

# Racial Blindsight: The Absurdity of Color-Blind Criminal Justice

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*In this introductory essay to this symposium, Professor Taslitz argues that the modern criminal justice system is plagued by “racial blindsight.” Analogizing to the physical phenomenon of “blindsight” in which a blind person sees objects but does not know that he sees them, Taslitz maintains that criminal justice system actors often view the world through racial stereotyping or bias but are consciously unaware, or refuse to become aware, of that bias. They see race as a primary guide to thought and action but do not know that they so see the world. Drawing on the too-oft-ignored political writings of Albert Einstein, Taslitz argues that racial blindsight is a particularly morally reprehensible form of self-deception and that persons and institutions are fully capable of removing their blinders. Taslitz identifies a temporal component to racial blindsight, exploring hindsight (ignoring past racial transgressions), foresight (ignoring future foreseeable but avoidable racial harms), and now-sight (ignoring individual and institutional racial biases currently at work), and discusses faux-sight (blatant and obvious efforts to pretend to a non-existent blindness). Taslitz summarizes each of the articles to follow, explaining how they fit within this temporal racial blindsight scheme and what each tells us about how we can open our eyes to promote more candid decisions about race in setting criminal justice policy.*

## I. INTRODUCTION

The articles in this Ohio State Journal of Criminal Law symposium address the implications for the criminal justice system of what I will call “racial blindsight.” The term derives from the psychological phenomenon of literal “blindsight,” meaning “seeing without knowing it.”<sup>1</sup> English neurologist George Riddoch researched the phenomenon to explain stories of World War I soldiers who were seemingly blinded by head injuries yet dodged bullets.<sup>2</sup> All the while the soldiers insisted that they could not see the violence threatening them.<sup>3</sup>

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<sup>1</sup> RITA CARTER, EXPLORING CONSCIOUSNESS 19 (2002).

<sup>2</sup> See George Riddoch, *Dissociation of Visual Perceptions Due to Occipital Injuries, with Especial Reference to Appreciation of Movement*, 40 BRAIN J. NEUROLOGY 15 (1917).

<sup>3</sup> See *id.*; CARTER, *supra* note 1, at 19 (discussing Riddoch’s work).

Blindsight, later studies have revealed, usually has a physical cause, arising most readily in people suffering from dead tissue patches in the brain's primary visual cortex.<sup>4</sup> Blindsight can extend not just to motion but to color and even facial expressions.<sup>5</sup>

The blindsight phenomenon has been observed in numerous experiments in which the blind are asked to "guess" the direction and color of an object, yet they do so with remarkable accuracy.<sup>6</sup> The phenomenon has even been observed in normally-sighted people, who may deny "seeing" certain events, yet can accurately describe what happened.<sup>7</sup> "Blindtouch," "blindsmell," and "blindsound" phenomena have been observed as well.<sup>8</sup> Blindsight studies are widely understood to be an important source of evidence suggesting "that sensory information which does not make it to consciousness may nevertheless influence our behaviour."<sup>9</sup>

If literal blindsight usually stems from a physical injury, there may be reason to believe it can also develop from psychological trauma.<sup>10</sup> The 1960s rock opera, *Tommy*, by The Who, captured this idea.<sup>11</sup> At a very young age, Tommy discovers his mother engaged in a sex act with her lover. The lover threatens Tommy into silence about what he observed. "You didn't hear it, you didn't see it, you won't say nothing to no one . . . oh how absurd it all seems without any proof!"<sup>12</sup> sings the ranting lover to Tommy. Tommy takes these words to heart. He becomes a "deaf, dumb, and blind boy."<sup>13</sup> Yet he also becomes a master of the pinball machine, a "pinball wizard"<sup>14</sup> for whom, "strange as it seems, his musical dreams ain't quite so bad."<sup>15</sup> But, later in life, Tommy discovers a "miracle cure," yet he uses his new found power of speech to urge all to return to his earlier near senseless condition, a condition that, he preaches, will bring salvation. He

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<sup>4</sup> See Charles A. Heywood & Robert W. Kentridge, *Affective Blindsight?*, 4 TRENDS IN COGNITIVE SCIENCES 125, 125 (2000); CARTER, *supra* note 1, at 19.

<sup>5</sup> See Heywood & Kentridge, *supra* note 4, at 125–26.

<sup>6</sup> See CARTER, *supra* note 1, at 19.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* For a synthesis of the research explaining the relationship among the conscious and unconscious minds and human behavior, see Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145 (2007) [hereinafter Taslitz, *Forgetting Freud*].

<sup>10</sup> Cf. Steven I. Friedland, *Law, Science and Malingering*, 30 ARIZ. ST. L.J. 337, 366 (1998) (discussing how to distinguish the malingerer from the true sufferer of hysterical blindness).

<sup>11</sup> THE WHO, *TOMMY* (MCA Records 1969). My summary of Tommy and my quotation of its song lyrics come from my recent re-listening to the songs on that opera (for perhaps the 200<sup>th</sup> time in my life) on my iPod.

<sup>12</sup> THE WHO, *1921, on TOMMY* (MCA Records 1969).

<sup>13</sup> THE WHO, *Amazing Journey, on TOMMY* (MCA Records 1969).

<sup>14</sup> THE WHO, *Pinball Wizard, on TOMMY* (MCA Records 1969).

