The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis

Ronald Turner
*University of Alabama School of Law*

Follow this and additional works at: [https://repository.law.umich.edu/mjrl](https://repository.law.umich.edu/mjrl)

Part of the [Law and Race Commons](https://repository.law.umich.edu/mjrl), [Law and Society Commons](https://repository.law.umich.edu/mjrl), and the [Legal Biography Commons](https://repository.law.umich.edu/mjrl)

**Recommended Citation**
Available at: [https://repository.law.umich.edu/mjrl/vol2/iss1/3](https://repository.law.umich.edu/mjrl/vol2/iss1/3)

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
This Article seeks to illustrate that those who attempt to use Dr. Martin Luther King, Jr.'s legacy to promote the colorblind thesis can only do so by disingenuously distorting and deviating from Dr. King's actual views on race. As argued herein, Dr. King was more "color-aware" than "colorblind," citing several examples of King's race consciousness. King expressed his support for affirmative action, indicating that such programs were an appropriate response to past discrimination and exploitation of people of color; he did not reject the avowedly race-conscious Black power movement; and King advocated patronizing Black banks and insurance companies. Turner concludes that conservative attempts to co-opt Dr. King's legacy to promote their own "colorblind" agenda can only be achieved by oversimplifying and acontextualizing King's views, as well as by omitting or ignoring King's numerous race-conscious assertions.

I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. I have a dream today!1

In 1963, on a sweltering August afternoon, we stood in Washington, D.C., and talked to the nation about many things. Toward the end of that afternoon, I tried to talk to the nation about a dream that I had had, and I must confess to you today that not long after talking about that dream I started seeing it turn into a nightmare.2

Simplify, simplify—that is the imperative of the hero industry.3
INTRODUCTION

Once again, recent incidents have revealed that the colorblind thesis, the notion that "race" does not or should not matter and that society and its laws are or can be colorblind, is simply unfounded.⁴ Race discrimination in the context of the workplace received significant media attention when an executive of Texaco, Inc. tape-recorded meetings where company executives belittled minority employees and discussed the unlawful destruction of documents sought by plaintiffs in a pending employment discrimination suit.⁶ The plaintiffs alleged, inter alia, that minority employees worked in a racially hostile environment and that Texaco had systematically discriminated against minorities in promotions.⁷ The meetings were secretly tape-recorded in 1994 by Texaco's then-senior coordinator for personnel services, Richard Lundwall, and were turned over to the plaintiffs' attorney by Lundwall after he was dismissed from Texaco during a reduction-in-force.⁸ News accounts of the contents of the tapes reported Texaco executives referring to African American employees as "black jelly beans" and "niggers" and complaining about the celebration of Kwanzaa⁹ by Blacks.¹⁰ While Texaco's top

---

⁴. The word "race" is commonly used in discussions concerning African Americans and other people of color. While I use that word in this Article for the sake of convenience, I note my agreement with the view that there is only one biological race—the human race. See Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in RACE, WRITING, AND DIFFERENCE 21, 35-6 (Henry Louis Gates, Jr. ed., 1985); Darlene C. Hine, "In the Kingdom of Culture": Black Women and the Intersection of Race, Gender, and Class, in LURE AND LOATHING: ESSAYS ON RACE, IDENTITY, AND THE AMBIVALENCE OF ASSIMILATION 337, 338 (Gerald Early ed., 1993). The term "race" is an incoherent fiction, has no inherent meaning, and is defined by the social contexts through and within which it is constructed. See DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 80-84 (1993); HOWARD WINANT, RACIAL CONDITIONS: POLITICS, THEORIES, COMPARISONS 14-17 (1994); D. Marvin Jones, Darkness Made Visible: Law, Metaphor, and the Racial Self, 82 GEO. L.J. 437, 439 (1993); Jennifer M. Russell, The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy, 46 HASTINGS L.J. 1353, 1362 n.38 (1995).

⁵. The colorblind premise is not only discussed in legal and nonfictional settings. In the novel Primary Colors, the African American narrator states that there are two subgroups of White people: (1) the truly colorblind who "will argue with you, yell at you, treat you like a human;" and (2) the "occasional miracles" who are race-conscious and "who just lay it all out there." ANONYMOUS, PRIMARY COLORS: A NOVEL OF POLITICS 27 (1996).


⁷. See id.


⁹. Kwanzaa is an annual seven day cultural celebration that gives Blacks an opportunity to renew and reaffirm those values and strengths that lie at the root of Black history. Ed.
official has condemned the tapes and the statements made by company executives, 11 one African American commentator notes that "the Texaco tapes are to the issue of job discrimination what the Rodney King tapes were to police brutality." 12

The public reaction to the jury’s not guilty verdict 13 in the O.J. Simpson trial gave rise to the contention that "urban black juries all too often put race above justice" 14 and evoked cries of concern and

---

10. See Page, supra note 8. One executive allegedly stated that he was “still having trouble with Hannukkah. Now we have Kwanzaa.” Eichenwald, supra note 6.

Following the initial release of the tapes, outside investigators hired by Texaco concluded that the word “niggers” was not used and that the Texaco official actually said “St. Nicholas.” See Peter Fritsch & Allana Sullivan, Texaco Probe Looks at Fate of Documents, WALL ST. J., Nov. 12, 1996, at A3. In addition, the investigators reported that the “black jelly beans” comment was a reference to a term used during the company’s diversity program and was not a racial slur. See id. An attorney for the Black employees responded that the investigators’ findings were “an insult. . .This doesn’t impact one iota the racial animus that’s all over these tapes and all over [Texaco’s minority] employment practices.” Id.

11. Texaco chairman and chief executive officer, Peter I. Bijur, has stated that the executives’ language and comments are “statements that represent attitudes we hoped and wished had long ago disappeared entirely from the landscape of our country—and certainly from our company. . .We believe unequivocally [that] it is utterly reprehensible to deny another human of his or her self-respect and dignity because of race, color, religion or sex.” Kurt Eichenwald, The Two Faces of Texaco, N.Y. TIMES, Nov. 10, 1996, § 3, at 1.


The bitter reaction to the O.J. Simpson verdict among whites threatens to linger as long as the trial itself. You can’t channel-surf for more than five minutes without bumping into a smirking Andy Rooney, an incensed Dominick Dunne or a smug Dinesh D’Souza reassuring us there is such a thing as “rational discrimination.” Away from the TV cameras, in the bowling alleys and bars of suburban San Fernando Valley, the “N-word” peppers the verdict post-mortems in alarming measure.

14. Michael Lind, Jury Dismissed, NEW REPUBLIC, Oct. 23, 1995, at 10. In a provocative article, Paul Butler argues for subversion of the American criminal justice system through jury nullification. Specifically, Butler contends that criminal conduct among African Americans “is often a predictable reaction to oppression. . . Punishing black people for the fruits of racism is wrong if that punishment is premised on the idea that it is the black criminal’s ‘just desserts.’ ” Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 680 (1995). In every case, Butler argues, the African American juror “should be guided by her view of what is ‘just.’ ” Id. at 715. In violent cases, African American jurors should consider the case on the basis of the evidence and convict if convinced beyond a reasonable doubt that the defendant committed the alleged offense. For nonviolent crimes like theft or perjury, Butler continues, nullification is an option that jurors should consider, with no presumption in favor of nullification. For other nonviolent offenses, including those involving “victimless” crimes, Butler argues for a presumption in favor of nullification. See id.
even outrage over the nation’s intractable Black\(^5\)-White\(^6\) divide.\(^7\)
The aftermath of the Simpson trial was characterized by discussions of the differing perceptions of many Whites and African Americans of the police and the criminal justice system\(^8\) and the use of the “race card.”\(^9\)

---


16. Although this Article focuses on Blacks and Whites, doing so runs the risk of “distort[ing] our views of other minority groups [and] also deprives us of comparisons that might help us better understand black-white relations, relations between other minority groups and whites, and relations among minority groups.” Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 Cal. L. Rev. 893, 893 n.2 (1994); see Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 Cal. L. Rev. 863 (1993). As stated by Harlon Dalton:

[T]here are many downsides to viewing a world of color through a lens that refracts only black and white. A major one is that the Black experience tends to become the template against which the experiences of all people of color are measured. Another is that frictions among people of color tend to be rendered invisible.

