

SWIMMING FROM THE ISLAND OF THE COLORBLIND: DESERTING AN ILL-CONCEIVED CONSTITUTIONAL METAPHOR

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No birds sing on Guam.¹ Indeed, no birds exist at all on the island; at the end of the Second World War, tree climbing brown snakes, hidden in the hold of an American Navy ship, found that they had no predators in the indigenous fauna.² And now that the birds have long since disappeared, the fruit bats' inevitable fate looms each night.³

On general (historical) principle, I am wary of White men traveling to distant shores, and I approach, with care, written descriptions of what these men find. More often than not, they see the world through the prisms of their own fantasies and preferences. Indeed, when Oliver Sacks⁴ went in search of the "island of the colorblind," he was appalled at the role that canned meats, particularly Spam, played in the diet of the Marshallese and

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1. See OLIVER SACKS, *THE ISLAND OF THE COLORBLIND AND CYCAD ISLAND* 154 (1996) [hereinafter SACKS, ISLAND].

2. *Id.* The brown tree snake has left the forests of Guam "profoundly silent." Harry E. Demarest, *An Ecological Whodunit*, S.F. CHRON., July 17, 1994, Sunday Review at 4 (reviewing and quoting MARK JAFFE, *AND NO BIRDS SING* (1994)).

3. SACKS, ISLAND, *supra* note 1.

4. Oliver Sacks is a medical doctor who the *New York Times* calls "[a]n explorer of that most wondrous of islands, the human brain . . ." D.M. Thomas, *The Mind's Eye*, N.Y. TIMES, Jan. 19, 1997, at 7. His writings chronicle his work exploring "strange and wondrous neurological conditions." *Id.* The descriptions chronicled in *THE ISLAND OF THE COLORBLIND* by Dr. Sacks are of places and people defiled and uprooted first by generations of Europeans, later by Japanese, and finally by Americans. SACKS, ISLAND, *supra* note 1, at 129-34. For example, he recounts how Johnston Island has become a depot for tons of mustard and nerve gas. The gasses are periodically incinerated, releasing a permanent haze of dioxin and other noxious gases such that the U.S. military personnel on the island must wear aluminized suits. *Id.* at 17-18. He also discusses how whole populations of Pacific Islanders have been removed from Bikini and Rongelap to allow the U.S. to perform nuclear tests on their island. *Id.* at 22. See also *infra* note 32.

Micronesians.⁵ A diet of taro, bananas, pandanus, breadfruit, yams, tuna, papaya, and coconuts—all readily available on the island—was more “to [his] taste.”⁶ Thus, he wondered why “all the peoples of the Pacific, seemingly, could fall so helplessly, so voraciously, on this stuff, despite its intolerable cost to their budgets and their health?”⁷ Incredibly, in search of an explanation, he gave some credence to a hypothesis of another Western traveler who believed the islanders’ fondness for Spam was the result of the “corpsy flavor” of the product due to a tradition of cannibalism.⁸ Indeed, he mused about this theory in relation to the “addiction” of the Pingelapese to the meat even though he admitted “there was no tradition of cannibalism on Pingelap.”⁹

There was no discussion that, perhaps like people in other cultures, the Pingelapese Islanders found that meat had an attractive flavor, it varied their diet, and, when canned, it could be easily stored and transported. Moreover, unacknowledged was the obvious fact that processed meats like Spam were developed in the United States where there is no “traditional” affinity for “corpse-like flavors.”¹⁰

This inability to filter out cultural prejudices and assumptions infects even those who are aware of their own alienage. In 1958, anthropologist Clifford Geertz and his wife visited a Balinese village.¹¹ The couple was not acknowledged by the inhabitants of the village until about ten days after their arrival. It happened that an illegal cockfight was scheduled in the center of the village, and Geertz and his wife went to watch it. In the midst of the contest, a police raid scattered the spectators and participants. Geertz and his wife ran as well, eventually ducking into the living compound of a fellow spectator and fugitive. When the police came to the house looking for participants, their host leaped to the defense of the couple. He proclaimed they were visiting American professors, and had been sitting in the compound throughout the afternoon drinking tea while discussing Balinese culture. Hearing the alibi, the police left.

5. SACKS, ISLAND, *supra* note 1, at 22–23. It is important to note at the outset that Dr. Sacks is cited primarily herein for his medical expertise and not for his political, cultural, or anthropological insight.

6. *Id.* at 48.