<sup>15</sup> THE WHO, *supra* note 13.

becomes a messianic figure with a huge following, all of whom block their eyes, their ears, and their mouths, blinding and deafening themselves to reality for the simpler and more distracting pleasures of the pinball machine. In the end, however, they abandon Tommy, recognizing that choosing to be blind and deaf to the real causes of suffering around you is ultimately an evil, contributing to, rather than alleviating, human pain. Therefore, even someone like Tommy was morally responsible for exercising free will to render himself and others insensate to grievous social wrong, insensitivity analogous to that so often displayed by the racial deeds of criminal justice system actors, if not by their words or conscious thoughts.

“Racial blindsight” metaphorically draws on two elements of literal blindsight: first, that much of America is consciously blind to the harmful effect of racial biases on our individual and collective psychologies, yet is at some subconscious level quite aware of their presence; second, that this blindsight is caused by trauma.<sup>16</sup> That trauma can be conceived of as physical, a blow to the “body politic,”<sup>17</sup> or as psychological, as in the injuries done to Tommy. Either way, the original trauma was the sin of slavery, followed by the assault of Jim Crow, then by today’s battles waged by Color-Blind Warriors on both the left and the right side of the political spectrum.<sup>18</sup> Those traumas continue to befog our senses, even long after they have occurred.<sup>19</sup>

The collective hope of the authors of the pieces in this symposium is to reveal the myriad ways in which these traumas manifest themselves in the criminal justice system today in a particular way: by deadening our racial senses, a deadening that is in fact a moral choice. This symposium’s authors suggest that because we can choose whether and how to see and hear racial injustice, we are morally

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<sup>16</sup> Cf. JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997) (analyzing the extent of, and psychological processes involved in, modern forms of race discrimination); LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* (2006) (similar, but using a different interpretive lens).

<sup>17</sup> The idea of the “people” of the United States as collectively and metaphorically constituting a single “body” has deep roots in American constitutional history. See ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868*, at 70–71 (2006).

<sup>18</sup> See, e.g., MARK M. SMITH, *HOW RACE IS MADE: SLAVERY, SEGREGATION, AND THE SENSES* (2006) (tracing how slavery and Jim Crow literally changed how White Americans’ senses perceived the world); GLORIA J. BROWNE-MARSHALL, *RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT* (2007) (tracing continuing historical effects of slavery and Jim Crow on modern American racial trauma); PATRICIA J. WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* (1997) (arguing that while we may hope for a color-blind future, embracing it as a governing principle for law and everyday life today ignores the “little blindnesses” by which racism routinely does social and psychological harm); and MICHAEL K. BROWN ET AL., *WHEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003) (challenging the reality or wisdom of the law’s pretending our society is or can be color-blind).

<sup>19</sup> See generally SMITH, *supra* note 18 (documenting the impact of race on the senses).

responsible for our own racial blindness.<sup>20</sup> But these pieces do more than urge simple self-awareness. They also demonstrate in practical, concrete ways how our collective eyes, once surgically corrected, can be kept open to reveal the resulting ugliness, including racially destructive sentencing policies, “facial profiling” of suspected terrorists in airports, “minor” hate crimes affecting housing segregation patterns, and lower court intransigence in the face of recent modestly racially-progressive United States Supreme Court death penalty jurisprudence.<sup>21</sup> The symposium pieces taken as a whole thus seek to turn criminal justice system actors away from the false messiah of racial blindness, much as dissenters ultimately turned Tommy’s followers away from their destructively blind leader.

Racial blindness need not necessarily occur at an entirely subconscious level, for there is a spectrum of relative degrees of consciousness.<sup>22</sup> Yet, the assertion that such blindness is in fact chosen may imply mechanisms of self-deception, which also may involve differing degrees of self-awareness.<sup>23</sup> Self-deception is motivated by reduced awareness of truths, the usual motivation being self-interest.<sup>24</sup> Racial disparities create both material and psychological winners and losers.<sup>25</sup> It is too little known that Albert Einstein, of  $e=mc^2$  fame, was also a combatant for racial justice.<sup>26</sup> Einstein believed that true human greatness sadly required suffering. Yet, he said, “[i]f the suffering springs from the blindness and dullness of a tradition-bound society, it usually degrades the weak to a state of

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<sup>20</sup> See WANG, *supra* note 16, at 23 (noting that, while unconscious discrimination processes “can be categorized as ‘normal,’ they are hardly inevitable. They can be disrupted if we recognize them and have the desire and will to think and act differently. We can override the default.”); ARMOUR, *supra* note 16, at 159 (noting the American people’s obligations to remove even unconscious racial discrimination from the legal process and that, “To remove them, we must first expose them, not allowing them to hide behind the calculators and pocket protectors of ‘rational discriminators’ or beneath the robes of judges and senators.”); Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1288–1303 (2000) [hereinafter Taslitz, *Mutual Indifference*] (arguing that indifference to others’ grave suffering, a form of emotional blindness, is a moral evil that constitutional law must recognize, deter, and punish).

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See Taslitz, *Forgetting Freud*, *supra* note 9, at 169–71. A small number of researchers have challenged the validity of the large body of social scientific research purporting to demonstrate the existence of subconscious racial bias, a bias that translates into altered behavior. These researchers also challenge whether the race bias studies, even if valid, in fact support the conclusions that its authors make. Professor Samuel Bagenestos has recently summarized these challenges and solidly debunked them with a level of detail that need not be repeated here. See Samuel R. Bagenestos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007).

<sup>23</sup> For an extended analysis of the psychological processes involved in self-deception and of their moral, social, and legal consequences, see Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005) [hereinafter Taslitz, *Willfully Blinded*].

<sup>24</sup> See *id.* at 394–98, 413–23.

<sup>25</sup> See, e.g., Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 53–69 (2003).