**Harlon L. Dalton, Racial Healing: Confronting the Fear Between Blacks and Whites** 5 (1995). See also Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. Rev. 263, 269 (1995) (noting the complexity of American race relations and stating that “a black/white division of the races does not suffice even as a social description, let alone as a recipe for legal remediation”). While this Article, given its specific purpose, focuses on Blacks and Whites, the validity of the colorblind thesis is an issue for all persons of color.

17. See Eric Foner, *The Great Divide*, 261 Nation 487 (1995). A recent poll showed that 85% of African Americans agreed with the jury’s verdict of not guilty while 54% of Whites disagreed with the verdict. Eighty percent of African Americans thought the trial was fair and impartial; the corresponding number for Whites was 50%. See Mark Whitaker, *Whites v. Blacks*, Newsweek, Oct. 16, 1995, at 28, 30, 34.


18. See Randall Kennedy, *After the Cheers*, New Republic, Oct. 23, 1995, at 14. The Mark Fuhrman factor confirmed to many that their deepest fears of police misconduct were in fact true. Research conducted by the Simpson defense team prior to the selection of the jury “showed that Fuhrman was perhaps the most critical element that sank the prosecution[’s] case. . . .” Larry Reibstein, *What Went Wrong*, Newsweek, Oct. 16, 1995, at 40, 43. Prosecutors relied on Fuhrman’s testimony in the trial even though he had told them in a mock cross-examination that he had made racist remarks in the past, and even though prosecutors were aware of racist statements made by Fuhrman when he filed for a disability retirement in the early 1980’s. See id.
Also consider the October 16, 1995 Million Man March on Washington, D.C. For some, the “day of atonement” was a source of pride and a day in which African American males united to address pressing issues facing their community. For others, the march was a self-serving platform for Louis Farrakhan, an individual they considered to be anti-Semitic, sexist, homophobic, and “a man whose presence and power is an affront to all who genuinely seek a colorblind, and color-just, America.” Others asked how “this great moment in American cultural politics was orchestrated by the demagogic leader of a black fascist sect, while no other nationally prominent black leader could have pulled it off?” Some considered the march to be consistent with or, conversely, antithetical to their understanding of Martin Luther King, Jr.’s call for a colorblind society. For Anita Hill, bell hooks, Angela Y. Davis, and Patricia J.

A recent study of the California criminal justice system shows that approximately 40% of Black males in their twenties in California are in prison or on parole on any particular day. Only 5% of White males in California in their twenties, and 11% of Latino males in that age group, were in the criminal system. The author of the study, Vincent Schiraldi, attributed the Black male involvement with the criminal justice system to harsher sentencing laws for crack cocaine use, poverty, the absence of good jobs and poor education in inner cities, and the growth of prison construction. See Fox Butterfield, Study Finds a Disparity in Justice for Blacks, N.Y. TIMES (National Edition), Feb. 13, 1996, at A8.

19. Simpson’s attorney, Johnnie Cochran, understood that it would be impossible to keep race out of the trial. See Sylvester Monroe, Race Man, EMERGE, Dec.-Jan. 1996, at 31, 33. The notion that Cochran improperly played the race card is disputed by Judge A. Leon Higginbotham, Jr., Chief Judge Emeritus, United States Court of Appeals for the Third Circuit:

If you knew that the most important witness had a history of racism and hostility against black people, that should have been a relevant factor of inquiry even if the jury had been all white. If the defendant had been Jewish and the police officer had a long history of expressed anti-Semitism and having planted evidence against innocent persons who were Jewish, I can’t believe that anyone would have been saying that defense counsel was playing the anti-Semitism card.


22. See Crossfire, (CNN Cable Broadcast, Oct. 17, 1995), available in LEXIS Genfed Scripts Transcript # 1476, (remarks of Lynne Cheney); Charlie Rose (WNET Broadcast, Oct. 16, 1995), available in LEXIS Genfed Scripts Transcript # 1487, (remarks of William Bennett, Secretary of Education during the Reagan administration and Drug Czar during the Bush administration). Cornel West participated in the march notwithstanding his view that “Minister Farrakhan is white America’s worst
Williams, among others, the exclusion of women from the march reflected Black male patriarchy and the sacralization of masculinity.

If the country’s reaction to the Simpson verdict and the Million Man March were not enough to highlight the nation’s continuing (and arguably expanding) racial chasm, consider the recent publication of Dinesh D’Souza’s The End of Racism. D’Souza argues, inter alia, that race is still the most divisive issue of our time; that African Americans “continue to show conspicuous evidence of failure” in the workplace, schools and colleges, and in maintaining intact families and secure communities; that “circumstances of poverty and deprivation in which blacks find themselves in America today are not the cause, but the result, of low intelligence;” that “black culture also has a vicious, self-defeating, and repellent underside that it is no longer possible to ignore or euphemise;” and that “African Americans seem woefully lacking in the skills needed to compete effectively in a multiracial society.” If “blacks can close the civilization gap,” D’Souza writes, “the race problem in this country is likely to become insignificant.” These controversial and derogatory

nightmare.” Cornel West, Why I’m Marching in Washington, N.Y. TIMES (National Edition), Oct. 14, 1995, at 15. Noting his own condemnation of xenophobia, patriarchy, homophobia, and anti-Semitism, West posited that the march was part of King’s legacy. King, “the integrationist, had no fear of a black united front and no hatred of black nationalists.” Id. Although he has deep disagreements with Farrakhan, West believes that the march was about matters much larger than Farrakhan. “I have in mind the general invisibility of, and indifference to, black sadness, sorrow and social misery, and the disrespect and disregard in which blacks are held in America and abroad. We agree on highlighting black suffering.” Id.

23. See Patricia J. Williams, Different Drummers Please, Marchers!, 261 NATION 493 (1995) (“I have nothing but misgivings about any venture organized by either Nation of Islam leader Louis Farrakhan or former N.A.A.C.P. executive director Ben Chavis, never mind the two of them together.”).

24. Gates, supra note 19, at 60. The march’s organizing committee urged men to take their place as the head of their families and the “maintainers” of women and children, and also urged women to “stay at home” while thanking them for their patience in “waiting for us to take up our responsibility.” Williams, supra note 23, at 493.


27. Id. at 6.

28. Id. at 445. According to D’Souza, “large inherited differences in IQ, far from undermining the case for affirmative action . . . may actually strengthen it . . . [I]f blacks cannot compete on a level playing field with whites and Asians, a humane argument can be made for preferences to artificially elevate their status.” Id. at 466.

29. Id. at 486.

30. Id. at 499.

31. Id. at 527.
statements are made, incredibly, by an individual who espouses "colorblindness" while simultaneously categorizing and separating people on the basis of race and color.

The Texaco race discrimination charges, the Simpson trial and verdict, the Million Man March, and D'Souza's *The End of Racism*: these are but a few recent incidents highlighting the perpetual and problematic color line\(^3\) as well as bringing to light American society's "integral, permanent, and indestructible component" of racism.\(^3\) These and other historical and contemporary developments, by demonstrating that minorities continue to be subjected to numerous forms of harmful discrimination, form the backdrop for this Article's discussion and ultimate rejection of the colorblind thesis.