7. *Id.* at 49.

8. *Id.* (quoting Paul Theroux).

9. *Id.*

10. My sansei (third generation Japanese American) friends from Hawaii all favor Spam teriyaki and Spam rice balls (omusubi). As far as I know, there is no cannibalistic tradition in Japanese American history—yet.

11. CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES* 412–17 (1973).

Geertz recounts how the next morning the entire village suddenly welcomed and became interested in their two guests. He remarked at the turnabout and attributed it mainly to the fact that when confronted by the police, "we [the Geertzes] had not simply 'pulled out our papers' . . . and asserted our Distinguished Visitor status"¹² It is noteworthy that Geertz's recollection of the incident contains no acknowledgment that the reason the villagers might have felt solidarity with him was not due to the couple's "self-sacrifice" and refusal to assert their privileged status to the police—a status, I suspect, that was facially apparent to the police. The simpler explanation may have been that the goodwill resulted from the couple providing an alibi for their erstwhile host and showing solidarity with his situation.¹³

Sacks' musings about Spam and Geertz's interpretation of his Balinese experience point to more vexing questions: How much are the vagaries of our perception predetermined in some "innocent" sense by our limited experience—how much do we choose to ignore by rationalization and denial; and, do the differences really matter?¹⁴ Indeed, Justice John Marshall Harlan, in his famous dissent in *Plessy v. Ferguson*,¹⁵ wrote how our "[c]onstitution is colorblind, and neither knows nor tolerates classes among citizens."¹⁶ Yet, in that very same dissent he argued that the Chi-

12. *Id.* at 416.

13. Even Geertz acknowledges the imprecision of anthropological interpretation:

In short, anthropological writings are themselves interpretations, and second and third order ones to boot. (By definition, only a "native" makes first order ones: it's *his* culture.) They are, thus, fictions; fictions, in the sense that they are "something made," "something fashioned" . . . not that they are false, unfactual, or merely "as if" thought experiments.

CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 15 (1973) (footnote omitted). Sacks notes that an anthropologist "tends to treat an indigenous chant or rite as an object, and may not be able to enter its inwardness, its spirit, the perspective of those who actually sing it." SACKS, *ISLAND*, *supra* note 1, at 212–13.

14. Sacks writes of another patient who, as a result of an enormous brain tumor, was totally blind, and apparently had no conscious knowledge that he could not see. He "had lost the very idea of seeing." OLIVER SACKS, *The Last Hippie*, in *AN ANTHROPOLOGIST ON MARS* 49 (1995) [hereinafter SACKS, *Last Hippie*]. It was a condition Sacks calls a "singular blindness to his blindness . . . no longer knowing what 'seeing' or 'looking' meant" *Id.*

Similarly, Sacks writes of patients who, after massive strokes in their right cerebral hemisphere, lose not only the sensation on their left sides, but also the concept of "leftness." OLIVER SACKS, *The Case of the Colorblind Painter*, in *AN ANTHROPOLOGIST ON MARS* 13 n.6 [hereinafter SACKS, *Colorblind Painter*]. They are "anosognosic"—they have no knowledge of their loss so the world is whole and complete although others may say it is bisected. *Id.*

15. 163 U.S. 537 (1896).

16. *Id.* at 559 (Harlan, J., dissenting). Indeed, so noteworthy is his dissent that some have posited the possibility that Justice Harlan had African American relatives. See James Gordon,

nese are "a race so different from our own that we do not permit those belonging to it to become citizens of the United States."¹⁷ Indeed, Harlan was offended by the very notion that the statute would not allow Blacks equal access but would allow a "Chinaman [to] ride in the same passenger coach with white citizens"¹⁸

Clearly, neither an end to racial hierarchy nor the elimination of racial superiority was Harlan's concern.¹⁹ Yet, the assumption that the nation's racial vision should metamorphosize into a kind of colorblindness, in light of the intense racial reality of American life, has become a constitutional catch phrase.²⁰ However, the *Plessy* "colorblind" metaphor may be inappropriate,²¹ not only in the context of the dissent, but in its construction.²²

Did the First Justice Harlan Have A Black Brother?, 15 W. NEW ENG. L. REV. 159 (1993).

17. *Plessy*, 163 U.S. at 561.