<sup>26</sup> See FRED JEROME & RODGER TAYLOR, *EINSTEIN ON RACE AND RACISM* ix–x (2005).

blind hate, but exalts the strong to a moral superiority and magnanimity which would otherwise be almost beyond the reach of man.”<sup>27</sup> Racial oppression, Einstein maintained, was a quintessential example of such suffering, degrading Blacks for the cause of enhancing White status, smugness, and self-esteem.<sup>28</sup> When some Whites insisted that they bore no racial prejudice but drew their fear and disdain toward Blacks from unpleasant personal experiences with that group, Einstein boldly labeled it the self-deceptive rationalization that it was:

[I] think that there is a certain amount of selfishness in this belief. By that I mean that American ancestors took these black people forcibly from their homes, so that the white man could more easily acquire wealth. By suppressing and exploiting and degrading black people into slavery, the white man was able to have an easier life. I really think that it is from a result of a desire to maintain this condition that modern prejudices stem.<sup>29</sup>

Likewise, Einstein deplored another psychological gambit—a blindness to collective responsibility.<sup>30</sup> In the racial version of this gambit, the White man bemoans racial minorities whining and seeking “handouts.” “I took no part in slavery,” thinks the White man, “so I bear no responsibility for it. Besides, with Jim Crow dead, there are no legal obstacles to success, so its apparent elusiveness must in fact be due to individual racial minorities’ personal failings.”<sup>31</sup> Right-wing intellectuals, the “Color-Blind Warriors” of whom I wrote above, take this reasoning a step further. Not only are neither Whites as individuals nor the collective American people, through their government, responsible for the few continuing instances of racial injustice, they also affirmatively owe an obligation to racial minorities to ignore their or anyone else’s race. Racial awareness, they maintain, leads only to balkanization, irrationality, and group-think in a society committed to defending the worth and autonomy of the individual.<sup>32</sup> This

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<sup>27</sup> Albert Einstein, Letter to the Editor, *Response to Walter White’s October 1947 Article, Why I Remain a Negro*, THE SATURDAY REVIEW OF LITERATURE, Nov. 11, 1947, reprinted in ALBERT EINSTEIN, THE HUMAN SIDE: NEW GLIMPSES FROM HIS ARCHIVES 87 (Helen Dukas & Banesh Hoffman eds., 1979).

<sup>28</sup> See JEROME & TAYLOR, *supra* note 26, at 9–10, 117–21.

<sup>29</sup> PETER A. BUCKEY, THE PRIVATE ALBERT EINSTEIN 47 (1992) (quoting from Buckey’s interview with Einstein).

<sup>30</sup> See *infra* text accompanying notes 36–39 (outlining Einstein’s position on this matter); see also Taslitz, *Mutual Indifference*, *supra* note 20, at 1289–1303 (analyzing the nature and consequences of this widespread “contract of mutual indifference” to racial suffering).

<sup>31</sup> The words quoted are my own imagined internal dialogue but reflect the message articulated in LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 37–41 (2002).

<sup>32</sup> See *id.* at 37–41 (summarizing these right-wing thinkers); LAWRENCE BLUM, “I’M NOT A RACIST, BUT...”: THE MORAL QUANDARY OF RACE 91–93 (2002) (defining and critiquing “race neutrality”—the idea that “racial categories are not to be utilized in the formulating of policies,” the

autonomous individual has no history, no important social relationships, no political commitments, so he is colorless, genderless, unlike any real human being.<sup>33</sup> Race is about skin color, not social status or power, and racism is a personal attitude of aberrant individuals, not an institutional or political problem.<sup>34</sup> Color-blind warriors on the left likewise counsel against race-consciousness, arguing that it merely alienates Whites from progressive causes, downplays the unifying role of class, and promotes destructive identity politics.<sup>35</sup> Although Einstein did not face color-blind arguments in his own time that were crafted in quite this way, he did understand the psychological processes making such arguments appealing. “If an individual commits an injustice, he is harassed by his conscience,” Einstein maintained.<sup>36</sup> “But,” he continued, “nobody is apt to feel responsible for misdeeds of a community, in particular, if they are supported by old traditions. Such is the case with discrimination.”<sup>37</sup> Einstein’s solution was to work to educate “all of our people” on the risks to democracy of this denial of collective and institutional responsibility.<sup>38</sup> To do otherwise, he insisted, is to ignore an evil that “so grievously injures the dignity and the repute of our country.”<sup>39</sup>

More purely subconscious forms of racial bias are, however, likely increasingly at work. Many Americans, perhaps most, including many Whites, abhor conscious racism or its legal sanction.<sup>40</sup> Many of these same Americans may even recognize that there are some continuing racial biases wrongly at work and even that they may occur unconsciously or as a result of institutional

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dominant form of “color-blind” thinking in modern public and legal discourse, a form embracing this single foundational principle: “A policy that makes explicit reference to race, or racial identities, is taken to stand condemned by that fact alone, independent of whatever the policy aims or is likely to accomplish (for example, to foster race egalitarianism).”).

<sup>33</sup> See GUINIER & TORRES, *supra* note 31, at 38.

<sup>34</sup> See *id.* at 38–39.

<sup>35</sup> See *id.* at 39–42.

<sup>36</sup> Albert Einstein, *Message to the Southwide Conference on Discrimination in Higher Education*, in SOUTHERN CONFERENCE EDUCATIONAL FUND, DISCRIMINATION IN HIGHER EDUCATION (1951) [hereinafter Einstein, *Message to SCEF*]. For a brief history of the Southern Conference Educational Fund, see ENCYCLOPEDIA OF THE AMERICAN LEFT 736–37 (Mary Jo Buhle, Paul Buhle, & Dan Georgakas eds., 1992).