This Article focuses on one particular aspect of the colorblind thesis: the misuse of Martin Luther King, Jr.'s image and legacy by liberals, neoliberals, conservatives, and neoconservatives\(^3\) "who cheaply invoke Dr. King's words even as they kill the substance and

---


34. While necessarily inexact, the terms "liberal," "neoliberal," "conservative," and "neoconservative" are widely used today and are applied herein as they are used in ordinary American political discourse. See generally Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 195 (1988) (describing a general sociopolitical viewpoint of current American liberalism); William H. Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 YALE L.J. 763, 779 n.87 (1984) (book review) (noting that purist liberals and conservatives define themselves in terms of ideological and philosophical positions on the appropriateness of government action, adding that neoliberals and neoconservatives generally support or oppose government intervention on grounds of cost consciousness and perceived results of social programs); WINANT, supra note 4, at 27 (stating that the chief concern of neocentrism is the "threat to political and cultural traditions it discerned in racial minority demands for 'group rights,' or 'equality of result' "). In the colorblind debate, colorblind conservatism looks to culture as the key factor in explaining the plight of many African Americans and people of color, while colorblind neoliberalism looks to class as the key explanatory factor. See STEPHEN STEINBERG, TURNING BACK: THE RETREAT FROM RACIAL JUSTICE IN AMERICAN THOUGHT AND POLICY 140 (1995).

spirit of his radical message.” The campaign supporting the adoption of Proposition 209, the California Civil Rights Initiative (“CCRI”), directly illustrates the misappropriation of King’s legacy. Supporters of this anti-affirmative action proposal which calls for racial neutrality and a colorblind America, regularly invoked King’s name, suggesting that he would have embraced such a measure. The California Republican Party prepared a television commercial in support of the proposition that included King’s reference to his dream of a colorblind and a content-of-character world. After opponents of the measure and civil rights leaders, including Coretta Scott King, denounced such use of King’s words, complaining that King’s legacy was being distorted, the “I Have a Dream” segment was removed from the commercial. The dangers of this misappropriation of “King-as-icon” and his legacy are illustrative of the ways in which facts and historical figures are distorted and in which iconolatry is substituted for reasoned argument. These dangers, as well as the need to identify and refute inaccurate distortions of history, are discussed in this Article.

35. West, supra note 22, at 15; see also CLARENCE PAGE, SHOWING MY COLOR: IMPOLITE ESSAYS ON RACE AND IDENTITY 5 (1996) (suggesting that the words of King have been perverted to support the colorblind approach to law); see generally Stewart Burns, Martin Luther King, Jr.'s Empowering Legacy, TIKKUN, Mar. 1993, at 49 (“Conservatives praise King’s dream of a color-blind society that they contend is violated by affirmative action and ‘reverse discrimination.’ ”).

36. Proposition 209 provides, inter alia, that the “state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Bill Jones, Secretary of State, Proposition 209, in CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, Nov. 5, 1996.


37. See Gotanda, supra note 36.


39. See Coretta Scott King, Man of his Word, N.Y. TIMES, Nov. 3, 1996, § 4, at 15 (arguing that King’s words have been “distorted by supporters of the California Civil Rights Initiative. . .”).


41. See Lesher, supra note 40. Ward Connerly, the African American campaign chairman of the Proposition 209 movement, disagreed with those who argued that King’s words were being distorted. As he stated: “I think it is outrageous for Jesse Jackson and all of those. . . from the 1960’s, to somehow suggest that it is inappropriate for any of us to use Dr. King’s memory. . . . He belongs to all of us.” Lesher, supra note 38, at A3.
I. COLORBLIND OR COLOR-AWARE?*

Should law and public policy be colorblind? What are the tangible effects of applying a purportedly colorblind analysis in a world in which race and color play an undeniable role in the quantity and quality of opportunities for people of all races? Would colorblindness perpetuate the often crippling effects of past and present discrimination? Can those who have benefited from the anticompetitive advantages of de jure and de facto discrimination validly claim that colorblindness should now be the moral and legal norm?

A call for colorblindness seems peculiar in a nation wherein race has been the most critical, and the most powerful [issue], in effecting political change. Race has crystallized and provided a focus for values conflicts, for cultural conflicts, and for interest conflicts—conflicts over subjects as diverse as social welfare spending, neighborhood schooling, the distribution of the tax burden, criminal violence, sexual conduct, family structure, political competition, and union membership. . . .

Whether race-consciousness is improper, illegal, or unconstitutional has been the focus of judicial** and scholarly*** debate between

---

* The term "color-awareness" contrasts effectively with "colorblindness." "It reflects the reality that most people who have grown up in the U.S. are aware of or want to know the color of others." Bryan K. Fair, Foreword: Rethinking the Colorblindness Model, 13 NAT'L BLACK L.J. 1, 3 n.15 (1993).


*** Justices of the Supreme Court of the United States have argued for and against the colorblind principle. See, e.g., Holder v. Hall, 114 S. Ct. 2581, 2598 (1994) (Thomas, J., concurring) (noting that "assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution"); Shaw v. Reno, 509 U.S. 630, 642 (1993) (noting the appellants' invocation of a color-blind Constitution, the Court stated that it "has never held that race-conscious state decisionmaking is impermissible in all circumstances"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., dissenting) (noting that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens'"); Johnson v. Transp. Agency, 480 U.S. 616, 677 (1987) (Scalia, J., concurring) (suggesting that Title VII of the Civil Rights Act of 1964 was "designed to establish a color-blind and gender-blind workplace"); United States v. Paradise, 480 U.S. 149, 194 (1987) (Stevens, J., concurring) (indicating that a court's consideration of race is unavoidable where that court must order relief and remedies in a race discrimination case); Fullilove v. Klutznick, 488 U.S. 448, 482 (1980) (rejecting the argument that in the remedial context Congress must act in a "wholly 'color-blind' fashion"); United Steelworkers of America v. Weber, 443 U.S. 193, 238 (1979) (Rehnquist, J., dissenting) (noting Senate sponsor's statement that the bill that
those who contend that the Constitution and laws should be applied in a colorblind fashion, and those who reject that notion in favor of color-aware application of our laws.

A. Colorblindness

The colorblind thesis embodies one facet of several broad subjects of public policy including: equality, the meaning and application of an antidiscrimination principle, societal conceptions of permissible private/public choices, and the definition of impermissible discrimination. Proponents of colorblindness posit that became Title VII was colorblind); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (discussing the limits of a state’s use of suspect racial classifications and holding, inter alia, that a medical school’s preferential admissions program was invalid under the Fourteenth Amendment); Bell v. Maryland, 378 U.S. 226, 287-88 (1964) (Goldberg, J., concurring) (claiming that the Constitution is color blind); id. at 342 n.42 (Black, J., dissenting) (arguing that the Fourteenth Amendment is color blind “in the sense that it outlaws all state laws which discriminate merely on account of color”); Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our Constitution is color-blind...”); see also john a. powell, An Agenda for the Post-Civil Rights Era, 29 U.S.F. L. REV. 889, 900 n.55 (1995) (noting that the word “colorblind” has appeared in twenty Supreme Court opinions since 1945 and that the word “has become synonymous with the white or non-white position in Supreme Court jurisprudence”). In the current Court, the colorblind ideal has been sanctioned by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, all of whom “have firmly committed themselves to the proposition that government can almost never classify citizens on the basis of race.” Jeffrey Rosen, The Color-Blind Court, NEW REPUBLIC, July 31, 1995, at 19.

