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ON JUSTITIA, RACE, GENDER, AND BLINDNESS

I. Bennett Capers*

If there is one image we associate with justice—beyond the gallows or the electric chair,¹ beyond robes in black,² beyond Renaissance images of the Last Judgment,³ and beyond (notwithstanding recent efforts) the Ten Commandments⁴—it is of Justitia herself, blindfolded, balancing a

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1. I have discussed the electric chair imagery in particular in previous work. See Bennett Capers, *On Andy Warhol's Electric Chair*, 94 CALI. L. REV. 243 (2006).

2. For a history of the robe, see Glenn W. Ferguson, *To Robe or Not to Robe? A Judicial Dilemma*, 19 J. OF THE AM. JUDICATURE SOC. 166–71 (1956). For a discussion of its symbolism, see Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes and Legal Change*, 1995 WIS. L. REV. 1129 (1995); Pnina Lahav, *Theater in the Courtroom: The Chicago Conspiracy Trial*, 16 LAW & LIT. 381, 433 (2004).

3. As Samuel Edgerton has observed, the fundamental iconic image for representing the concept of law during the late Middle Ages was the Last Judgment, with scenes arranged so that Last Judgments were likened to courts of law. One of the miniatures in the *Decretal* in fact highlights the connection between heavenly and earthly justice. A miniature painted by the fourteenth century artist Nicolo di Giacomo da Bologna contains two horizontal registers: the upper register depicting the Last Judgment, with Christ condemning sinners to hell; the lower register depicting an ecclesiastical court, with the Pope banishing sinners to prison. Last Judgment images continued to proliferate after the fourteenth century, and by the sixteenth century, Last Judgment paintings were the standard backdrop behind the judges' bench, at least in northern Europe. See SAMUEL Y. EDGERTON, JR., *PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE* 21–58 (Cornell University Press 1985).

4. The Supreme Court recently decided two cases involving the display of the Ten Commandments: *McCreary County, Kentucky v. American Civil Liberties Union*, 545 U.S. 844 (2005) (holding that displays of the Ten Commandments on courthouse grounds in Kentucky violated the establishment clause where its purpose was to endorse religion) and *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that display of the Ten Commandments on the grounds of the Texas' state capitol building did not violate the establishment clause since the display was primarily historic rather than religious). To a certain extent, however, these cases were overshadowed by the refusal of Alabama Supreme Court Justice Roy Moore to remove a Ten Commandments monument from the rotunda of the Alabama Supreme Court building. His refusal resulted in his removal from the bench, as well as a judicial order from the Eleventh Circuit that the monument be removed. *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003). See also Ariel Hart, *Alabama Justice's Ouster Upheld in Ten Commandments Case*, N.Y. TIMES, May 1, 2004, at A9; *Chief Justice Roy Moore's Last Stand*, N.Y. TIMES, Aug. 28, 2003, at A30.

scale in one hand, brandishing an unsheathed sword in the other. Indeed, the image is so ubiquitous—in courthouses, on law books, in law schools⁵—and so ingrained in our collective consciousness, that it has the weight of a given. Too often we are beyond noticing it, beyond seeing it.

This Essay is about seeing *Justitia*. Except already I need a clarification. In fact, this Essay is about looking beyond the easy attributes: the scales that suggest a careful weighing of facts; the sword that suggests the threat of swift force behind the law's judgment, what Robert Cover so aptly identified as law's violence.⁶

Rather, this Essay, like my gaze, focuses on *Justitia*'s more problematic attributes. Like *Justitia*'s blindfold, which has been described as "the most enigmatic" of her traits.⁷ Is the blindfold merely emblematic of *Justitia*'s purported impartiality, her claim to algorithmic justice?⁸ As law

5. For example, statues of *Justitia* can be found at the Sofia Court of Justice, the Brussels Palais de Justice, the Louvre, the Palace of Westminster, Old Bailey in London, France City Hall, the Munich Residenz Museum, the Santa Maria del Popolo Church in Rome, the Rijksmuseum in Amsterdam, the façade of the U.S. Capitol and, of course, the Supreme Court building in Washington, D.C.

6. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); see also Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., Routledge 1992) ("Applicability, 'enforceability,' is not an exterior or secondary possibility that may or may not be added as a supplement to law. It is the force essentially implied in the very concept of justice as law."). As another commentator has put it:

Justice . . . in one hand, holds the scales, in which she weighs the right, carries in the other the sword with which she executes it. The sword without the scales is brute force, the scales without the sword is the impotence of the law. The scales and the sword belong together, and the state of the law is perfect, only where the power with which Justice carries the sword is equaled by the skill with which she holds the scales.

RUDOLPH VON IHERING, *THE STRUGGLE FOR LAW* 1–2 (Chicago: Callaghan and Company 1879).

7. See Martin Jay, *Must Justice Be Blind?* in LAW AND THE IMAGE 19 (Costas Douzinas and Lynda Nead, eds., 1999) (quoting and translating Robert Jacob, "Images de la justice; Essai sur l'iconographie judiciaire du Moyen Age à l'âge classique" (1994)). Robert Cover made a similar point in *Procedure*. See R. COVER, O. FISS, & J. RESNICK, *PROCEDURE* Ch. 5:

There is a critical ambiguity to the blindfold of Justice—which no end of explanation in terms of 'impartiality' can illuminate. Sure Justice is blindfolded so that she may be impartial, but just as sure her blindfold cannot function on that level alone . . . the richness of the concreteness of our icon lies in its incapacity to be reduced 'merely' to an idea like impartiality.

Id.