<sup>37</sup> Einstein, *Message to SCEF*, *supra* note 36.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Commentator Jim Myers captured this point thus: “Since the 1940s, polls indicate that whites show an increasing willingness to interact with black people, and this must also be one reason why many white Americans assume that race relations are getting better. They know that they have *personally* abandoned bad attitudes toward black people.” JIM MYERS, AFRAID OF THE DARK: WHAT WHITES AND BLACKS NEED TO KNOW ABOUT EACH OTHER 28 (2000). See also WANG, *supra* note 16, at 4 (noting Whites often engage in racial discrimination not by conscious design but by unconscious “default”).

processes.<sup>41</sup> Yet, when faced with making judgments in particular situations, they fail to see such bias at work in their own hearts. They are selectively blind.<sup>42</sup> Professor Lu-in Wang refers to this state of affairs as “discrimination by default,” that is, by automatic selection.<sup>43</sup> Such discrimination does its work via three largely unconscious processes: situational racism, self-fulfilling stereotypes, and failures of imagination. “Situational racism” involves the increase in racially-biased behavior in “normatively ambiguous” situations, those in which the actor can readily and consciously justify his choices based on reasons other than racial bias.<sup>44</sup> Self-fulfilling stereotypes are habits of thought based on preconceptions, habits that can channel our thoughts and behavior, filter what evidence we perceive, and color how we interpret that evidence—all without our ever being aware that such stereotypes are at work.<sup>45</sup> “Failures of imagination” describe our limited empathy for those on the short end of the stereotyping stick, our weak ability to stand in their shoes, see the world through their eyes, and be open to their points of view.<sup>46</sup> Such failures of imagination lead us to seek stereotype-consistent explanations for the behavior of the oppressed, ignoring or minimizing stereotype-contradicting situational, institutional, or character-based explanations.<sup>47</sup> These mechanisms work so powerfully that even educating the most consciously anti-racist liberal about their existence and operation does little, if anything, to limit their effect or to encourage their bearers to recognize them at work.<sup>48</sup>

Precisely because sub and semi-conscious psychological processes and institutional ones of this sort, combined with the subtle reach of the dead hand of history, are so hard to combat, institutional solutions, simple and clear legal rules, and psychologically-informed legal actors are required to effect change.<sup>49</sup> These

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<sup>41</sup> See ARMOUR, *supra* note 16, at 139 (“[P]eople who are firmly committed to their low-prejudiced beliefs remain prone to automatic activation of stereotypes.”).

<sup>42</sup> See *id.* at 118–39 (explaining the psychological processes by which such selective blindness to racial bias is achieved).

<sup>43</sup> See WANG, *supra* note 16, at 4–5.

<sup>44</sup> See *id.* at 17.

<sup>45</sup> See *id.* at 17; Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 410–33 (1996) (discussing “epistemological filters” and other unconscious processes affecting our preconceptions and behavior).

<sup>46</sup> See WANG, *supra* note 16, at 18 (explaining “failures of imagination”); Taslitz, *Mutual Indifference*, *supra* note 20, at 1288–1303 (analyzing analogous concept).

<sup>47</sup> See WANG, *supra* note 16, at 18, 83–114.

<sup>48</sup> See, e.g., CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM*, 248 (2003) (discussing why helping jurors to recognize their unconscious assumptions and giving them counter-stereotypical ways to view a situation are important first steps in overcoming racial bias); ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 133 (1999) (explaining why such first steps are insufficient, further requiring “subjects who view a prejudiced belief as wrong” to be told by qualified experts how “it may nevertheless affect their judgments,” for only then can the bias’s impact be reduced).

<sup>49</sup> See *infra* Part II.

characteristics, we will shortly see, well describe the recommendations made by this symposium's authors to lift the racial blindfolds from our criminal justice system's eyes.

Before turning to the task of summarizing how the individual pieces address these questions, one final note on blindsight is required. Sight necessarily has a temporal component.<sup>50</sup> We can lack foresight by failing to see the future consequences of our current actions, distort a clear vision of our past by revising it in hindsight, or miss what is right in front of us this very moment, escaping our "now-sight."<sup>51</sup> These temporal forms of vision-obstruction will each play a role in many of the pieces to be discussed shortly, as will one final concept: "faux blindness"<sup>52</sup>—consciously seeing racial wrongs but pretending not to; there is another word for this state of affairs: lying.<sup>53</sup>

## II. TIME, DECEPTION, AND RACIAL BLINDSIGHT

### A. *Racial Foresight*

Marc Mauer, in his piece, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*,<sup>54</sup> focuses on racial foresight—on improving our ability to foresee the future racial consequences of the criminal justice system choices that we make today. Mauer begins by carefully reviewing the data to

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<sup>50</sup> For a discussion of the temporal component in cognitive science and legal theory, see Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181 (2005).

<sup>51</sup> See MICROSOFT ENCARTA COLLEGE DICTIONARY 560, 680 (2001) (defining "foresight" and "hindsight."). The term "now-sight" is my own, a shorthand meaning what we can see in the present and, all sight being limited, necessarily implying that there are some things beyond our current vision that we may come to see in the future or once saw in the past.

<sup>52</sup> See *id.* at 521 (defining "faux").