"[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." 46 The lesson to be drawn "from centuries of race-based laws, traditions, and customs designed to subordinate blacks is that race should seldom be used as a criterion for decisionmaking, even when its use purports to make restitution for the present effects of a racist past." 47 In the constitutional context, the Supreme Court, cognizant of the likelihood of prejudice in race-conscious classifications, has subjected such classifications to the strictest of scrutiny and has determined that, to pass constitutional muster, the classification must be justified by a compelling governmental interest necessary to accomplish a legitimate purpose. 48

Colorblindness is a policy choice and not, as many assert, a moral principle. 49 Proponents of colorblindness include those who maintain that "[i]f it was wrong to discriminate against black people on the basis of their color, . . . it must be equally wrong to discriminate in favor of black people on the basis of their color." 50 The mantra of the proponents of colorblindness "is Justice John Marshall Harlan’s aphorism. . . .that 'our Constitution is color-blind.' 51 Some advocates of colorblindness believe that "merit" is the ultimate conception of colorblindness and that "people are treated unjustly and discriminated against 'when their merit is assessed according to their status rather than according to the value of their traits or products.' 52 According to that view, any consideration of race "remains

47. Anthony E. Cook, The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence, 82 Geo. L.J. 1431, 1512 (1994). Cook argues that colorblindness has been exploited "as a camouflage for the preservation of elite white privilege." Id.
49. See Culp, supra note 45, at 171 ("[T]he colorblind principle in modern constitutional discourse must be seen as a policy argument and not a moral precept.").
51. Id. In his dissent in Plessy v. Ferguson, Justice Harlan stated, "[o]ur Constitution is color-blind and neither knows nor tolerates classes among citizens." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Harlan’s dissent from the Court’s validation of “separate-but-equal” railroad accommodations often is cited as the genesis of judicial recognition of the colorblind thesis. His opinion goes further, however, and expresses his support for White hegemony:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id. at 559 (emphasis added).
a regrettable if necessary deviation from the ideal of a color-blind meritocratic system.\textsuperscript{53}

In the aftermath of the United States Supreme Court's decision in \textit{Brown v. Board of Education},\textsuperscript{54} "colorblindness" was a dominant theme and slogan of the Civil Rights Movement.\textsuperscript{55} \textit{Brown} was viewed as a major victory of the Civil Rights Movement, helping to establish "colorblindness as the central principle of the law governing racial discrimination."\textsuperscript{56}

The colorblindness thesis dictates that the immutable characteristic of skin color is meaningless.\textsuperscript{57}

The colorblind position supports a legal skepticism of racial categories and racial classifications. . . . The apparent goal is to treat everyone equally without reference to context, situation, history or culture. On its face, the position is ostensibly neutral, in keeping with the dictates of procedural fairness and formal equality. . . .\textsuperscript{58}

Again, the aphorism of colorblindness conveys the message that the "essence of the obligation not to discriminate is for the pertinent decision-maker not to take color or race—any color or race—into consideration. The effect of blindness is to treat all colors as normative equivalents. . . .\textsuperscript{59}

\textsuperscript{53} Id. at 859.
\textsuperscript{54} 347 U.S. 483 (1954).
\textsuperscript{55} See powell, supra note 44, at 893.
\textsuperscript{56} Strauss, supra note 45, at 99; see also J. Harvie Wilkinson III, \textit{The Law of Civil Rights and the Dangers of Separatism in Multicultural America}, 47 STAN. L. REV. 993, 997-98 (1995) ("Brown stands for the premise that race is not the salient characteristic of an American citizen or even a relevant characteristic for public decisionmaking at all.").

However, Professor David Strauss argues that the colorblindness principle espoused by the Court in \textit{Brown} did not preclude race-consciousness. The "prohibition against discrimination established by \textit{Brown} is not rooted in colorblindness at all. Instead, it is, like affirmative action, deeply race-conscious. . . .[and] reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites." Strauss, supra note 45, at 100; see also id. at 114 ("[W]e do not have a choice between colorblindness and race-consciousness; we only have a choice between different forms of race-consciousness.").

However, Professor David Strauss argues that the colorblindness principle espoused by the Court in \textit{Brown} did not preclude race-consciousness. The "prohibition against discrimination established by \textit{Brown} is not rooted in colorblindness at all. Instead, it is, like affirmative action, deeply race-conscious. . . .[and] reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites." Strauss, supra note 45, at 100; see also id. at 114 ("[W]e do not have a choice between colorblindness and race-consciousness; we only have a choice between different forms of race-consciousness.").

\textsuperscript{57} See Cheryl I. Harris, \textit{Whiteness as Property}, 106 HARV. L. REV. 1709, 1768 (1993). Harris argues that defining race as simply color and therefore meaningless "is as subordinating as defining race to be scientifically determinative of inherent deficiency. The old definition creates a false linkage between race and inferiority; the new definition denies a real linkage between race and oppression under systematic white supremacy. Distorting and denying reality, both definitions support race subordination."

\textsuperscript{58} powell, supra note 44, at 892 (disputing the notion that colorblindness is neutral in effect and arguing that it treats differently situated persons similarly).

Important questions concerning the connection of race and culture and the effects thereof on the lives of African Americans would not be addressed in a colorblind regime, for "colorblindness permits us to avoid any discussion of the morality or justice of assimilation, nationalism, or cultural differences. Instead, its proponents simply assert that justice and morality are vested within colorblindness," and that a colorblind and race-neutral approach "does not suffer the drawbacks of traditional race-based action such as injustice to dispreferred groups, stigmatization of preferred ones, and flagrant race consciousness."

B. Color-Awareness

For those who are color-aware, the "ideal of a society in which race is as insignificant a factor as eye color" has an initial but illusory appeal. In contrast to advocates of colorblindness, those who are color-aware do not believe that true colorblindness can ever exist. Rather, people who are color-aware view efforts to implement a colorblind regime as a form of race subordination that fails to acknowledge White hegemony even while fostering it. Of course, color-awareness of the subordinating variety has existed throughout the nation’s history. Slavery, the legally enforced subordination of African Americans, and the effects of past and present discrimination are harmful and powerful forces. Proponents of color-awareness do not deny these overwhelming instances where color-awareness has resulted in the subjugation of people of color.

60. Culp, supra note 45, at 163.

61. Wilkinson, supra note 56, at 1014 (footnote omitted).

62. Strauss, supra note 45, at 117. See also DALTON, supra note 16, at 65 ("[E]ye color and ear contours have little social significance in my daily comings and goings and do not play much of a role in my aesthetic judgments."); Barbara J. Flagg, "Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 970-71 (1993) ("Race is undeniably a powerful determinant of social status and so is always noticed, in a way that eye color, for example, may not be.").

63. See Gotanda, supra note 45, at 34; Harris, supra note 15, at 1768. A commitment to colorblindness can also be fleeting and self-serving. Southern state legislatures seeking readmission to the United States after the Civil War gained readmission with colorblind constitutions. Having done so via a colorblind regime, most of those states then enacted laws permitting or requiring segregated schools. See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 964-65 (1995). In that circumstance, colorblindness facilitated White hegemony without a corresponding protection or promotion of the rights of African Americans.

64. See BOXILL, supra note 50 at 11. For example, the aim of color-aware Jim Crow policies was the subordination of Blacks. See id.

However, in today’s society, where the baseline is not colorblind, the laws and Constitution need to be applied in a more remedial color-aware manner to address both the imbalance and the reality that racial and ethnic biases still exist.

Color-awareness advocates argue that “racial justice and colorblindness are not the same thing. Race-neutral policies are only as good or bad as the results they produce. . . . [T]o assume that ignoring race in making social policy will bring about justice or achieve morality is legal fantasy.” Moreover, people of color may not want to be treated as raceless or colorless, since so much of who they are is the result of growing up as a person of color in America. To “e-race” individuals is to deny them a meaningful identity and separate them from their own flesh and blood.

Adoption of a colorblind approach would permit society in general and courts in particular to avoid accounting for and grappling with fundamental issues raised by past and present discrimination. Color-awareness, rather than sidestepping these issues, posits that it is permissible and desirable to take race and color into account when remedying the present effects of past racial discrimination. In that regard, Title VII of the Civil Rights Act of 1964 is a color-aware statute.