8. See Alan Wolfe, *Algorithmic Justice*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 361, 366 (Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson, eds., Routledge 1992) (describing "algorithmic justice" as involving the blind adherence to binding rules and precedent).

professor Costas Douzinas and art historian Lynda Nead have asked, does the blindfold enable *Justitia* “to avoid the temptation to see the face that comes to the law and put the unique characteristics of the concrete person before the abstract logic of the institution”?⁹ Or does the blindfold signify something more, a second sight of sorts? Maybe that *Justitia*, unable to see, becomes, like Sophocles’ *Teiresias*, a seer? That *Justitia*, lacking sight, obtains insight? I am indebted to the French scholar M. Petitjean for yet a third possibility: that the blindfold functions as a limiting principle, reminding *Justitia* that she should tread cautiously, slowly, always cognizant of the step that came before.¹⁰ Cass Sunstein, a proponent of judicial minimalism, should appreciate that one.¹¹

Except when I consider these readings of *Justitia*’s blindfold, I know that something is missing. Or at least in my case. This is because when I linger in front of *Justitia*, I linger not just as a law professor and an iconophile—as Judith Resnik and Dennis Curtis did two decades ago in their *Yale Law Journal* essay “Images of Justice”¹²—but also as a black law professor, a black iconophile. My position in looking up to *Justitia*—looking up, since *Justitia* is normally situated on a pedestal, cast larger than life¹³—is necessarily, if unfortunately, different. Rather than a distinct male gaze¹⁴ or

9. See Costas Douzinas & Lynda Nead, *Introduction*, in *LAW AND THE IMAGE 3* (Costas Douzinas and Lynda Nead, eds., The University of Chicago Press 1999).

10. See M. Petitjean, *Un homme de loi semurois: L’avocat P. Lemulier*, in *ANNALES DE BOURGOGNE* 57:245 (cited in Martin Jay, *Must Justice Be Blind?* in *LAW AND THE IMAGE* 32 (Costas Douzinas and Lynda Nead, eds., The University of Chicago Press 1999)).

11. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4 (Harvard University Press 1999).

12. See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 *YALE L.J.* 1727 (1987).

13. *Id.* at 1741 (“For much of the Western world’s history, Justice has been depicted as a large female figure.”).

14. “The male gaze” comes from Laura Mulvey’s highly influential essay on male spectatorship, and describes not only the pleasure male viewers receive when viewing women on film, but also the concept that giving men pleasure is one of the functions of imagery. See Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *ART AFTER MODERNISM: RETHINKING REPRESENTATION* 361, 366 (B. Wallis, ed., 1988). Not surprisingly, the concept is also frequently used in discussing Western art and the prevalence of the female nude. For example, in the seminal *Ways of Seeing*, John Berger contends that “Women are depicted in a quite different way from men—not because the feminine is different from the masculine—but because the ‘ideal’ spectator is always assumed to be male and the image of the woman is designed to flatter him.” JOHN BERGER, *WAYS OF SEEING* 64 (British Broadcasting Corporation 1972).

female gaze,¹⁵ or even a dominant gaze,¹⁶ I have what can be described as a black gaze.¹⁷

Suddenly, Justitia's blindness becomes more complex, and to my mind, more problematic. After all, what does it mean, connotatively and denotatively, for Justitia to be blind in a society where color is so determinative? And given that defendants in our criminal justice system are disproportionately underprivileged men of color,¹⁸ another question must be asked: What do *they* see when they this metonymic image we call Justitia, and what are the consequences (to "them," to "us") of this confrontation? Put differently, what does it mean for Justitia to be figured not only as blind, but as white and female? To many this may seem like an idle question, something to while away the time. After all, the response might go, it's only an image. One goal of this Essay is to convince readers otherwise. After all, so much of actual justice depends on how justice is perceived.

And hence this highly personal, hopefully engaging Essay, which I think of not so much as an argument but as a journey. My *hegira*. And to encourage the reader to stay along for the ride, here's a roadmap. In Part I, I begin by tracing the historical origins of our present day Justitia, discussing the power of imagery, and posing the question of how we view her "most enigmatic" attribute, blindness. In Part II, I continue the discussion by considering how blindness plays out in criminal cases in general, from selecting a jury to executing capital defendants. In Part III, I go a step further, focusing on the Supreme Court's blindness as to matters of race in a series of Fourth Amendment cases. In Part IV, I shift the focus from Justi-

15. See, for example, the essays collected in *THE FEMALE GAZE: WOMEN AS VIEWERS OF POPULAR CULTURE* (Lorraine Gamman and Margaret Marshment, eds., The Women's Press Ltd. 1989), which attempt to situate the traditionally excluded female viewer and also stress the importance of gazes *between* female figures.

16. See Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 *LEGAL STUDIES FORUM* 243 (1991).

17. In invoking a black gaze, I am indebted to two fairly recent collections of art theory: *RACE-ING ART HISTORY: CRITICAL READINGS IN RACE AND ART HISTORY* (Kymberly N. Pinder, ed., Routledge 2002) and *WITH OTHER EYES: LOOKING AT RACE & GENDER IN VISUAL CULTURE* (Lisa Bloom, ed. 1999). I am also indebted to the work of cultural theorist bell hooks and film theorist Manthia Diawara. See BELL HOOKS, *BLACK LOOKS: RACE & REPRESENTATION* (1992); Manthia Diawara, *Black Spectatorship: Problems of Identification and Resistance*, 29 No. 4. *SCREEN* 66 (1988). I am not suggesting that spectators do not call upon a multiplicity of gazes depending on the image, or that these gazes are exhaustive. I am suggesting that these terms are useful in discussing idealized spectatorial positions.

18. As the Sentencing Project has recently noted, "black males born today have a one in three chance of going to prison during their lifetime, as opposed to a one in seventeen chance for white males." See *Racial Disparity* http://www.sentencingproject.org/issues_07.ctm. One in every eight black men in his twenties is in prison or jail. *Id.* "These trends have been exacerbated by the impact of the 'war on drugs,' with three-fourths of all drug offenders being persons of color, far out of proportion to their share of drug users in society." *Id.*

tia's blindness to her other attributes, namely, her race and her gender. In doing so, I ask what it means to look through the prism of a black male gaze at an image of justice that has been figured as white and female. Finally, in Part V, I suggest that maybe, just maybe, it is time for us to create a new image of justice.