<sup>53</sup> See *id.* at 831, 859 (defining "lie" and "lying"); cf. ARMOUR, *supra* note 16, at 119–20 (discussing "hypocritical racists," those who "profess racial liberalism" to "appear socially desirable" but who in fact feel quite the opposite); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1648–50 (1985) (arguing that "it now may be quite common to underreport prejudiced attitudes" by faking one's true beliefs). I use the term "faux blindness" in an analogous but not identical fashion to how Armour and Johnson use it. The "faux blind" lower court judges of whom Sheri Lynn Johnson writes in this symposium believe that the Supreme Court of the United States sees a state of racial affairs that it deems morally and legally reprehensible. Yet these same lower court judges pretend not to understand the Court's message or to see the state of affairs that the Court identifies as troubling. These lower courts pretend blindness likely stems from a belief that the relevant state of affairs, while it does exist, is not in any sense a wrong. Accordingly, these judges may be morally blind but have a clear vision of what the high Court demands of them, and may also clearly see the facts sparking the Court's action, yet fake thorough blindness to all these things as a way of evading their obligation to minimize racial bias in the criminal justice system. Johnson's anger at this racial recalcitrance, we shall soon see, is palpable. See *infra* text accompanying notes 86–89.

<sup>54</sup> Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19 (2007).



prove first, that substantial racial disparities exist in the criminal justice system and, second, that these disparities are in significant part due to biases in institutional processing and decision-making, not merely to racial disparities in offending. Mauer does not oversimplify matters, exploring, for example, the relative contributions of race and class to conclude that race nevertheless plays an important, perhaps primary, role in causing group disparities. More importantly, however, Mauer urges that “[s]entencing and related criminal justice policies that are ostensibly ‘race neutral’ have in fact been seen over many years to have clear racial effects that could have been anticipated by legislators prior to enactment.”<sup>55</sup> In some instances, he maintains, these negative effects actually were consciously anticipated (in an earlier day, even consciously desired), but his argument does not turn on white ill-will. Rather, he suggests that subconscious processes, or even simple ignorance, resulting from the failure even to look at the available data, or at the racial incentives likely created by new policies, are at least equally at work. Mauer does not argue that disparate racial impacts necessarily require abandoning proposed criminal justice legislation. But he does insist that it is morally unacceptable to fail to make the effort to foresee such consequences and to weigh them in the cost/benefit analysis over what criminal justice policies should govern our future.<sup>56</sup> He argues the case for making more transparent the foreseeability of racial harm at the time of proposed adoption of legislation that may amplify criminal justice system racial disparities. He illustrates racial impact foreseeability at work in three major areas: (1) cocaine sentencing laws; (2) school drug zone laws; and (3) habitual offender laws.

Mauer next suggests a novel solution to racial blindness about the criminal justice future: racial impact statements. Analogizing to environmental impact statements, Congressional Budget Office fiscal impact statements, and health impact statements under existing law, Mauer argues for the mandatory preparation of statements exploring the likely impact on criminal justice system racial disparities of any proposed criminal justice legislation. These statements must be prepared before the legislature can vote a new criminal justice proposal up or down. Such impact statements would also explore the relative racial impact of proposed policy alternatives to the pending legislation for achieving public safety. Mauer suggests that the agency charged with estimating prison capacity needs will generally be the appropriate entity to prepare such statements, ideally (where they exist) state and federal sentencing commissions, with departments of corrections and fiscal agencies being other options. Mauer emphasizes, furthermore, that racial disparities can often decrease public safety, such as where racial profiling diverts policing resources from more effective crime-fighting tactics or where racial disparities discourage minority cooperation with the police.

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<sup>55</sup> *Id.* at 28.

<sup>56</sup> *Cf.* Taslitz, *Mutual Indifference*, *supra* note 20, at 1288–1303 (explaining moral egregiousness of not even trying to see a harm to others that we can easily place in our line of vision).

Much of the remainder of Mauer's piece focuses on the nuts-and-bolts of his proposal. Using the crack cocaine and mandatory minimum sentencing laws as his primary examples, he carefully parses out alternative ways of defining and computing "disparities;" addresses a wide range of potential technical problems (e.g., limited data, costs of production, interaction effects among various phases of the criminal process, and the uncertainty of projections), all of which, he maintains, can be solved; and lays out the necessary components of an impact statement. Mauer also walks his readers through the legislative dynamics of precisely how and when racial impact statements would be prepared and used at various stages of the legislative process, also articulating models for appropriate cost/benefit analysis. Finally, he explores analogous proposals and legislation, including a recent legislative proposal in Oregon to require the preparation of "racial and ethnic impact statements that assess impact [sic] of prison-related legislation . . . on [the] prison population,"<sup>57</sup> to prove that his somewhat broader approach is not that of a wide-eyed visionary but of a pragmatic scholar and advocate offering a realistic proposal for change. For Mauer, foreseeing our racial future is both plausible and imperative, for only then can we act to change it or to bear more candidly the moral weight of failing to do so.

#### B. *Now-Sight*

Jeannine Bell, in her contribution, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*,<sup>58</sup> addresses a particular instance of societal blindness in the here-and-now: the failure to adequately recognize the important contribution of "anti-integrationist violence"<sup>59</sup> to racially segregated housing patterns in the United States. Racial housing segregation in America is severe, especially black-white segregation. "The results from the 2000 U.S. Census reveal that Blacks were hypersegregated—a term housing scholars use to define the most extreme form of segregation—in 28 of the 50 largest metropolitan areas in the United States."<sup>60</sup> Scholars use several measures of segregation: the evenness with which minorities are geographically dispersed, the degree to which they are isolated from the majority, the existence of minority clustering to form a "continuous enclave," the extent of minority racial concentration in a single area, and the extent of minority centralization in the city's center. Hypersegregation occurs only when at least four of these five measures are simultaneously high, yet that circumstance still occurs in over half our large cities.