While Title VII is colorblind in the sense that an employer covered by the statute may not lawfully consider a person’s race in making employment decisions, the statute effectively results in color-aware conduct on the part of employers. For example, in pattern and practice disparate treatment suits, the statistical “underrepresentation” of Blacks can raise the inference of intentional discrimination by employers, which may cause an employer to take steps to limit its vulnerability to such legal claims by being aware of the racial demographics of its work force and by taking steps to address any underrepresentation of African Americans. Also, statistical underrepresentation in an employer’s work force can be critical in disparate impact cases wherein a statutory violation can be found even in the absence of an unlawful employer motive. In order to avoid exposure to liability from a disparate impact suit an employer

66. Culp, supra note 45, at 162-63.
67. See DALTON, supra note 16, at 47.
68. See id. at 72.
69. 42 U.S.C. § 2000e et seq. (West 1996). Generally, Title VII prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.
70. See Jerome McCristal Culp, Jr., The Michael Jackson Pill: Equality, Race, and Culture, 92 Mich. L. Rev. 2613, 2620 (1994) (“The improper use of race and the other categories alone triggers the protective mechanisms of Title VII and other civil rights statutes.”).
may seek to maintain a racially "representative" work force which effectively requires that it act in a race-conscious manner.\textsuperscript{72}

Color-awareness advocates thus believe that color-awareness comports with a reality in which a person's race and color are observable characteristics; after all, we all can distinguish among colors.\textsuperscript{73} Even the visually colorblind, who may not be able to differentiate colors, can distinguish between races.

In sum, color-awareness best describes and most accurately captures the historical, contemporary, contextual, and nuanced dimensions of this nation's history and color line. As stated in Palmore\textit{ v. Sidoti,}\textsuperscript{74} it "would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated."\textsuperscript{75} Those who are color-aware are more likely to see the full dimensions of racial caste and subordination than are those who limit their legal and social inquiries to misguided attempts at achieving a purportedly neutral colorblind position. To borrow the words of Stanley Crouch, colorblindness is:

\begin{quote}
 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.\textsuperscript{76}
\end{quote}

Color-awareness is not similarly flawed.


\textsuperscript{73} See Jerome McCristal Culp, Jr. et al., A New Journal of Color in a "Colorblind" World: Race and Community, 1 AFR.-AM. L. & POL'Y REP. 1, 3-4 (1994) (discussing the scientific understanding of colorblindness); George Rutherglen, Discrimination and Its Discontents, 81 VA. L. REV. 117, 127 (1995) ("Someone who is colorblind cannot discriminate among colors . . . .").

\textsuperscript{74} 466 U.S. 429 (1984).

\textsuperscript{75} Id. at 433; see also id. ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

II. MARTIN LUTHER KING, JR.’S COLOR-AWARENESS

The most significant issue to be addressed by this essay is how Martin Luther King, Jr.’s legacy has been misused in support of the colorblind thesis. As noted in the prologue, King dreamed that one day his “four little children [would] live in a nation where they will not be judged by the color of their skin but by the content of their character.” This statement has been wrenched out of the social and political context in which King lived and died and has been misappropriated by some proponents of colorblindness who erroneously argue that “if colorblindness was good enough for Martin Luther King... then it ought to be good enough for a society that still aspires to the movement’s goals of equality and fair treatment.” This incorrect and ahistorical perversion of King’s statement distorts his actual views and legacy, and illustrates the dangers of the misuse of “acontextual snippets.”

A. King’s Black Liberation Theology and Race Consciousness

King “filtered his theoretical deconstruction of hegemonic theologies through his knowledge of the history and experience of oppression, and thereby made that theoretical deconstruction richer, more contextual, and ready to engage the existential realities of oppression.” That theoretical deconstruction grew out of King’s religious views as well as his leadership role within an undeniably “colored” institution—the African American church. The Black

77. See Gotanda, supra note 45, at 16-17.
78. TESTAMENT OF HOPE, supra note 1, at 219.
79. Culp, supra note 45, at 163 (noting the flaws inherent in decontextualizing King’s views). See infra Part III.A. and accompanying notes.
82. See Burns, supra note 35, at 50. Burns explained that

[King’s] deep faith in God that was rooted in the Black Baptist tradition sustained his activism. He believed in a loving, personal divinity that acted in history for human betterment, offering “cosmic companionship” for oppressed peoples in their struggles for freedom, and that upheld universal values of right and wrong. The fourth generation of Baptist preachers, his great-grandfather as a slave preacher, King felt called to serve both as a leader of the Black community and as a prophet conveying divine purposes to all humanity. His leadership of the Black freedom movement was anchored in a prophetic mission to reconcile the demands of justice with the ethic of love, the latter the “supreme unifying principle of life.”

83. See Cook, supra note 81, at 1023; see also Culp, supra note 45, at 164 n.6 (discussing the race-conscious ways in which the Southern Christian Leadership
church was more than just a place of worship; it was “also a bulletin board to a people who owned no organs of communications, a credit union to those without banks, and even a kind of people’s court.” Working from the base of Black liberation theology and within an “openly and frankly religious” Civil Rights Movement, King “advocated redemptive suffering of African Americans through their own bloodshed.” King also sought to bring into being a community of racial equality, while fighting against the nation’s racial caste system.

B. King’s “Dream” and “Nightmare” Speeches

On August 28, 1963, King gave the keynote address of the Civil Rights March on Washington, D.C.—his well-known “I Have a Dream” speech. Delivering the speech at the Lincoln Memorial, King began by noting President Abraham Lincoln’s signing of the Emancipation Proclamation: “This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice. It came as a joyous day-break to end the long night of their captivity.” One hundred years after the signing of the Proclamation, however, King stated that the Negro is still not free; one hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination; one hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity; one

85. See BELL HOOKS, KILLING RAGE: ENDING RACISM 57 (1995) (“The black church has always been a place in the United States where African Americans have learned oppositional ways of thinking that enhance our capacity to survive and flourish. Black liberation theology always intervened in any tendency to elevate humans to the status of all-powerful beings.”).
88. See id. at 26.
89. See Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2429 (1994) (noting that a caste system turns race or some other highly visible and irrelevant characteristic and difference into political and social disadvantages without good reason).
90. See TESTAMENT OF HOPE, supra note 1, at 217.
91. Id.
hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land.\textsuperscript{92}

America defaulted on its promise to African Americans of life, liberty, and the pursuit of happiness, King continued, and had “given the Negro people a bad check: a check which has come back marked ‘insufficient funds’. . . And so we have come to cash this check, a check that will give us upon demand the riches of freedom and the security of justice.”\textsuperscript{93} Referring to the “sweltering summer of the Negro’s legitimate discontent,” King declared that there would neither be rest nor tranquillity in America until Blacks were granted their rights of citizenship.\textsuperscript{94} Nor would African Americans be satisfied as long as they were the victims of police brutality, were deprived of their dignity by “whites only” signs, or were subjected to injustices in America.\textsuperscript{95}

King then turned to the dream aspect of his speech. Among those dreams was the following: “I have a dream my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character. . . .”\textsuperscript{96} He expressed his hope that in Alabama, “with its vicious racists, with its governor having his lips dripping with the words of interposition and nullification. . . little black boys and little black girls will be able to join hands with little white boys and white girls as sisters and brothers. . . .”\textsuperscript{97}

King’s “I Have a Dream” speech arguably reflects his color-awareness. His recognition of the fact that African Americans were subjected to injustice and to the most base discrimination in every aspect of their lives because they were African Americans was certainly race-conscious. His dream and hope that Black children and White children would be able to join hands was race-conscious both in the identification of the discrimination that kept them apart and in the desire for an integrated future. His awareness of and objection to harsh racial realities, which were woven into the very fabric of his message, arguably demonstrated that King was color-aware.

\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 217-18.
\textsuperscript{95} See id. at 218-19.
\textsuperscript{96} Id. at 219.
\textsuperscript{97} Id. King referred to Alabama governor George Wallace and Wallace’s adherence to the interposition doctrine. Under that doctrine, states would have the constitutional authority to “interpose” themselves between the federal government and the state’s citizens, thereby giving states “the power to block federal judicial decisions and federal law.” DAN T. CARTER, THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS 86-87, 163 (1995).
Furthermore, statements King made after his “I Have a Dream” speech more clearly suggest that his call for a transformative change in American society was color-aware.