In one respect, my goal is a modest one: to draw on law, art history, literature, and cultural studies to explore the meanings of *Justitia*, to see how that meaning functions, and to examine whom that meaning serves. In another respect, my goal is an ambitious one: to open the floor, if you will, for a larger and more inclusive discussion about the dialogic interplay between art and law, to spur a legal iconology. And in one final respect, my goal is more ambitious still. The art historian James Elkins has stated that "seeing alters the thing that is seen and transforms the seer. Seeing is metamorphosis, not mechanism."¹⁹ And that is my wish in this Essay. That in pausing to linger, we, unlike *Justitia*, will see. And that in seeing, understanding, we too will be transformed.

I.

First, a confession.

I knew little of *Justitia*'s genealogy when I began this project. I did not know, for example, that her origins are traceable to the Greek goddess Themis, one of the original Titans, the Elder Gods created at the beginning of time by heaven and earth.²⁰ There, sitting at Zeus's side, Themis was responsible for convoking and dissolving the Agora, the deliberative assembly on the authority of Zeus.²¹ As mythologist J. Harrison observed, Zeus himself could not summon his own assembly. Rather, he had to "bid Themis call the gods to counsel from many-folded Olympus' brow."²²

19. JAMES ELKINS, *THE OBJECT STARES BACK: ON THE NATURE OF SEEING* 11–12 (Simon & Schuster 1996). Elkins explains:

An image is not a piece of data in an information system. It is a corrosive, something that has the potential to tunnel into me, to melt part of what I am and re-form it in another shape. Some things in me are different because of that image, and that means—if I am willing to let down my guard and be honest about how this works—that I am not the same person as I was before.

Id. at 42–43.

20. See generally EDITH HAMILTON, *MYTHOLOGY: TIMELESS TALES OF GODS & HEROES* 24–25 (Little Brown and Company 1940); HUGH LLOYD-JONES, *THE JUSTICE OF ZEUS* 50 (University of California Press 1971); HELEN F. NORTH, *FROM MYTH TO ICON: REFLECTIONS OF GREEK ETHICAL DOCTRINE IN LITERATURE & ART* (Cornell University Press 1979) and Cathleen Burnett, *Justice: Myth and Symbol*, *LEGAL STUDIES FORUM*, Vol. XI, No. 1 (1987) at 1.

21. ERIC A. HAVELOCK, *THE GREEK CONCEPT OF JUSTICE* 101 (Harvard University Press 1978).

22. JANE E. HARRISON, *EPILEGOMENA AND THEMIS* 482 (University Books 1962).

Themis thus became associated with the process that “brings and binds men together,”²³ the maintenance of a certain order, and shared and continuing principles of law, what we today might describe as precedent.²⁴ And the Greek word “themis” came to mean “the custom,” and was applied to decrees, ordinances, and precepts of learned men.²⁵ I also learned that Justitia has another Greek forebear: Dike, the daughter of Themis and Zeus.²⁶ Occupying the seat on Zeus’s other side, Dike was responsible for administering justice. Perhaps not surprisingly, Dike is associated with the procedures created to effect the implementation of justice.²⁷ And the Greek word “dike”? It’s related to decisions.²⁸

When I began this project, I was also unaware of Justitia’s Egyptian forebear, the goddess Ma’at, from whose name derives the word magistrate.²⁹ Like our current day Justitia, Ma’at carried a sword (as well as a feather), and determined justice, law and order, as well as the fate of the dead.³⁰ And as several Egyptian papyrus scrolls reveal, Ma’at used a scale. For example, in the painted scene “Judgment Before Osiris” from the *Book of the Dead of Hunefer* (c. 1275 BCE), the goddess Ma’at appears atop of a scale in the “Hall of Two Truths” while the god Thoth, revered as the inventor of hieroglyphic writing, functions as a sort of court stenographer.³¹ A heart, representing the deceased Hunefer, appears on one dish of the scale, while Ma’at’s feather, representing truth and justice, appears on the other. The slightest turning of the scale, the image suggests, will dictate whether Hunefer will join Osiris, King of the Blessed, or be devoured by Ammit, the dreaded “Eater of the Dead.”³²

And then there’s the third source for Justitia: St. Michael, one of the seven archangels named in the New Testament, and the one tasked with

23. *Id.* at 485.

24. HAVELOCK, *supra* note 21, at 136 (1978).

25. John W. Heckel & Kathleen G. Farmann, *Questions and Answers*, 52 LAW LIBR. J. 232, 234 (1959).

26. As Zeus’s consort, Themis bore him several children representing distinct aspects of order, of which Dike is the most well known. Cathleen Burnett, *Justice: Myth & Symbol*, LEGAL STUDIES FORUM, Vol. X1, No. 1 (1987), at 81.

27. *Id.* at 82–83.

28. See F.E. PETERS, GREEK PHILOSOPHICAL TERMS: A HISTORICAL LEXICON 38–40 (1967); see also R.V.D. Magoffin, THE AMERICAN POLITICAL SCIENCE REVIEW, Vol. 3, No. 2 (May, 1909), pp. 284, 286 (reviewing RUDOLPH HIRZEL, THEMIS, DIKE UND VERWANDTES. EIN BEITRAG ZUR GESCHICHTE DER RECHTSIDEE BEI DEN GRIECHEN (1907)).

29. *Legal Symbols of the Anglo-American Tradition*, WEST’S GUIDE TO AMERICAN LAW, Vol. II, Appendix D, p. 687 (1983).

