying.” It shapes whether accented speech undermines job qualifications. These modern examples are as much a result of an unarticulated white perspective as was the historical conclusion that when a white person was mistaken for being black, a serious compensable injury had occurred. But when the opposite happened, compensation was not legally appropriate.

Some white lawyers, judges, and professors even erase race from the writing of the Constitution and the formation of the nation. Some urge courts to measure constitutional rights by the “original intent” of the framers without acknowledging their racism. Many of the founders, Rogers Smith has shown, understood themselves to be the bearers of a superior culture or racial heritage. And it was these white, propertied, European-descended male gentry who were who were the chief architects of the new American government. Despite this history, a number of Supreme Court justices act as though these attitudes were unimportant when the nation’s “neutral” framework of rights and power was created. Thus, they neglect the powerful shaping force of slavery and race in the very structure of our government.

This unacknowledged perspective of white America radiates throughout contemporary color-blind racial discourse. The advocates of Prop 54 seek to transcend racial conflict by banishing blackness and the consciousness of racial inequality that accompanies it. They could, however, transcend racial conflict by

naming whiteness and the privilege that accompanies it. But this possibility remains unexamined. Acknowledging and banishing white advantage is never considered. Nor do they propose that race be made less visible by redistributing white power, by diversifying white dominance of political, social, intellectual, academic, and economic institutions. Instead, the apostles of Prop 54 urge color-blindness, which, in effect, “whitewashes” the racial status quo.