In 1965, following the Watts riots, King began to doubt that Whites were willing to work for a racially just society. Four years after the “I Have a Dream” speech, King delivered a Christmas Eve sermon at the Ebenezer Baptist Church. During that sermon, referring to his 1963 speech, King stated “[t]oward the end of that afternoon, I tried to talk to the nation about a dream I had had, and I must confess to you today that not long after talking about that dream I started seeing it turn into a nightmare.” The dream turned into a nightmare when four Black children were killed in the bombing of a Birmingham, Alabama church. The dream turned into a nightmare as he “moved through the ghettos of the nation and saw [his] black brothers and sisters perishing on a lonely island of poverty in the midst of a vast ocean of material prosperity, and saw the nation doing nothing to grapple with the Negroes’ problem of poverty.” Notwithstanding his “deferred dreams [and] blasted hopes,” King still dreamed that “one day every Negro in this country, every colored person in the world, will be judged on the basis of the content of his character rather than the color of his skin, and every man will respect the dignity and worth of human responsibility.” When viewed in light of other statements made by King, this speech evidences his color-aware approach to eliminating the subordination of minorities in the U.S.

C. King’s Other Color-Aware Statements and Views

King’s color-awareness is revealed in other speeches and writings. For instance, in his “Letter from Birmingham Jail,” he expressed his grave disappointment, not with the Ku Klux Klan or the White Citizen Council, but with the White moderate devoted more to order than to justice. In another speech he recounted an
incident during the Montgomery bus boycott in which a White person in Montgomery, Alabama told King that Montgomery had been a peaceful community,\textsuperscript{105} that "you people [Blacks] have started this movement and boycott, and it has done so much to disturb race relations, and we just don't love the Negro like we used to love them, because you have destroyed the harmony and the peace that we once had in race relations."\textsuperscript{106} King responded that Blacks had never had peace in the South, arguing that they were seeking a positive peace with an aim at achieving complete integration into American life, rather than a nominal integration which was little more than token democracy.\textsuperscript{107}

Was King opposed to explicitly race-conscious and color-aware laws and policies? In a 1965 interview, he was asked whether a proposal for a multi-billion dollar program providing preferential treatment for Blacks or any other minority group was fair. King's answer merits full quotation:

I do indeed. Can any fair-minded citizen deny that the Negro has been deprived? Few people reflect that for two centuries the Negro was enslaved, and robbed of any wages—potential accrued wealth which would have been the legacy of his descendants. All of America's wealth today could not adequately compensate its Negroes for his centuries of exploitation and humiliation. \ldots

Accordingly, King's support for affirmative action and the color-awareness of his views cannot be doubted.\textsuperscript{109} His response to the question of the fairness of affirmative action could not be more direct or explicit—King believed that affirmative action was

\begin{quote}
I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen Counciler or the Ku Klux Klanner, but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action;" who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time and who constantly advised the Negro to wait until a "more convenient season." Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.
\end{quote}

106. TESTAMENT OF HOPE, supra note 1, at 50.
107. See id. at 50, 51.
108. Id. at 367.
109. See Cass R. Sunstein, True Lies, NEW REPUBLIC, Dec. 25, 1995, at 37, 40 (noting the "pervasive but utterly false claim that Martin Luther King, Jr. was an opponent of race-conscious affirmative action policies. King strongly supported such policies").
appropriate given the centuries of slavery and the massive theft suffered by African Americans at the hands of those who oppressed them.

In his last presidential address to the Southern Christian Leadership Conference, King called for the Negro to "boldly throw off the manacles of self-abnegation" and to stand up and say, "I'm black and I'm beautiful," a self-affirmation "made compelling by the white man's crimes against him." As articulated by Kwame Toure (née Stokley Carmichael) and Charles Hamilton, Black Power meant that "black people must lead and run their own organizations. Only black people can convey the revolutionary idea—and it is a revolutionary idea—that black people are able to do things themselves.... They must achieve self-identity and self-determination in order to have their daily needs met."

Thus, "black organizations should be black-led and essentially black-staffed, with policy being made by black people." It cannot be denied that this movement was explicitly color-aware. "Many have come seeing 'no difference in color,' they have become 'color blind.' But at this time and in this land, color is a factor and we should not overlook or deny this. The black organizations do not need this kind of idealism, which borders on paternalism."

King embraced some of these aspirations of the Black Power movement, particularly the call for African Americans to amass political and economic strength to achieve their goals. Developing

---

110. TESTAMENT OF HOPE, supra note 1, at 246.
111. STOKLEY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 46 (1967). For Toure and Hamilton, Black Power was about "black people taking care of business—the business of and for black people." Id. at vii. Vast segments of Black communities are beginning to recognize the need to assert their own definitions, to reclaim their history, their culture; to create their own sense of community and togetherness. There is a growing resentment of the word 'Negro,' for example, because this term is the invention of our oppressor; it is his image of us that he describes. Many blacks are now calling themselves African-Americans, Afro-Americans or black people because that is our image of ourselves.

Id. at 37. Toure and Hamilton also called for group solidarity as the route to social and political viability and cited the political solidarity of Italian Americans and Irish Americans as examples of the ways in which groups remembered their roots. See id. at 44-45.

112. Id. at 83.
113. Id.; see also id. ("America was first and foremost a racist society, and any redistribution or legal reforms that failed to be race-specific would end up benefiting white groups more than Blacks.").
114. See ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. 116 (1995); TESTAMENT OF HOPE, supra note 1, at 577; see also id. at 582 (noting that the positive aspects of Black Power "are compatible with what we have sought to do in the civil rights movement all along without the slogan . . ."); Gary Peller, Race Consciousness, 1990 DUKE L.J.
political awareness and strength and electing Blacks to key political positions was, in King's view, "a positive and legitimate call to action that we in the civil rights movement have sought to follow all along and which we must intensify in the future."\textsuperscript{15} King did not equate Black Power with Black racism:

> It is inaccurate to refer to Black Power as racism in reverse. . . . Racism is a doctrine of the congenital inferiority and worthlessness of a people. While a few angry proponents of Black Power have, in moments of bitterness, made wild statements that come close to this kind of racism, the major proponents of Black Power have never contended that the white man is innately worthless.\textsuperscript{16}

This is not to say that King agreed with all of the tenets of the Black Power movement, for he clearly did not.\textsuperscript{17} However, his acceptance and agreement with some aspects of Black Power illustrate his color-awareness.

Ten days before he was assassinated, King suggested to the convention of the Rabbinical Assembly that "temporary segregation" may have been necessary to prevent the loss of Black economic power which may have resulted from complete integration.\textsuperscript{18} In his last speech, given in Memphis, Tennessee on April 3, 1968, King

\begin{footnotes}
\item[758] 789 n.63 (observing that King saw positive aspects to the concept of Black Power in terms of building racial pride and solidarity in politics and economics).
\item[115] Testament of Hope, supra note 1, at 578.
\item[116] Id. at 585.
\item[117] King did not agree with what he termed the “negative values” of Black Power, arguing that it was a “nihilistic philosophy born out of the conviction that the Negro can’t win.” Id. at 582. In his view, the ultimate contribution of the Black Power movement was that the movement was the most revolutionary wing of the social revolution taking place in the United States. Yet it rejects the one thing that keeps the fire of revolutions burning: the ever-present flame of hope. When hope dies, a revolution degenerates into an undiscriminating catchall for evanescent and futile gestures. The Negro cannot entrust his destiny to a philosophy nourished solely on despair, to a slogan than cannot be implemented into a program. Id. at 583. Furthermore, King stated, the weakness of Black Power was its failure to see that Blacks needed Whites and that Whites needed Blacks:

> However much we may try to romanticize the slogan, there is no separate black path to power and fulfillment that does not intersect white paths, and there is no separate white path to power and fulfillment, short of social disaster, that does not share that power with black aspirations for freedom and human dignity. We are bound together in a single garment of destiny. The language, the cultural patterns, the music, the material prosperity and even the food of America are an amalgam of black and white.