18. *Id.* For a comprehensive treatment of Harlan's *Plessy* dissent in the context of the anti-Chinese jurisprudence of his other work, see Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 1 (forthcoming 1997). Professor Chin explores how legal scholars and jurists have used Harlan's "colorblind" language to support various approaches to race issues, but never fully address Harlan's equal protection analysis in the light of his obvious anti-Chinese sentiment.

19. Chin, *supra* note 18, at 9.

20. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993) (referring to appellants' desire for a "color-blind electoral process"); see also Chin, *supra* note 18, at 2-4 (listing those in the judiciary, the academy, and the popular media who have used the "colorblind" language in Harlan's *Plessy* dissent to either oppose or support affirmative action); Carroll Rhodes, *Changing the Constitutional Guarantee of Voting Rights From Color-Consciousness to Color-Blind: Judicial Activism by the Rehnquist Court*, 16 MISS. C. L. REV. 309, 341 (1996) (noting that when the Court struck down the majority African American electoral districts in North Carolina, it was the "first time a majority of the Court tacitly recognized the concept of a color-blind electoral process"); Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove The Colorblind Thesis*, 2 MICH. J. RACE & L. 101, 107-110 (1996) (documenting the use of the "colorblind" metaphor in judicial and scholarly debate).

21. Of course, when the context is "disability," the traditional fears and prejudices about the disabled are intertwined in the discussion. It is the:

hidden but powerful component of any discussion about disabled people [which is] . . . the usually unacknowledged and unconscious fear and prejudice . . . toward . . . those who look and function differently . . . [stemming] from the frightened belief that disability inevitably means loss of control, social isolation, loss of an essential part of one's humanity, and the related deep-seated anxiety that this could happen to me. . . . At times, these fears and prejudices burst out in violent words and deeds, but usually, and perhaps even more dangerously, they are masked by an avowed compassion, contempt cloaking itself in paternalism.

Paul K. Longmore, *Elizabeth Bouvia. Assisted Suicide and Social Prejudice*, 3 ISSUES IN L. & MED. 141, 141-42 (1987).

There is a larger discussion, unattempted here, of whether disability is a social construction. See, e.g., *id.* at 147 (discussing an increasing effort on the part of the disabled and their allies to emphasize a minority group perspective in which disability is defined as a social rather than medical construction); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769, 770 (1992). "Like the notion of the poor, the concept of the disabled . . . is a social construct—a thing—consisting of specific ideals and discourses." *Id.*

In fact, the metaphor is based on superficially implied assumptions about colorblindness.²³ Indeed, what is particularly ironic about the metaphor is the lesson we can learn from the colorblind, that color is much more than hue, is not translated by those who proclaim racial "colorblindness" into the lesson that people of color can teach, that race is much more than pigment.

THE ISLAND OF THE COLORBLIND

There is an island in the Pacific Ocean called Pingelap where the finest weaver is a colorblind woman who learned the craft from her colorblind mother.²⁴ Inside her darkened hut she weaves mats of intricate and subtle design from the fibers of palm fronds.²⁵ These mats display delicate patterns of differing luminances that are visible in the darkness of the hut, but disappear when taken out into the sunlight.²⁶

The phenomenon of total colorblindness first intrigued Oliver Sacks after treating a patient who became colorblind following an automobile

Ironically, Sacks makes the assertion that, in some sense, "color" is a construction: "These demonstrations [of Edwin Land in 1957] . . . demonstrated a neurological truth—that colors are not 'out there' in the world, nor (as classical theory held) an automatic correlate of wavelength, but rather, are *constructed by the brain*." SACKS, *Colorblind Painter*, *supra* note 14, at 24.

22. See *infra* notes 52–67 and accompanying text.

23. Professor Chin points out that there are two different perceptions of "colorblindness": (1) a condition that prevents recognition of all color and (2) a condition which permits the perception of black and white only and prevents the ability to distinguish certain colors. Chin, *supra* note 18, at 34.

The critique of description and understanding racial categories solely in Black/White terms is a well trodden area of legal and popular comment. See, e.g., TOMÁS ALMAGUER, *RACIAL FAULT LINES* 2 (1994); Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 248 (1995); see also Tom Morganthau, *What Color is Black?*, NEWSWEEK, Feb. 13, 1995, at 62 (commenting that the "binary approach toward race" is no longer relevant to the nation's changing demographics—immigrants and "multiracials").