Bell examines the standard explanations for such extreme housing segregation—economics, discriminatory renting and lending practices, and group

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<sup>57</sup> Mauer, *supra* note 54, at 45-56 (quoting H.B. 2933, 74th Leg. Reg. Sess. (Or. 2007)).

<sup>58</sup> Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47 (2007).

<sup>59</sup> *Id.* at 66.

<sup>60</sup> *Id.* at 67 (internal citations omitted).

preferences—finding them, even when taken in combination, inadequate to explain such massive racial division. Economic explanations insist that Blacks' lower average wealth and income mean that they cannot afford to live in more expensive white neighborhoods. But this explanation confronts the problem that financially better-off Blacks still more often live in neighborhoods that are poorer in money, safety, and social services than in neighborhoods for Whites with similar incomes. Housing market renter, lender, and seller "steering" practices do contribute to segregated housing patterns, and existing laws arguably do too little to combat these wrongs. But, concludes Bell, the effects of illegal race-steering are also likely still too small to account for the extraordinary degree of housing segregation. Move-in and other anti-integrationist violence offers a better explanation.

Although more research is needed, Bell also concludes from the research data that Whites "prefer" largely white neighborhoods because they fear that a significant Black presence brings with it crime, poverty, declining property values, and declining schools. But Blacks, though perhaps favoring some level of same-race company (some research suggests a desire to live in neighborhoods that are at least ten percent Black), "prefer" largely minority neighborhoods "because they fear white hostility and the violence associated with it."<sup>61</sup> This fear, Bell argues, stems from realistic Black perceptions that they will face "anti-integrationist violence,"<sup>62</sup> violence that is usually low-level but is meant to intimidate Blacks from entering in, or remaining in, White neighborhoods as residents.<sup>63</sup> Much of this abuse is "move-in violence" designed to scare off darker-hued neighborhood newcomers.<sup>64</sup> Such violence is geographically diverse, occurring in the North, Midwest, and West, as well as the South, with "'the perpetrators of these attacks . . . rarely [being] found to be card carrying racists.'"<sup>65</sup> In short, maintains Bell, anti-integrationist violence is a too-often unseen or ignored form of hate crime that bears much of the weight of explaining segregated housing patterns. Bell summarizes her argument thus:

[E]ven in the current climate of racial tolerance, crimes directed at minorities who have moved to white neighborhoods remain a severe problem. When it occurs, such violence may come in the form of small acts of neighborhood terrorism—vandalism to cars, broken windows and other property damage, harassment and intimidation. Families at whom such crimes are directed may be isolated, as newcomers, and as the only persons of color in the neighborhood. Even if they do turn to law

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<sup>61</sup> *Id.* at 73.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 53 (quoting SOUTHERN POVERTY LAW CENTER, MOVE-IN VIOLENCE: WHITE RESISTANCE TO NEIGHBORHOOD INTEGRATION IN THE 1980S, at 2 (1987)).

enforcement officers for help, the police may be reluctant to investigate such low-level crimes, especially when the victim is not able to identify the perpetrator. Without recourse, the violence is likely to continue, and the victim is likely to leave the neighborhood.<sup>66</sup>

Society is, of course, not entirely blind to anti-integrationist violence, but it is too often viewed as a relic of the past, rarely rearing its ugly head today. Bell suggests, therefore, that we are at least blind to its widespread prevalence today. Moreover, even when the supposedly rare instance of anti-integrationist violence is noticed and brought to the attention of the police, they often do not see it for the race-motivated crime that it is; do not understand how such “small” crimes cumulatively have big consequences; do not, therefore, see the value of devoting resources to investigating or deterring such crimes; and thus effectively “blind” the justice system to the necessity for action. Policymakers too have a tunnel vision that obscures from their view the strong causal role anti-integrationist violence plays in maintaining housing segregation patterns and their resulting social ills. Perhaps these concerns would matter less if there were, nevertheless, effective legal remedies against this form of violence, even if those remedies were not necessarily designed for that purpose. Accordingly, Bell examines current federal and state remedies, from criminal civil rights statutes, the Federal Fair Housing Act, and Federal Sentencing Guidelines enhancements, to state criminal laws, and finds them wanting for a variety of reasons, including victim ignorance about their availability, law-enforcement non-recognition of their applicability to low-level anti-integrationist violence, and their difficulty in meeting evidentiary burdens of proof.<sup>67</sup>

Bell suggests a two-fold legal remedy to make up for these enforcement gaps: first, recognize that, in both its nature and impact, “low-level”<sup>68</sup> anti-integrationist violence is best understood as a serious, high-level hate crime; second, at least in big cities, create specialized hate crime units where they do not exist and educate all hate crime units in the mechanisms, proof problems, and impact on *de facto* housing segregation of these crimes.<sup>69</sup> For Bell, recognizing the causal connection between these crimes and racial segregation, and thus the necessity of prosecuting these offenses vigorously, offers a new justification for the existence of hate crime laws. Such laws prod police to create the specialized units that can not only charge such crimes in the housing context but also can “prevent . . . [them] from occurring by conducting proactive patrols of neighborhoods to which minorities are moving.”<sup>70</sup> Concludes Bell, “[r]efusing to effectively harness the power of the State [in this way] may lead to the continued re-segregation of this country, where

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<sup>66</sup> *Id.* at 75.

<sup>67</sup> *Id.* at 55-66.

<sup>68</sup> *Id.* at 73-76.

<sup>69</sup> *Id.* at 76-77.