Id. at 588; see also Fairclough, supra note 114, at 116-17 (discussing King’s problems with the Black Power movement).
\item[118] Dyson, supra note 98, at 99.
\end{footnotes}
urged Blacks to anchor direct action with the power of economic withdrawal. If fair treatment by businesses was not forthcoming, Blacks should withdraw their economic support from such businesses. King called on Blacks to support Black businesses: “[T]ake your money out of the banks downtown and deposit your money in Tri-State Bank—we want a ‘bank-in’ movement in Memphis. . . . You have six or seven black insurance companies in Memphis. Take out your insurance there. We want to have an ‘insurance-in.’” 119

A King essay published after his assassination indicted White America for its “ingrained and tenacious racism.” 120 King said that many Whites could not understand why Blacks did not intend to remain at the bottom of the economic structure—“they cannot understand why a porter or a housemaid would dare dream of a day when his work will be more useful, more remunerative and a pathway to rising opportunity. This incomprehension is a heavy burden in our efforts to win white allies for the long struggle.” 121

As described in this section, in many significant respects King was race-conscious and color-aware; indeed, the mere mention of his name brings to mind issues of color-awareness and African American (as well as universal) rights. 122 King spoke “not abstractly but in a particular context at a particular historical moment, and he meant to make a particular historical point, one very much connected to issues of lower caste status.” 123 Given that context, one cannot fairly derive a colorblind principle from King’s total message and philosophy. Such a derivation could only be achieved by omissions, distortions, simplification, acontextuality, and an overall lack of familiarity with King’s views.

119.  TESTAMENT OF HOPE, supra note 1, at 283.
120.  Id. at 315.
121.  Id. at 316.
122.  The color-awareness connected with King’s name can have different dimensions. For example, Black residents of Hackensack, New Jersey opposed renaming a street in their community after King. Why? They feared that doing so would “signal to ‘anyone who read the phone book’ that it was a black neighborhood. It was feared that no white person would ever want to live there and property values would drop: ‘It stigmatizes an area.’”  PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR 118 (1991) (quoting Michael Winerip, A City Struggles Over an Honor for Dr. King, N.Y. TIMES, Jan. 19, 1988, at B1). When the New York City Council changed 125th Street in Harlem to Martin Luther King, Jr. Boulevard, some Blacks (feeling that King was a White choice) responded by renaming Lenox Avenue after Malcolm X. See ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 63 (1992).
III. MISUSING KING'S LEGACY

A. Examples

Notwithstanding King’s race-consciousness and color-awareness, “people have created a mythic Martin Luther King, Jr., and associated him with a fictional notion of colorblindness.”124 Opponents of affirmative action, for example, have erroneously cited and used King’s legacy as an endorsement of colorblindness, with particular reliance on King’s dream that persons would one day be judged by the content of their character and not by their skin color.

Consider President Ronald Reagan’s January 1986 radio address in which he rejected charges that his administration had attempted to do away with affirmative action and antipoverty programs and had weakened the enforcement of civil rights laws.125 Reagan stated:

We are committed to a society in which all men and women have equal opportunities to succeed, and so we oppose the use of quotas. We want a color-blind society. A society, that in the words of Dr. King, judges people not by the color of their skin, but by the content of their character.126

John Jacob, then-head of the National Urban League, responded that Reagan’s interpretation of King’s statement was a distortion of what King actually meant. Jacobs stated, “For the administration to associate the name of Dr. Martin Luther King, Jr. with the attempt to destroy affirmative action is obscene.”127

In February 1986, Reagan again turned to King to support the explanation of his administration’s efforts to do away with affirmative action programs. Reagan stated that “we want affirmative action to continue. We want what I think Martin Luther King asked for: We want a colorblind society. The ideal will be when we have achieved the moment when no one—or when nothing is done to or for anyone because of race, differences, or religion, or ethnic origin; and it’s

124. Culp, supra note 45, at 164.
125. See Norman C. Amaker, Civil Rights and the Reagan Administration (1988) (arguing that the Reagan administration’s civil rights enforcement record was weaker than the record of the six preceding administrations).
done not because of those things, but in spite of them."\(^{128}\) Reagan's use of King to support colorblindness is all the more disturbing given Reagan's comment that it was too early to tell whether King was under Communist influence.\(^{129}\)

William Bradford Reynolds, Assistant Attorney General during the Reagan Administration, expressed the view that the "struggle continues for a national heritage blind to skin color or ethnic background."\(^{130}\) Reynolds argued that *Brown v. Board of Education*\(^{131}\) set forth the judicial insistence on colorblindness in public school systems, and contended that the "true essence [of the colorblind principle] was best captured, in my judgment, by Dr. Martin Luther King, Jr., when he dreamed aloud in the summer of 1963 of a nation in which his children would 'not be judged by the color of their skin, but by the content of their character.'"\(^{132}\)

In 1991, during the United States Senate's hearings on the nomination of Clarence Thomas to the United States Supreme Court, Senator Alan Simpson asked what was wrong with a colorblind society and referred to King, the "greatest . . . civil rights leader. . . [who] asked only that he and his children be judged, quote, 'based on the content of their character and not on the color of their skin,' unquote. Isn't what he was asking for was [sic] a colorblind judgment, and isn't that exactly what Judge Thomas is advocating?"\(^{133}\)

In 1992, President George Bush declared that he shared King's dream of a colorblind society. One commentator, offended by Bush's comments, noted that Bush had used the Willie Horton fear tactic

---

128. The President's News Conference, PUB. PAPERS 200, 201 (Feb. 11, 1986). Shelby Steele argues that Reagan "may have aspired to racial color blindness, but few would grant that he ever reached this sublimely guiltless state." SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 8 (1990). In Steele's view, Reagan's professed colorblindness "clearly revised reality, moved it forward into some heretofore unknown America where all racial determinism would have vanished," and "was really a claim of racial innocence and guiltlessness—the preconditions for entitlement and power." *Id.*


and racism in his 1988 presidential campaign and had opposed affirmative action proposals.\textsuperscript{134}

In a 1992 book, Jared Taylor\textsuperscript{135} expressed his hope that “[s]omeday the entire edifice of race-based preferences will be torn down”\textsuperscript{136} and referred to King’s “I Have a Dream” speech as support for his position. Characterizing the development of what he called an explicit racial identity of Blacks as the “guiding light of a movement to carve out racial privileges based on race,” Taylor asserted that race-consciousness on the part of African Americans “was a rejection of the color-blind vision of Martin Luther King, and a violation of the tacit agreement under which whites were abandoning their own racial identity.”\textsuperscript{137} Again, as detailed in Part II, King was not opposed to race-conscious action that would have addressed the effects of past discrimination against African Americans, and he supported preferential treatment and the compensation of Blacks in recognition of the unpaid slave labor that was critical to this nation’s economic development.\textsuperscript{138}

A more recent effort to misuse King to support the colorblindness thesis is found in Dinesh D’Souza’s \textit{The End of Racism}.\textsuperscript{139} Deceptively reducing King’s complexity and legacy to a “vision of a society in which we are judged as individuals on our merits,” D’Souza argues that the “mention of King’s insistence that character, rather than color, should be the basis of public decisions inspires

\begin{footnotes}
\item [135] Dinesh D’Souza has described Taylor as a bigot and notes that Taylor edits a newsletter called \textit{American Renaissance} which has contained items stating that: the acceptance of racial differences may be good for Blacks; Blacks celebrated in their usual destructive, riotous style after the Chicago Bulls won the National Basketball Association championship; and no mantras numb the brain like the phrase “All men are created equal.” \textit{D’Souza, supra} note 26, at 387-88. D’Souza also reported that he saw Taylor talking with David Duke at a 1994 “white preservation” meeting in Atlanta, and that Taylor has stated that the Black separatists were right and also warned of the possibility of a race war. \textit{See id.} at 389. According to D’Souza, the messages of \textit{American Renaissance} are that

Western civilization is inherently white, America was founded on white norms, immigrants are perennial outsiders, blacks are “Africans in America,” they are in America but not of America, race determines culture, miscegenation and intermarriage are an abomination, and racial separatism, preferably separate black and white nations, is the answer.