24. SACKS, ISLAND, *supra* note 1, at 44.

25. *Id.* Since achromatopes lack functional cones that are responsible for detecting color and fine detail, they must depend on the rods in the eye which are distributed around the periphery of the retina. *Id.* at 13. Rods cannot discriminate color, but are light sensitive. *Id.* Thus, achromatopes are almost blinded by bright light. *Id.*

26. *Id.* Sacks tells of the colorblind sister of his traveling companion, also an achromatope, who knitted a jacket using only dim browns and purples for her patterns and images. SACKS, ISLAND, *supra* note 1, at 44. The images were almost invisible to those not colorblind, but quite clear to the knitter who responded solely to the differing luminances of the patterns. *Id.* at 44–45. "You have to be totally colorblind to see it," she remarked. *Id.* at 45.

accident.²⁷ Sacks learned from a fellow physician about Pingelap Island, where the population had a high incidence of achromatopsia, and decided to investigate.²⁸

Pingelap Island, a small coral atoll located about 180 miles from the island of Pohnpei in Micronesia, consists of three islets forming a ring around a central lagoon.²⁹ The population of Pingelap originally settled there about a millennium ago. The Pingelapese brought with them a sophisticated social structure, an oral culture and mythology and a complex language.³⁰ In 1775, a huge typhoon wiped out over ninety percent of the island's population leaving about twenty survivors. Yet within a few decades, the population was reapproaching one hundred.³¹ Pingelap children with achromatopsia, perhaps as a consequence of inbreeding, were first noticed about 1820.³² One third of Pingelap's present population carry the gene for "maskun,"³³ and fifty-seven of the island's seven hundred residents are achromatopes.³⁴ Thus, on Pingelap, the incidence of color-blindness is one in twelve in contrast to the worldwide average of one in 30,000.³⁵

For "color-normals," the island was almost a "confusion of greens," while for the colorblind, it was a "polyphony of brightnesses, tonalities, shapes, and textures, easily identified and distinguished from each other."³⁶ When Sacks and his companions arrived on the island they were greeted by their interpreter, James James, an achromatope.³⁷ Indeed, when James was asked whether he could tell the difference between a ripe yellow banana

27. SACKS, *Colorblind Painter*, *supra* note 14, at 5-6.

28. SACKS, ISLAND, *supra* note 1, at 8, 28.

29. *Id.* at 33.

30. *Id.* at 36-37.

31. *Id.* at 37.

32. *Id.* Sacks retells the Pingelap explanations for the condition. They recount how a god became enamored of the wife of the ruler of the typhoon survivors and fathered the maskun children. *Id.* at 53. Other explanations trace the condition to the curse of a Christian missionary or alternatively to the forced labor of a number of the islanders in a German phosphate mine. *Id.* at 53-54. As Dr. Sacks traveled to Pingelap with an achromatope companion from Scandinavia, he noticed that the islanders began to suspect that maskun had been introduced by achromatopic whalers from the far north who had landed on Pingelap and raped the island women, thereby bringing a White man's curse to the island. *Id.* at 54. This suspicion is entirely consistent with the history of the islands since White Europeans brought a number of diseases such as smallpox which wiped out half the population of Pohnpei in 1854, followed by epidemics of measles and influenza. *Id.* at 78.

33. Maskun is the Pingelap term for achromatopsia. *Id.* at 37.

34. SACKS, ISLAND, *supra* note 1, at 38.

35. *Id.*

36. *Id.* at 32.

37. *Id.* at 31.

and an unripe green one he responded by going to a banana tree and selecting a bright green banana.³⁸ The questioner gingerly ate a piece expecting it to be unripe, but found it completely edible: "You see," said James, "we don't just go by color. We look, we feel, we smell, we *know*—we take everything into consideration, and you just take color!"³⁹

This is similar to the explanation of "color" by another achromatope who lived far away from Pingelap in Berkeley, California. In a letter to Sacks, she explained that, although she was totally colorblind, she still experienced color in a very real way:

People say I must see in shades of gray . . . but I don't think so. The word gray has no more meaning for me than the word pink or blue—in fact, even less meaning, because I have developed inner concepts of color words like pink and blue . . . I would be willing to bet . . . that if we [achromatopes] were tested along with normals . . . we would be able to detect far more shades of gray The world I see has so much more richness and variety than black-and-white photos or TV shows My vision is a lot richer than normals can imagine.⁴⁰

Likewise, the finest night fishermen in Pingelap are colorblind. Out of the glare of the sunlight, twilight becomes a time when an achromatope's visual acuity is at its height. On the island of Pingelap this ability has concrete advantages:

It is common knowledge among the Pingelapese that those with the maskun manage better at scotopic times—dusk and dawn, and moonlit nights—and for this reason, they are often employed as night fishers. And in this the achromatopes are preeminent; they seem able to see the fish in their dim course underwater, the glint of the moonlight on their outstretched fins as they leap—as well as, or perhaps better than, anyone else.⁴¹

The fact that there is a rich texture to the "color" that achromatopes see may be a revelation to those of us who are "color-normal," who see only the immediate surface appearance of what we call color.⁴² For many

38. *Id.* at 32–33.