30. *Id.*

31. R.O. FAULKNER, THE ANCIENT EGYPTIAN BOOK OF THE DEAD (revised ed. C.A.R. Andrews) (1985).

32. *Id.* See also David Daube, *The Scales of Justice*, 63 JURID. REV. 109, 113 (1951). The next register informs the viewer that Hunefer has passed the test; he is presented to Osiris. In the top register, Hunefer appears in the afterlife, kneeling before the nine gods of Heliopolis.

calling forth, receiving, and judging released souls on Judgment Day.³³ Here I was on firmer ground, given my familiarity with Last Judgment paintings, many of which depict St. Michael with a sword or with scales. Jan van Eyck's *Last Judgment* (c. 1430), Rogier van der Weyden's *Beunne Alterpiece* (c. 1450), Hans Memling's *The Last Judgment* (c. 1472), Joos van Cleve's *The Last Judgment* (ca. 1520), and Tintoretto's *Last Judgment* (c. 1558) come to mind. Still, I was learning. Perhaps because *Justitia* is usually blindfolded, whereas St. Michael is always sighted, the connection had escaped me. There's even a little known painting showing the two together. In Jacobello del Fiore's *Justice Between the Archangels Michael and Gabriel* (c. 1421), which originally hung in the chamber of the Magistrato del Proprio at the Palazzo Ducale, *Justitia* sits in the central panel, while St. Michael appears in the panel to her left. Both hold a pair of scales. Both brandish an unsheathed sword.³⁴

This is not to suggest that I came to this project completely uninformed. What I knew was that images are powerful, visceral, and often polemical. As evidence, one has only to consider the face that launched a thousand ships, or the face that recently launched over a hundred thousand rioters in Afghanistan, Lebanon, Syria, Somalia, Pakistan, Nigeria,³⁵ to say nothing of the iconoclasm that spurred the Reformation. "Images are sensual and fleshy; they address the labile elements of the self, they speak to the emotions, and they organize the unconscious. They have the power to short-circuit reason and enter the soul without the interpolation or intervention of language or interpretation."³⁶ Or as art historian Pierre Legendre has put it, images help bind the biological, unconscious, and social parts of the person.³⁷ At the same time, every image is specular, stares back, tells us something about ourselves. Art historian W.J.T. Mitchell observed as much in his *Iconology*:

33. This is not to suggest that Saint Michael is the only saint associated with *Justitia*. In fact, early Latin Christians also associated the Virgin Mary with *Justitia*, since the Virgin Mary was often depicted as the intercessor for human souls at the Last Judgment, as in Fra Angelico's *Last Judgment* (c.1440). See SAMUEL Y. EDGERTON, JR., PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 38 (1985).

34. For a lengthier discussion of this painting, see GIOVANNA SCIRE NEPI, TREASURES OF VENETIAN PAINTING: THE GALLERIE DELL'ACCADEMIA 42–43 (The Vendome Press tran. 1991).

35. The riots were in response to 12 caricatures of the Prophet Muhammad first published in Denmark's *Jyllands-Posten* in September 2005 and reprinted in several European newspapers in February 2006. Within weeks, well over a hundred deaths had been attributed to protests over the caricatures. See Lydia Polgreen, *Nigeria Counts 100 Deaths Over Danish Caricatures*, N.Y. TIMES, Feb. 24, 2006, at A8; Carlotta Gall, *Muslim Protests Against Cartoon Spread*, N.Y. TIMES, Feb. 6, 2006, at A8.

36. See Douzinas & Nead, *supra* note 9.

37. Pierre Legendre, *Introduction to the Theory of the Image: Narcissus and the Other in the Mirror* 8 LAW & CRITIQUE 3, 5, 10–16 (1997) (trans. Peter Goodrich & Alain Pottage).

Images are not just a particular kind of sign, but something like an actor on the historical stage, a presence or character endowed with legendary status, a history that parallels and participates in the stories we tell ourselves about our own evolution from creatures "made in the image" of a creator, to creatures who make themselves and their world in their own image.³⁸

And I knew that Justitia is blind. And this is what intrigued me more than anything. After all, do we truly associate blindness with anything good? Even when we think of love and blindness, we see the blindness as a limitation; we snicker that "the lover is blinded about what he loves so that he judges wrongly the just, the good and the honourable."³⁹ Or we associate blindness with an impurity, as art historian Erwin Panofsky observed in discussing Justitia in his *Studies in Iconology*:

Whether the expression caecus is interpreted as 'unable to see' (blind in the narrower sense, physically or mentally) or as 'incapable of being seen' (hidden, secret, invisible) or as 'preventing the eye from seeing' (dark, lightless, black): blindness 'conveys to us only something negative and nothing positive, and by the blind man we generally understand the sinner,' to speak in the words of a mediaeval moralist.⁴⁰

The negative connotations we associate with blindness go beyond this. One thinks of the condemned, blindfolded and awaiting execution by firing squad. There is something disturbing about blindness, something we fear. Consider the narrator in Raymond Carver's short story "Cathedral" who dreads having to pass the evening with a blind man.⁴¹ Or

38. W.T.J. MITCHELL, *ICONOLOGY: IMAGE, TEXT, IDEOLOGY* 9 (University of Chicago Press 1986).

39. 5 LEGES PLATO V, *THE DIALOGUES OF PLATO* 113, (B. Jowett trans., Oxford University Press 3 ed. 1892). In his discussion of the visualization of love as blind, Erwin Panofsky notes:

Cupid is nude and blind because he 'deprives men of their garments, their possessions, their good sense and their wisdom.' He is blind 'because he does not mind where he turns, inasmuch as love descends upon the poor as well as the rich, the ugly as well as the handsome. He is also called blind because people are blinded by him, for nothing is blinder than a man influenced by love for a person or a thing.'

ERWIN PANOFSKY, *STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE* 95, 107-08 (1939, 1972).

40. *Id.* at 95-109.

41. Carver's narrator explains: "[H]is being blind bothered me. My idea of blindness came from the movies. In the movies, the blind moved slowly and never laughed. Sometimes they were led by seeing-eye dogs. A blind man in my house was not something I

consider Nobel Prize winner José Saramago's harrowing novel *Blindness*, in which a city is hit by an epidemic of "white blindness."⁴² The city responds not with compassion, but with unmitigated terror, quarantining the blind in an abandoned asylum while armed guards patrol the perimeter to make sure none escape. The novel is anything but easy, with its scenes of the blind urinating and defecating in the hallways of the asylum, unable to find lavatories, or fighting over the inadequate rations of food the soldiers leave by the gate each day; with its scenes of soldiers shooting the blind who, unable to see, wander too close to the gate; and when factions are formed to wield control over the limited food rations, with the novel's graphic scenes of gang rape and torture. Tellingly, it is the one sighted inhabitant, who feigned blindness so that she could remain at her blind husband's side, who alone is able to administer justice (by stabbing the lead rapist in the throat with a pair of scissors), and thus restore justice.