\item [137] \textit{Id.} at 238.
\item [138] \textit{See Testament of Hope, supra} note 1, at 367.
\item [139] \textit{D’Souza, supra} note 26.
\end{footnotes}
embarrassment and anger. . . ." According to D'Souza: "It is no exaggeration to say that a rejection of Martin Luther King, Jr.'s vision of a regime in which we are judged solely based on the content of our character is a virtual job qualification for leadership in the civil rights movement today." D'Souza also asserts that "King never abandoned his principled position of color blindness." D'Souza's fundamental misunderstanding of King and his failure to see King's color-awareness is repeated throughout The End of Racism. For instance, he erroneously argues that King was an adherent of colorblindness. For the reasons discussed throughout this essay, D'Souza's contention that King was colorblind is both factually and thematically wrong and cannot be squared with King's color-awareness.

The Republican leadership of the U.S. House of Representatives has quoted King in support of their call to eliminate affirmative action. Attorney Al Latham, a volunteer for the anti-affirmative action California Civil Rights Initiative, quotes King's "content of their character" statement. House Speaker Newt Gingrich and Linda Chavez, both conservatives, have quoted King in stating their opposition to affirmative action programs. Other "neo-Kingists" include California Governor Pete Wilson and California Civil Rights Initiative Chairman Ward Connerly.

B. The Dangers of Misappropriation

The daunting task of demonstrating or calling for colorblindness in a country in which race matters requires one to grapple

140. Id. at 163, 164.
141. Id. at 165.
142. Id. at 199.
143. See id. at 201 (referring to "King's principle of a race-neutral society in which laws and policies are indifferent to color"); id. at 266 (referring to King's "doctrine that race should be ignored and we should be judged on our merits as persons"); id. at 317 (noting that King and other Black activists "appealed to merit-based hiring, conducted without regard to race, as an effective means to ensure that able and deserving candidates got the job"); id. at 542 (claiming that King favored colorblind principles in the public and private sectors).
with difficult questions regarding the application of concepts of equality in a society that "has rejected equality of income and wealth as both unnecessary and counterproductive."

As a result of incompletely theorized agreements with respect to the meaning or meanings of equality, some individuals will agree on a general notion of equality without agreeing on the colorblind thesis, while others will agree on the colorblind thesis without agreeing on a large-scale theory of equality.

Additionally, debating the colorblind thesis raises the issue of what constitutes "discrimination." Is "discrimination" to be understood in its ordinary, dictionary usage such that all discrimination (whether against or in favor of an individual or group) is unlawful, or is the term "discrimination" to be used and understood in a technical legal fashion such that, for example, prohibited discrimination against members of one group is distinguished from permissible "discrimination" (affirmative action) in favor of members of another group?

Ordinary usage would support colorblindness, while technical legal usage would not preclude and could support an argument for color-awareness.

Furthermore, settling on an equality principle or concept of discrimination at any given point does not mean that those understandings have permanence or a fixed political valence. Rather, and because of the phenomenon of "ideological drift" identified by J.M. Balkin, their "valence varies over time as they are applied and understood repeatedly in new contexts or situations."

Ideological drift is illustrated by the movement of colorblindness away from the concept offered in 1896 by Justice Harlan in Plessy v. Ferguson and toward the current use of colorblindness as the "rallying cry of conservatives who seek to protect white males from racial oppression."

The misappropriation of King's legacy is all the more alluring for those who would otherwise have to address the aforementioned issues and debate the thesis on the merits. That King would be mis-

---

149. Sunstein, supra note 123, at 194; see also id. ("American political thought has never been egalitarian.").

150. See Cass R. Sunstein, Incompletely Theorized Agreements, 108 HARV. L. REV. 1733 (1995). Sunstein notes that individuals "favor racial equality, but they are divided on affirmative action," and "may believe that government cannot discriminate on the basis of race, without settling on a large-scale theory of equality . . . ." Id. at 1739.

151. This analysis is discussed in George Rutherglen, Discrimination and its Discontents, 81 VA. L. REV. 117, 127 (1995).


153. Id. at 870 (footnote omitted).

154. 163 U.S. 537.

155. Balkin, supra note 152, at 871.
used by colorblind proponents for purposes of the debate is not surprising, for he

was—and remains—the leader that whites would have chosen for black Americans if they had the power to choose. To white eyes, King was safe and acceptable. It is hardly accidental that they invariably referred to him as "Dr. King," as if to draw assurance from the credentials he had earned in the white world. King stood for civil rights and peaceful change, as opposed to the fists of black power. . . . He also represented a mainstream religion, Baptist, which gave his movement moral impetus as well as political stature. Colleges and universities literally lined up to give him honorary degrees.\textsuperscript{156}

It was this view of King that became "the establishment’s model of what blacks should strive for: interracial harmony, coalition building, mutuality of interests across color and class lines."\textsuperscript{157}

The passage of time since King’s life and death makes it easier to misuse and abuse his legacy. The farther away extant society is from the days of the Civil Rights Movement and the less informed society is and remains about the specifics of those days, the more likely it is that some will simply not know or appreciate King’s real views.\textsuperscript{158} Because "what is forgotten is as crucial as what is remembered,"\textsuperscript{159} some have found it convenient to, in Henry Louis Gates’ words, "airbrush out the more radical aspects" of King.\textsuperscript{160} Such airbrushing has been applied by advocates of colorblindness who enlist King in support of their cause. Invoking the name of Martin Luther King, Jr., in support of colorblindness gives proponents of that theory a number of advantages. First, it provides them with a powerful rhetorical weapon. Linking the image of Dr. King and his efforts in the struggle against racism and injustice to colorblindness provides that theory with a veil of legitimacy. If not closely examined and

\textsuperscript{156} Hacker, supra note 122, at 63. Michael Eric Dyson has noted White attempts to make King a "safe American hero" and the "attempts of some blacks to portray him as the tool of an amorphous white power structure. Neither view is true." Dyson, supra note 98, at 98. Henry Louis Gates has argued that King’s academic credentials were stressed "to underscore his powers of reason, his gravitas, [and] his middle-class respectability . . . ." Gates, supra note 3, at 7.

\textsuperscript{157} Id.

\textsuperscript{158} See Cass R. Sunstein, The Idea of a Useable Past, 95 Colum. L. Rev. 601, 601 (1995)("Human beings see history through their own filters, including their own assumptions, and the result is, inevitably, something other than unmediated access to what happened before.").

\textsuperscript{159} Gates, supra note 3, at 7.

\textsuperscript{160} Id.
analyzed, this veil could serve to replace reality and set up a no
question zone—after all, the misappropriators can argue, how can
one disagree with Dr. King? How can those who are color-aware
square their position with the purported colorblind vision of the
man who said that he dreamed of the day when his children would
not be judged by the color of their skin but by the content of their
character?

Despite manipulations of rhetoric, the argument that King was
colorblind is simply wrong. But in the absence of a willingness to
educate ourselves and to correct the glaring as well as the subtle er-
rors in the King-supported colorblindness argument, it becomes
easier to misstate and distort King's views and to substitute iconola-
try and fundamentally flawed assumptions for argument and
accurate conclusions. If the King-was-colorblind argument is not
refuted, the misuse of his legacy will continue to be used to illegiti-
mately skew the colorblind versus color-aware debate in favor of the
former. That debate should be won or lost on the strength of the ar-
guments made and reasoning employed by both sides and not on
the basis of caricature, misrepresentation, and misappropriation.

CONCLUSION

Those who disagree with the proposition that the "question of
race" is "not one of blindness, but of vision" 161 should search for and
rely upon facts and themes that do not misappropriate Martin Lu-
ther King Jr.'s legacy. Any such misuse of King as a symbol for
colorblindness must be recognized for what it is: a deception
(knowing or unknowing) built on misleading sound-bites, ahistori-
cal and acontextual "analysis" and other fundamentally flawed
premises. This deception must be highlighted and continually ques-
tioned by those who are interested in accuracy, principled argument,
and respect for King's actual words, acts, and life.

161. Wilson, supra note 34, at 1263.