<sup>70</sup> *Id.* at 76.

whites and minorities increasingly occupy entirely separate neighborhood spaces.”<sup>71</sup>

### C. Hindsight

Lenese Herbert’s piece, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*,<sup>72</sup> reminds us that clear hindsight is a pre-requisite to adequate now-sight. Herbert examines the Transportation Security Administration’s [TSA] use of the Screening Passengers by Observation Technique [SPOT]. SPOT-trained examiners identify “moment-to-moment” facial muscle movements of airport passengers, evaluating them pursuant to a Facial Action Coding System [FACS], which allows them to assign suspicion scores to the observed. SPOTers will stop and interrogate those individuals assigned a high enough score. SPOT has uncovered some criminal activity, much of it minor, and resulted in stops of many innocent people, but has not yet uncovered a single potential terrorist.

SPOT and FACS rely on a wide array of movements requiring interpretation by the TSA employee using these methods. Although SPOT’s sponsors maintain that it relies on behavior (facial expressions), rather than physical characteristics like race, Herbert finds these claims questionable. Subconscious racial biases and cultural understandings virtually ensure that TSA staff will rely on racial attributes in forming their suspicions about passengers’ potential dangerousness. Furthermore, she argues, race and facial expression are not independent variables. Racial minorities, African-Americans especially, are more likely to resent such observation, to suspect that they are being watched or stopped for racially discriminatory reasons, and, therefore, to wear the hostile, fearful, or worried expressions that may trigger TSA’s SPOT personnel into action. Moreover, concludes Herbert, observers necessarily view African-American faces through race-colored glasses, seeing threat where none exists. Race and face are one.

Herbert also challenges dominant understandings of Fourth Amendment privacy. The United States Supreme Court considers “privacy in public” an oxymoron.<sup>73</sup> For the Court, we, with rare exceptions, “assume the risk” of observation by all for all purposes whenever we reveal anything to anyone.<sup>74</sup> Because everyone can potentially see our faces once we leave home, we then lose any privacy interest in our face, in turn losing any Fourth Amendment protection.

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<sup>71</sup> *Id.* at 77.

<sup>72</sup> Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79 (2007).

<sup>73</sup> See Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 133–34 (2002).

<sup>74</sup> See Taslitz, *supra* note 25, at 47–51.

Who watches us, how long, for what purposes, and by what method (for example, videotape or closed-circuit television) are irrelevant.<sup>75</sup>

Building on the work of other authors, Herbert argues that such a constricted view of Fourth Amendment privacy is nonsense. Empirically, most of us do care who watches us, how, and why. We do not see walking on the street as cause for the State's watching, and perhaps recording, our every muscle-twitch to gather evidence of crime. Nor do we expect our private thoughts to be read by the State from our facial features, even if we, at "some level," intend to communicate those thoughts to someone or perhaps largely to ourselves. Normatively, the law should treat State observations of facial expressions for evidence of criminality as invading privacy because it infringes on the most philosophically justifiable notion of privacy—the ability to control the "masks" by which we choose to present different aspects of ourselves to different degrees for different purposes to different audiences.<sup>76</sup> To say that privacy is invaded does not necessarily either invalidate the State's surveillance or limit its occurrence to situations where a warrant based on probable cause has previously been required. But, Herbert argues, it does necessitate a court's engaging in the sort of interest-balancing that the Fourth Amendment reasonableness standard requires.

It is here that hindsight becomes so important. Herbert counsels her readers not to forget the lessons learned from racial profiling via more traditional policing methods, such as traffic stops. This experience teaches that subconscious racial biases have power over even the most well-meaning police officers and have freest play when officers have greatest discretion. But Herbert reviews social science research demonstrating that facial expressions in particular are powerful triggers of just the sort of biases involved in racial profiling. The overriding lesson of the experience of racial profiling for the law is, therefore, this: the law's insistent focus on conscious police choice condemns it to near-irrelevance in the fight against racial bias and unwarranted invasions of privacy—a harm magnified where, as with FACS, officers are specifically directed to focus on racial minorities' faces. Yet the federal government boldly proceeded with FACS without ever looking back to learn from racial profiling. Mauer focused on collecting data to predict racial impacts from novel proposed legislation. But Herbert's point is that sometimes no new research is needed. A simple look to our history, whether recent or distant, can inform the likely impacts of our current and future actions. A Fourth Amendment jurisprudence devoid of that history is soul-less, ill-informed, and complicit in both privacy invasion and racial subordination, rendering it unworthy of citizen respect and in need of hastening its death.

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<sup>75</sup> See Taslitz, *supra* note 73, at 134–41.

<sup>76</sup> See JEFFREY ROSEN, UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 8–12, 19–20, 210 (2000) (discussing public "masks").

#### D. *Faux Blindness*

In *Race and Recalcitrance: The Miller-El Remands*,<sup>77</sup> Sheri Lynn Johnson argues that the lower courts, on remand of important United States Supreme Court cases raising *Batson* issues, engaged in open resistance against the high Court's mandates while pretending to see no inconsistency. *Batson v. Kentucky*,<sup>78</sup> as interpreted in later case law, prohibits as violative of the Equal Protection Clause intentional racial discrimination by the prosecutor in exercising her peremptory challenges—her limited number of challenges that, barring race discrimination, require no explanation or “cause” for striking potential jurors.<sup>79</sup> *Batson* came to be understood as creating a three-part procedure, first asking whether a *prima facie* case of racial discrimination had been established; second, if yes, whether the prosecutor supplied a race-neutral reason; and third, if so, whether that reason was credible and persuasive.<sup>80</sup>