And despite our rhetoric about blindness signifying impartiality, the fact is that even when it comes to actually judging, we have seen blindness as a defect. How else can we explain the concerns raised when the Honorable Richard Casey, who happens to be blind, was nominated to the federal bench in 1992?⁴³ Luckily, those concerns were allayed.

Which brings me to my favorite Bruegel drawing, his *Justitia* (1559). On a pedestal in the foreground stands Justice personified, properly blindfolded, sword in one hand, scales in the other. It's only when the viewer looks beyond the foreground that the viewer notices the surrounding torture, the surrounding cruelty: the penitent being beheaded, the man strapped to a bench while boiling liquid is poured down his throat, the persons tied to wheels, while others hang from gallows, the person hanged by his bound ankles and wrists.⁴⁴ All in the name of Justice.

Isn't this what we think of when we think of blindness?

II.

The more I began to think about *Justitia's* blindness, the more I saw blindness everywhere, especially in the criminal arena, with which I am most familiar. The trope of blindness permeates the process, at least

looked forward to." Raymond Carver, *Cathedral*, in *WHERE I'M CALLING FROM: SELECTED SHORT STORIES* 356 (1989).

42. JOSÉ SARAMAGO, *BLINDNESS* (trans. Giovanni Pontiero) (1997).

43. *A Blind Judge*, N.Y. TIMES, Feb. 6, 1992, at A22 ("Even in this age of increased opportunities for the disabled, the Senator's candidate, Richard Casey, pushed the outer boundaries of what the judicial system can accommodate The ability to make eye contact has almost universally been assumed indispensable for the task of trial judging."); see also Lynda Richardson, *Lawyer Who Is Blind Is Recommended To Be Federal Judge*, N.Y. TIMES, Feb. 2, 1992, at B6.

44. For an interesting discussion of this drawing, see LIONELLO PUPPI, *TORMENT IN ART: PAIN, VIOLENCE AND MARTYRDOM* 15 (1991).

notionally. Juries used to be comprised of a defendant's peers.⁴⁵ Now, we insist on jurors who are anything but the defendant's peers, excluding those who know the defendant, or the defendant's family, or the defendant's neighborhood. And that is only the beginning. We exclude those who know anything about the crime itself, about where the crime was committed, about the victim, or the victim's family. And lest some vision still remain, we exclude venire persons who know the prosecutor, the defense attorney, the judge.

From there the enforced blindness continues. The evidence juries are permitted to consider is based more on rules of exclusion rather than inclusion. Evidence that would tend to provide explanation or context is deemed irrelevant, or non-probative. We stick to this line so strongly that we banish any juror who so much as mentions extraneous evidence. And if that doesn't remedy the problem, we declare a mistrial. Because we insist. We tell ourselves the judge can factor this all in at sentencing. For now, it should be the blind leading the blind.

Indeed, the contrast between what information jurors are permitted to know and what information is excluded becomes most glaring in capital cases. There, the capital phase allows the jurors to see evidence that was previously excluded. This is true of mitigating evidence. That the defendant's mother was a crack addict and that, between the ages of seven and ten, he was raped repeatedly by one of her successive boyfriends. That though not mentally retarded, at least not enough to insulate him from execution under *Atkins v. Virginia*,⁴⁶ he is on the borderline. That he has been repeatedly diagnosed as psychotic. And this is true of aggravating evidence. No, this was not his first arrest. No, this was not even his first murder. And did we mention the prior rape convictions? Only in these few capital cases, however, do we allow this fuller image to emerge. Only after we've secured a guilty verdict in the guilt phase. Only when the concept of innocence or even juror nullification has been removed from the table, only when the only option left is life imprisonment, or death. Only then do we begin to lift the veil. When we choose death, we continue our enforcement of blindness. It used to be that in death by firing squad, the defendant awaiting execution would be blindfolded. But the blindness went both ways. The defendant was blindfolded, and thus

45. As Lawrence Friedman has observed, jurors were not supposed to be "impartial, unaware, blank pages," but rather community men with "a keen knowledge of the good and rotten apples in their barrel." LAWRENCE M. FRIEDMAN, *CRIME & PUNISHMENT IN AMERICAN HISTORY* 26–27 (1993). For example, an early Virginia law drew a clear preference for jurors familiar with the case, stating that jurors should be drawn from "thence who by reason of their neere acquaintance with the business may give information of diverse circumstances to the rest of the jury." W.W. HENING, *STATUTES AT LARGE OF VIRGINIA*, Vol. 2, p. 63.

46. 536 U.S. 304 (2002) (overruling its prior decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) and holding that the Eighth Amendment bars the execution of the mentally retarded).

couldn't see his shooter, but the shooters too were blind in a way. Because there were several shooters firing at once, they could remain blind to who fired the fatal shot.⁴⁷ This double blindness exists even where death is by gas, by lethal injection, or by electric chair. And that is because responsibility for state-imposed death is always diffused, from the prosecutor to the jurors to the sentencing judge to the appellate courts to the executive to the warden.⁴⁸ A system so perfect that not one of the participants ever has to look in a mirror and see a killer. An execution without an executioner.

Either way—in capital cases or in non-capital cases—the defendants are banished from our sight entirely.⁴⁹ They are removed from view, placed behind cinder block walls, rendered invisible but for the occasional riot or escape, or the salacious prisoner's rights case, such as the inmate alleging that he was repeatedly gang raped,⁵⁰ or the Jewish inmate suing to be classified as "non-white other."⁵¹ Aside from these brief incursions into our consciousness, the condemned remain invisible, reduced to mere numbers, and we remain blindly indifferent. For anyone who doubts this, just consider the numbers. The U.S. prison and jail population is well over 2 million.⁵² In terms of people, this is more than the population of

47. We even armed one of the firing squad members with a blank round, further insulating each shooter from responsibility.