39. *Id.* at 33.

40. SACKS, *Colorblind Painter*, *supra* note 14, at 33 n.24.

41. SACKS, *ISLAND*, *supra* note 1, at 54–55.

42. An excerpt from a letter to Sacks by an achromatope gives a very different perspective about color vision and what we in fact see. The writer notes, "Words like 'achromatopsia' dwell only on what we lack. They give no sense of what we have, the sort of worlds we appreciate or make for ourselves." *Id.* at 204 n.5. She continues:

All objects have unique qualities which can be savored. All can be looked at in

"color-normals," the notion of colorblindness assumes a lack of appreciation for color which is yet another example of the arrogance of dominance and normalcy that cannot comprehend the nuances perceived by those outside the norm. Indeed, it is the same way that the luxury of "racial normalcy" allows Whites the comfortable fiction of a colorblind law.⁴³

In a completely different sense, for people of color whose lives are affected daily by the circumstance of their color, the admonition that "the nation is colorblind" is a denial of the very reality that has shaped the context of their lives.⁴⁴ Sacks tells of a painter, Jonathan I., who was born "color normal" but, as the result of an automobile accident, lost all sense of color.⁴⁵ In his new condition, the artist's world was disturbing, even appearing dirty.⁴⁶ He saw people's flesh as grey, and had to close his eyes to eat because food took on a dull and unappetizing color.⁴⁷ As a consequence, Jonathan I. increasingly turned to black and white foods—rice, black olives and yogurt.⁴⁸ As time passed:

he particularly missed the brilliant colors of spring—he had always loved flowers, but now he could only distinguish them by shape or smell. The blue jays were brilliant no longer; their blue, curiously, was now seen as pale grey. He could no longer see the clouds in the sky, their whiteness, or off-whiteness as he

different lights and in different kinds of shadows. Dull finishes, shiny finishes, textures, prints, transparent qualities—I scrutinized them all, up close, in my accustomed way (which occurred because of my visual impairment but which, I think, provided me with more multi-sensory impressions of things).

Id. at 207–08 n.12.

43. Race has been constructed as a relationship and that construction in turn has allowed races to be defined against one another. IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 165–67 (1995). Whiteness becomes the "positive mirror image to the explicit negative identities imposed upon non-whites," and "the norm around which other races are constructed." *Id.* at 167.

44. The myth of a colorblind society has been described as:

a fiction that shrinks our understanding of this country by avoiding the evidence of those things seen just about everywhere—in our politics, our mass media, on our menus, our campuses, our showroom floors, in our department stores, our malls, our bureaucracies, the lobbies of our hotels, our movie theaters, at our airports, on our highways, in our advertising.

Turner, *supra* note 20, at 115 (quoting Stanley Crouch).

45. SACKS, *Colorblind Painter*, *supra* note 14, at 3. Total colorblindness is called cerebral achromatopsia. *Id.* at 4.

46. Sacks describes the painter's reaction: "It was not just that colors were missing, but that what he did see had a distasteful, "dirty" look, the whites glaring, yet discolored and off-white, the blacks cavernous—everything wrong, unnatural, stained, and impure." *Id.* at 7.