For a long period, the Court seemed to accept the most transparently pre-textual of prosecutor explanations as sufficient, giving great deference to trial court judgments, thus de-clawing *Batson*.<sup>81</sup> More recently, however, particularly in the death penalty context, the Court has become less deferential to trial judges and more skeptical of prosecutors.<sup>82</sup> The Court seems to have recognized, at least in the most egregious cases, that, in their zeal to win, prosecutors may indeed engage in purposeful race discrimination in jury selection, a tactic reflecting stereotypical assumptions about the attitudes of members of certain racial minorities.<sup>83</sup> Furthermore, the Court seems willing, at least in some cases, to recognize the ease with which prosecutors can craft pre-textual, purportedly “race-neutral,” explanations for their conduct, thus requiring a searching judicial inquiry into the legitimacy of those explanations.<sup>84</sup>

Yet, argues Johnson, the lower appellate courts seem to disagree with the high Court's stance. Accordingly, the lower courts have either “ignore[d] or dispute[d]

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<sup>77</sup> Sheri Lynn Johnson, *Race and Recalcitrance: The Miller-El Remands*, 5 OHIO ST. J. CRIM. L. 131 (2007).

<sup>78</sup> 476 U.S. 79 (1986).

<sup>79</sup> For a definition and detailed analysis of peremptory challenges, see MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS* 449–70 (2d ed. 2005).

<sup>80</sup> See *Purkett v. Elem*, 514 U.S. 765, 767–69 (1995) (per curiam).

<sup>81</sup> See Arthur L. Burnett, Sr., *Abolish Peremptory Challenges: Reform Juries to Promote Impartiality*, 20 CRIM. JUST. 26 (2005); Arthur L. Burnett, *Jury Reform for the 21st Century: A Judge's Perspective*, 20 CRIM. JUST. 32 (2005).

<sup>82</sup> See Johnson, *supra* note 77; see also Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding*, 94 GEO. L.J. 1589 (2006) (arguing that the Court tends to protect criminal defendants' rights most vigorously when they involve a special type of adversarialism-promotion as in *Batson*).

<sup>83</sup> See Johnson, *supra* note 77; Taslitz, *supra* note 82.

<sup>84</sup> Johnson, *supra* note 77, at 146.

the Supreme Court's specific comments"<sup>85</sup> on remands; rejected (as if it were never said) the Court's instruction for more searching, skeptical inquiries; selectively quoted testimony damning to the prosecutor's case; feigned being persuaded by patently inconsistent and absurd prosecutor "race-blind" explanations; conveniently forgotten to compare relevant aspects of prosecutor treatment of black venirepersons with the very different treatment of white ones; invented race-neutral reasons never even offered by the prosecutor; rationalized patently discriminatory prosecutor actions and statements; acted as if powerful evidence of prosecutor racial animus had never even been entered into the record; deemed irrelevant histories showing a pattern of prosecutorial abuse; focused on selected aspects of the record rather than considering it as a whole; and rejected racial realities recognized by the high Court. All the while, the lower appellate courts have feigned obedience to the Supreme Court's mandates without offering its reality.

I will not repeat here the careful, detailed parsing of the relevant cases examined by Johnson. Suffice it to say that she makes a convincing case for appellate courts using the catalogue of tactics listed above to resist *Batson*'s rule while publicly declaring their obedience to it, and to deny the existence of racially discriminatory practices in favor of a "color-blind" jurisprudence that, at least in this one area, the United States Supreme Court does not embrace.

If Johnson is right, how can such resistance be halted in the future while avoiding an endless series of perhaps fruitless remands? Johnson offers several options. First, she maintains, judicial recalcitrance may "add fuel to that fire,"<sup>86</sup> the one seeking to consume peremptories entirely on the ground that there really is no way to ensure their race-neutral exercise. Second, if peremptories are to be retained, the Court should adopt a rule requiring great suspicion that racially discriminatory purpose is at work any time a prosecutor's asserted "color-blind" explanation for his strike is congruent with racial stereotyping. As Johnson puts it,

[a]ny time a prosecutor says that an African-American juror has a relative who is a criminal, or asserts that the juror is poorly educated or on welfare (or unstably employed), lives in a crime-prone neighborhood, is dumb, inarticulate, hostile, or radical, or opposes the death penalty, or mistrusts the police, to name a few, skepticism is warranted.<sup>87</sup>

Third, Johnson argues that the Court should simply recognize the frequency with which stereotyping is unconscious, thus clearly stating that unconscious racial discrimination suffices to invalidate peremptory strikes under the Equal Protection Clause. Lower courts free to rely on findings of unconscious discrimination need

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<sup>85</sup> *Id.* at 137.

<sup>86</sup> *Id.* at 158.

<sup>87</sup> *Id.*



not call the prosecutor, “with whom you must sit down at the next bar luncheon . . . a racist—and a liar to boot.”<sup>88</sup> Explains Johnson,

[i]f the Court were to emphasize the frequency with which stereotyping is unconscious, it would be much easier for a trial judge to cite that language in determining that race had influenced the exercise of a prosecutor’s peremptory challenge, even though he or she may have been unaware of that influence.<sup>89</sup>

Finally, Johnson insists, if the Court will not take one or more of these steps, then legislatures should do so, at least on an experimental basis. In doing so, legislatures might consider ways to halt race discrimination in jury selection without unduly dampening adversarial combat. For example, says Johnson, “it may be that peremptory challenges could be eliminated without significant harm if the standard for challenges for cause were less demanding.”<sup>90</sup>

### III. CONCLUSION

In its focus on the role of the subconscious, the cognitive blinders that help to perpetuate racial bias, and the temporal tactics used to achieve such blindness, this symposium seeks to use one embodied metaphor—that of sight (or its absence)—to urge protection of another sort of body, the body politic, against the ravages of race. In this respect, we hope, this symposium helps to shed new light on a centuries-old American criminal justice problem.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*