48. Craig Haney has argued that this distance is not accidental, but part of an elaborate system to ensure that citizens continue to sanction executions. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 *STAN. L. REV.* 1447, 1449 (1997). Professor Markus Dubber makes a similar observation:

Viewed in its complex entirety, the modern system of capital punishment appears as one mad and futile scramble to deny personal responsibility for the necessarily violent aspect of law. It is the system of capital punishment that inflicts the pain of its punishment, not any of its members. If a particular member of the system is to be held responsible for the system's acts, it is always someone else, someone earlier, and someone elsewhere.

Markus Dirk Dubber, *The Pain of Punishment*, 44 *BUFF. L. REV.* 545, 605–06 (1996).

49. This is not to say that inmates are invisible inside the prison. There, they are always under surveillance, as Foucault pointed out in his exegesis of the penitentiary as panopticon. See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 280 (Alan Sheridan, trans. 1977). My point, rather, is that they are invisible from outside of the prison.

50. See, e.g., Adam Liptak, *Inmate Was Considered 'Property' of Gang, Witness Tells Jury in Prison Lawsuit*, N.Y. TIMES, Sept. 25, 2005, at A1 (discussing case of Roderick Johnson who sued Texas prison system for turning a blind eye to the repeated rapes he endured as an inmate); *Sexual Slavery in Prison*, N.Y. TIMES, Oct. 12, 2005, at A22 (same).

51. See, e.g., Phillip Martin, *Jewish Inmate Seeks Segregation From Anti-Semitic Gangs*, NPR's ALL THINGS CONSIDERED, Nov. 6, 2005 ("A Jewish inmate at California's San Quentin prison says his life is in danger because he's being housed with other white inmates, many of whom belong to anti-Semitic white supremacist gangs. The inmate is asking the prison to reclassify him from "White" to "Other.").

52. Bureau of Justice Statistics, *Prisoners in 2004* (U.S. Dep't of Justice).

Delaware, more than the population of New Hampshire, more than the population of Wyoming, more than the population of Vermont. To mention nothing of minority communities, where as many as 10% of all males age 25 to 29 are now behind bars.⁵³ Just imagine if a tenth of the young males you knew were no longer present, no longer reachable. Is it any wonder that advocates who lobby against New York's Rockefeller Drug Laws refer to themselves as Mothers of the New York Disappeared?⁵⁴

We are especially proud of our professed blindness when it comes to race, perhaps the most meaningful and meaningless visual attribute there is. With *Batson v. Kentucky*,⁵⁵ we prohibited prosecutors from using race in selecting jurors. We instruct jurors not to consider race. Indeed, we reverse for a new trial if the judge fails to so instruct. We tell prosecutors not to make appeals to race, again reversing if they do. And if it is discovered that race played a role in deliberations, we reverse for a new trial. So we blind ourselves to issues of race. Indeed, we determined that race was so problematic that we created "reverse *Batson*," prohibiting defense lawyers from striking jurors based on race.⁵⁶ Never mind that our history is all about race. That until recently, blacks were routinely excluded from jury service. And continue to be excluded, as we were forced to acknowledge just a few years ago in *Miller-El v. Dretke*.⁵⁷ Never mind that until recently, prosecutors routinely appealed to race, and that jurors still consider race. For evidence, one only has to think of the racial disparities in capital sentencing that were brought to the Supreme Court's attention, to no avail, in *McCleskey v. Kemp*.⁵⁸ Or of the social cognition research showing the

53. See <http://www.sentencingproject.org/pdfs/1044.pdf>.

54. For more on this organization, see <http://www.nymom.org> (last visited February 12, 2006).

55. 476 U.S. 79 (1986).

56. *Georgia v. McCollum*, 505 U.S. 42 (1992).

57. 545 U.S. 231 (2005) (granting habeas relief to a black death-row inmate after concluding that prosecutors had engaged in purposeful discrimination in using their peremptory challenges to excuse ten of eleven black venirepersons, and noting "the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries").

58. 481 U.S. 279 (1987) (declining to invalidate a Georgia death penalty statute on constitutional grounds despite statistical evidence demonstrating that, in Georgia, the imposition of death often strongly correlated with the race of the defendant and the race of the victim because the racial discrepancies did "not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."). See also Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1411-13 (1988) (noting the seeming indifference of the Supreme Court to the continuing pervasiveness of racism in the administration of criminal justice) and SAMUEL R. GROSS and ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* 110 (1989). A more recent study found that in Maryland, while victims in capital cases between 1978 and 1999 were roughly evenly split, in 80% of the cases where the death penalty was imposed, the victim was white. Adam Liptak, *Death Penalty Found More Likely When Victim is White*, N.Y. TIMES, Jan. 8, 2003, at A12.

pervasiveness of implicit racial biases.⁵⁹ Despite all of this, we maintain the fiction. That the jury was colorblind. That justice was served. That blindness is justice.

III.

It just so happens that as I was researching *Justitia's* genealogy, I was also rereading Fourth Amendment cases. And maybe because I was thinking about blindness, I was suddenly struck by the repeated elisions and displacements in matters of race in the cases I read. Consider the solecism in the following passage from *Oliveira v. Mayer*,⁶⁰ a civil rights action alleging wrongful arrest:

On January 4, 1991, a private motorist spotted the plaintiffs, three dark-skinned males, handling an expensive video camera while driving a dilapidated station wagon through an affluent area of North Stamford, Connecticut. Suspicious *merely* because the camera appeared quite valuable and because the vehicle had New York license plates and had emerged from a dead-end street, the motorist called the police from his car phone and reported that there may have been a burglary.⁶¹

Merely? Isn't this just selective blindness recast as a shell game of now you see it, now you don't? In referring to the males as "dark-skinned," and yet omitting their color in listing the factors that likely triggered the complainant's suspicion, isn't the Second Circuit both revealing race and concealing race, revealing it as a factor, concealing its relevance?