47. *Id.*

48. *Id.*

saw them, being scarcely distinguishable from the azure, which seemed bleached to a pale grey.⁴⁹

Thus, Jonathan I.'s first reactions to his new condition were extreme. He became excruciatingly aware that color did indeed exist. Museums and galleries, once places of great pleasure became unbearable, rainbows turned into depressing semicircles in the sky, and his dreams were washed out and dull.⁵⁰ Even music, which he previously experienced as a "rich tumult of inner colors," lost its beauty.⁵¹

Unfortunately, the colorblind myth of racial vision confuses the ideological end to racial hierarchy with what already exists.⁵² That is, the prescriptive ideal of a "colorblind" society, in which racism and White supremacy are eradicated, has been transformed by judicial fiat into "a condition of societal denial," creating the illusion that racial hierarchy has been eliminated.⁵³ Indeed, "denial is a pervasive symptom of contemporary American racism."⁵⁴ And, of course, the denial of reality merely perpetuates the condition of racial subordination.⁵⁵

My son's Japanese-American friend was once excluded from a game by a group of White, female classmates because she did not have blue eyes. Her father and other parents of color, including myself, felt racial pain when we heard what happened. The White girls' parents were upset about her exclusion, but felt the category was an innocent one—a "neutral" one—akin to blue skirts or red slippers. Yet, whatever the characterization of the category, it had the effect of excluding this little girl because of how she looked.⁵⁶

49. *Id.* at 9.

50. *Id.* at 11.

51. SACKS, *Colorblind Painter*, *supra* note 14, at 11.

52. See Charles R. Lawrence, III, *The Epidemiology of Color-Blindness: Learning to Think and Talk About Race Again*, 15 B.C. THIRD WORLD L.J. 1, 6 (1995) (footnotes omitted):

The transformation of color-blindness from prescriptive ideal into a condition of societal denial first appeared in [the] anti-affirmative action cases and in the politics that created those cases "Our Constitution is color-blind" becomes "We are a color-blind society." Such an assertion can only be believed if we engage in massive denial of what we see and hear every day.

53. *Id.* at 5–6.

54. *Id.* at 8; see also Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1 (1991). "Nonrecognition [of race] is not a common-sense solution to racism, but a pathology which prevents recognition of the disease." *Id.* at 22 n.90.

55. Gotanda, *supra* note 54, at 21–23. "Nonrecognition [of race] fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue." *Id.* at 16 (footnote omitted).

56. I tell this same story in a different context in *Deconstruction, Reconstruction, We-construction: Reclaiming the Politics of Racial Identity and Reflections on the Critique of the*

Thus, the proclamation of a "colorblind law" obscures and excuses a more basic lack of racial vision. Indeed, racism is often well-intentioned and unconscious.⁵⁷

Judges are not immune from our culture's racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs. . . . Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities.⁵⁸

But whether it is lack of vision, lack of perspective, or simply lack of will, the effect is the same. In the recent *Hopwood v. Texas*⁵⁹ case, four White applicants challenged a graduate school's admission policy. The Fifth Circuit Court of Appeals held as unconstitutional the University of Texas School of Law's admission policy. Under this policy, African- and Mexican-American candidates were evaluated differently in order to admit a class whose demographics reflect the graduating classes of Texas undergraduate institutions.⁶⁰ The court reached this holding despite the indisputable fact—acknowledged by the Fifth Circuit—that the law school had historically discriminated against Blacks.⁶¹ What is striking, however, is how the Fifth Circuit defined race. For the court, race was simply a matter of appearance, an immutable physical characteristic having no larger societal meaning other than physical size or blood type. The Fifth Circuit saw racial diversity as "simply [achieving] a student body that looks different."⁶²

Black/White Paradigm (unpublished manuscript on file with the *Loyola of Los Angeles Entertainment Law Journal*).

57. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) (noting that racially prejudiced behavior is often "experienced as a reflection of rational deduction from objective observation" and the decision maker may often be "unaware of the selective perception that has produced her stereotype").

58. *Id.* at 380. Discussing *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), in which the Supreme Court struck down a minority set-aside program in Richmond, Virginia, Professor Lawrence points out how the majority blinded themselves to the city's history of slavery and segregation, which is still reflected in its schools and neighborhoods. Lawrence, *supra* note 52, at 6-7. He posits that to discount the effect of that separation, the Justices had to deny their own life experiences, living in environments and circumstances where Blacks were rarely encountered. *Id.* at 7.

59. 78 F.3d 932 (5th Cir. 1996), *cert. denied sub nom.* Thurgood Marshall Legal Soc'y v. Hopwood, 116 S. Ct. 2580 (1996).

60. *Id.* at 934.

61. *Id.* at 953.