Or consider Justice Scalia's opinion in *Whren v. United States*,⁶² which held that pretext stops, i.e., stops for minor offenses in the hope that evidence of a more serious offense will be revealed, do not violate the Fourth Amendment. In describing the facts of the case, Justice Scalia states that plainclothes vice-squad officers became suspicious when they spotted a dark Pathfinder truck with temporary plates "and youthful occupants" waiting at a stop sign, and observed the driver looking down into the lap of the passenger at his right. Seeing the driver later turn without signaling and drive away "at an 'unreasonable' speed," the officers pulled alongside the Pathfinder and ordered the driver to park. An officer then approached

59. See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490-1539 (2005) (charting the social science data and examining the reification of biases through the media); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCH. BULLETIN 1367 (2000).

60. 23 F3d 642, 644 (2d Cir. 1994).

61. *Id.* at 644 (emphasis added).

62. 517 U.S. 806 (1996).

the Pathfinder on foot and “immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren’s hands.”⁶³

Not surprisingly, Whren and the other occupants challenged the legality of the stop, arguing that the officers’ asserted ground for approaching them—to give them a warning concerning a traffic violation—was pretextual. Justice Scalia, writing for the Court, rejected this argument, essentially concluding that officers are permitted to engage in pretext stops, whatever their ulterior motives, so long as they have reasonable suspicion or probable cause to conduct a stop. What interests me about his opinion, however, is the way he, like the Second Circuit in *Oliveira*, both concealed and revealed race. Reading his recitation of the facts, one could think the occupants of the vehicle were colorless, or that the officers were colorblind. It is not until several lengthy paragraphs later that Justice Scalia mentions that the petitioners are black, and even here, he is able to profess a type of blindness by mentioning race solely in the context of stating the petitioners’ argument: “Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car’s occupants.”⁶⁴ Justice Scalia thus presents race as a double afterthought: as an afterthought of the petitioners to buttress their presumably weak claim, and as an afterthought that occurred to him only upon the petitioners’ bringing race to his attention. *Oh, you’re black. We hadn’t noticed.* And as if to reemphasize the Court’s professed colorblindness, Justice Scalia never mentions the race of the defendants again, nor the role it might have played in the officers’ decision to conduct a pretext stop other than to inform the petitioners that the “basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.” But of course the concealment of race is little more than legerdemain, and transparent at that, especially since the concealment isn’t even internally consistent. Justice Scalia repeatedly races the officer who allegedly sees the crack cocaine by repeating his name—Officer Ephraim Soto⁶⁵—while omitting the names or providing any description of the other plainclothes vice-squad officers. The strategy is clear: Race was not a factor here. We do not even notice race. Honestly. Just ask the Hispanic cop.

I began to realize that this blindness impacts not only the way courts write (or do not write) about race, but also the way courts think (or do not think) about race. Here’s another Fourth Amendment example: the Supreme Court’s “free to leave” test, first announced in *U.S. v. Mendenhall*⁶⁶ and elaborated upon in *INS v. Delgado*,⁶⁷ *Florida v. Bostick*,⁶⁸

63. *Id.* at 808–09.

64. *Id.* at 810.

65. Justice Scalia refers to Officer Soto by name a total of five times.

66. 446 U.S. 544 (1980).

67. 466 U.S. 210 (1984).

68. 501 U.S. 429 (1991).

and *U.S. v. Drayton*.⁶⁹ In each of these cases, the Supreme Court was confronted with whether a limited detention had occurred requiring reasonable suspicion.

In *U.S. v. Mendenhall*, DEA agents observed Sylvia Mendenhall as she was walking through the concourse at the Detroit Airport and, concluding that she met several of the profile characteristics of a drug courier,⁷⁰ asked to see her identification and airline ticket. Ms. Mendenhall willingly complied—she had just arrived on a flight from Los Angeles and was en route to a connecting flight—but because the name on the ticket and the identification did not match, and because, according to one of the agents, she seemed “quite shaken, extremely nervous,”⁷¹ the agents asked her to accompany them to the airport DEA office for further questioning. There, the agents asked if they could search her handbag. She consented. They asked if they could search her person. She consented. They asked if they could conduct a strip search. She said she had a plane to catch. They said if she did not have any narcotics, there wouldn’t be a problem. So she stripped. She removed packages of heroin from her undergarments and handed them to an agent. She was prosecuted and convicted. Here’s the rub. There was no dispute that, when the officers approached Ms. Mendenhall, they lacked probable cause to arrest her. And before the Supreme Court, the Government denied that there had even been a limited detention requiring reasonable suspicion pursuant to *Terry v. Ohio*.⁷² The Government argued instead that Mendenhall was never detained, that she was always “free to leave.”⁷³ They argued that during the entire time she was questioned by the agents, the entire time she was in the DEA office, the entire time she was removing her clothes, it was consensual. The Court essentially agreed. Since “a reasonable person” would have felt free to leave, her consent to the search was not the product of detention requiring either reasonable suspicion or probable cause.⁷⁴

69. 536 U.S. 194 (2002).

70. 446 U.S. at 547 and n.1. The agent testified that he found four factors relevant:

(1) [T]he respondent was arriving on a flight from Los Angeles, a city believed by the agents to be a place of origin for much of the heroin brought into Detroit; (2) the respondent was the last person to leave the plane, “appeared to be nervous,” and “completely scanned the whole area where [the agents] were standing”; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.

Id.

71. 446 U.S. at 548.

72. 392 U.S. 1 (1968).

73. 446 U.S. at 550–51.