62. *Id.* at 945. They stated that the race of an applicant had no real meaning concluding,

Race, however, is not simply a biological and immutable attribute such as phenotype or skin color. On the contrary, "race is a socially constructed, human category, not a natural or scientific one."⁶³ It is a concept, albeit a powerful one, "which signifies and symbolizes social conflicts and interests by referring to different types of human bodies."⁶⁴ Indeed, the historical categorization of races in the United States has been arbitrary, fluid, and highly political.⁶⁵ Thus, the meaning of race is constructed by social context.⁶⁶

Although race is socially constructed and not an immutable biological characteristic, it is nonetheless real.⁶⁷ The irony of *Hopwood* is that ignoring the social and political implications of racial intercourse forced the court to come full circle back to defining race as merely a circumstance of skin color—a standard rejected as impracticable by the Supreme Court seventy-five years ago.⁶⁸ The very notion of racial colorblindness itself casts race as a neutral and apolitical attribute. It leaves the analysis of race

"[s]uch a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants." *Id.*

63. Gotanda, *supra* note 54, at 23.

64. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 55 (1994) (emphasis omitted). A full discussion of the social construction of race is beyond the scope of this article.

65. For a description of the fluidity of racial classifications, see Gotanda *supra* note 54, at 23–36. For Critical Race theorists, the focus is consequently upon "how law was a *constitutive* element of race itself: in other words how law *constructed* race." *CRITICAL RACE THEORY, THE KEY WRITINGS THAT FORMED THE MOVEMENT* xxv (1995) (Kimberlé Crenshaw et al. eds., 1995) [hereinafter *CRITICAL RACE THEORY*].

66. Race is "about a certain set of political and moral rights and obligations" arising from a historical context. Angela P. Harris, *Foreward: The Unbearable Lightness of Identity*, 2 *AFR.-AM. L. & POL. REP.* 207, 212 (jointly with BERKELEY WOMEN'S L.J.) (1995). This is in contrast to a notion of racial "essentialism" which is the belief that there is a monolithic racial experience. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 588 (1990).

67. "[T]here is a material dimension and weight to the experience of being 'raced' in American society, a materiality that in significant ways has been produced and sustained by law." *CRITICAL RACE THEORY, supra* note 65, at xxvi; see also Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 *STAN. L. REV.* 747, 771 (1994) (pointing out how theories that reduce racial identities to ethnic ones hinder the ability to resist entrenched forms of racism (citing OMI & WINANT, *supra* note 64, at 10, 21–24)); Turner, *supra* note 20.

Even at the most simple biological level, there are instances where dark skin shade may reduce the odds of working by 52%. James H. Johnson, Jr. & Walter C. Farrell, Jr., *Race Still Matters*, *CHRON. OF HIGHER EDUC.*, July 7, 1995, at A48 (reporting on research done regarding the employment rates of men categorized by skin shade (dark, light, white) in Los Angeles, California).

68. *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (rejecting skin color as "impracticable" for determining race since there were some Whites darker than "persons of the brown or yellow races"); see also Gotanda, *supra* note 54, at 30 n.119 (discussing *Ozawa* and the Court's rejection of skin color in determining who was a "white person").

nowhere to go but a return to the already discredited notion of race as simply a biological condition.

CONCLUSION

In the end, whether we call ourselves colorblind may be irrelevant since the present reality of racial hierarchy will continue for the immediate future irrespective of terminology. The ideological superstructure of racial hierarchy rests on a more solid foundation than the labels chosen to obscure its existence. Moreover, lawyers and legal scholars often inflate the importance and influence of our work in effectuating progressive social change. As one scholar has observed, law's function may not be to promote the evolution of social norms, but rather "to suppress deviation from those norms."⁶⁹ As such, the eradication of racial subordination will probably have less to do with legal constructions, fictions, and abstractions, and more to do with the results of grassroots political mobilization that the law will dutifully and fitfully follow.

To the extent that legal constructions influence the public debate regarding the direction and values of our society, it would be prudent to heed the lessons of the island of the colorblind about how and what we perceive about ourselves and the world around us. From these lessons we might learn that a true "colorblind" constitutional analysis would "see" race as a complex, textured, political phenomenon. We might also understand that the appreciation of race—like the appreciation of color itself—cannot be reduced to considerations of pigment and surface appearance alone. This understanding could create the opportunity to explore more fully racial hierarchy and its many dimensions. Indeed, we need to be constantly reminded that there are still many lessons to be learned about how to experience and change our collective condition because, while no birds may sing on Guam, there is every reason to hope that in their absence we may hear the crickets chirp more sweetly.

69. Frank H. Wu, *From Black to White and Back Again*, 3 *ASIAN L.J.* 185, 202 (1996).