74. *Id.* at 555. Though Justice Stewart’s opinion failed to garner a majority—seven justices declined to rule that no seizure had occurred, finding that the argument had not

Sylvia Mendenhall was an African American.⁷⁵

In *INS v. Delgado*, between twenty and thirty federal agents entered a factory and conducted a sweep to suss out illegal aliens, and four of the employees later filed suit, claiming that the agents lacked reasonable suspicion to conduct the sweep. Invoking its “free to leave” test, the Court rejected the claim. Never mind the fact that several agents immediately moved throughout the factory to systematically question the employees. Never mind the fact that the agents were armed and carried handcuffs. Never mind the fact that other agents (presumably armed as well) manned the exits.⁷⁶ As Justice Rehnquist put it in writing for the majority, this “could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory” or simply leave.⁷⁷ In short, they were never detained.

The employees were Hispanic.

In *Florida v. Bostick*, Terrance Bostick was on a Greyhound bus traveling from Miami to Atlanta. At a temporary stop, the driver allowed two police officers to board the bus and question the passengers. When the officers reached Bostick, they asked for identification, and when this seemed to be in order, they asked for permission to search his luggage. Bostick consented. Drugs were found. The trial court rejected his contention that he had been detained without reasonable suspicion, he was convicted, and the Supreme Court affirmed. Never mind that the bus driver himself had exited, closing the door behind him, effectively leaving the passengers stranded so that the officers could search for drugs. Never mind that the officers were armed. Instead they said a reasonable person would have felt free to leave.⁷⁸

Terrance Bostick was African American.⁷⁹

And then there’s *U.S. v. Drayton* which, not surprisingly, reads like a repeat of *Bostick*. Christopher Drayton and Clifton Brown, Jr. were passengers on a Greyhound bus traveling from Ft. Lauderdale to Detroit. At a pit stop in Tallahassee, the driver allowed three plain clothes officers to board the bus and conduct “routine” questioning of the passengers. And when two officers got to Drayton and Brown, one of the officers—Officer Lang—placed “his face 12-to-18 inches away from Drayton’s” and asked to check Drayton’s bag.⁸⁰ Finding nothing in the bag, the officer then asked Drayton’s companion Brown if he could frisk him. Brown

been properly preserved by the government—the Court adopted his articulation of the “free to leave” test in subsequent cases.

75. *Id.* at 558 (identifying Mendenhall as “a female and a Negro”).

76. Brief for Respondents at 3–4, *INS v. Delgado*, 466 U.S. 210 (1984) No. 82-1217.

77. 466 U.S. at 220–21.

78. Although the Court in *Bostick* did not decide this issue, it strongly suggested that the encounter between Bostick and the officers was not a seizure. 501 U.S. at 435.

79. *Id.* at 441 n.1 (Marshall, J., dissenting).

80. 536 U.S. at 198.

consented, drugs were found, and he was arrested. The officer then returned his attention to Drayton, asking Drayton if he would consent to a frisk. Notwithstanding that Drayton had just seen his companion arrested, according to the record, Drayton consented as well. And drugs were found on Drayton. And Drayton was arrested.⁸¹ A detention without reasonable suspicion? Of course not. Free to leave? You bet. Never mind that one of the three officers had positioned himself at the front of the bus near the sole exit.⁸² Never mind that the officers were armed.⁸³ Never mind that the bus driver, to assist the officers, had essentially rendered the passengers immobile.

Drayton and Brown were African American.

The gravamen of my complaint is not that racial profiling occurred—though certainly the evidence points in that direction.⁸⁴ Nor is my aim necessarily to weigh in on the debate about the merits of racial profiling as a law enforcement tool or to call attention to how racial profiling victimizes blacks and other people of color as a class, rendering

81. *Id.* at 199.

82. *Id.* at 197.

83. A recurring motif in the Supreme Court's free to leave cases is that the officers did not display their weapons. But this simply does not hold water. Furthermore, it suggests a type of blindness: that while officers are capable of spotting bulges under coats from a mile away, as they frequently claim to do, a reasonable person would neither notice the officer's bulge or holster, nor would a reasonable person assume that the officer is carrying a weapon. Moreover, it suggests that while an officer is right to feel apprehensive about a bulge on a citizen—hence, his authority to conduct a limited pat down under *Terry v. Ohio*, 392 U.S. 1 (1968)—a reasonable person would feel no apprehension about seeing a bulge, or a billy club, on a cop. This, however, is not reality. As Justice Stevens has pointed out, in certain communities, even an innocent person may "believe[] that contact with the police can itself be dangerous." *Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., with whom Souter, Ginsburg, and Breyer, J., joined, dissenting).

84. Consider *Mendenhall* again. Even though the factors the agent identified as prompting him to approach Mendenhall did not include her race, 446 U.S. at 547 and n.1, it is hard to imagine that he did not notice her race or that race was not a factor. Certainly, recent studies suggest race was likely a factor. For example, a report released by the U.S. General Accounting Office found that black women traveling internationally were nine times more likely than white women to be subjected to x-rays or strip searches by U.S. Customs officials, even though they were less than half as likely to be carrying contraband. Such targeting prompted a class action suit against officials. See *Black Women Searched More, Study Finds*, N.Y. TIMES, Apr. 10, 2000, at A17; John Gibeaut, *Marked for Humiliation*, NBA NAT'L BAR ASS'N MAGAZINE 20, Jan./Feb. 1999; David Johnston, *U.S. Changes Policy on Searching Suspected Drug Smugglers*, N.Y. TIMES, Aug. 12, 1999, at A14. Other studies have found disproportionate targeting of black and Hispanic drivers. See, e.g., John Lamberth, *Driving While Black: A Statistician Proves that Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1; Michael Raphael & Kathy Barrett Carter, *State Police Reveal 75% of Arrests Along Turnpike Were of Minorities*, NEWARK STAR-LEDGER, Feb. 10, 1999, at 1. For more on the pretextual stops of Hispanics, see Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000).

them inherently suspect, burdening them with a “racial tax,”⁸⁵ labeling them as second class. Finally, my point is not to simply look “beyond racial profiling” as R. Richard Banks has recently advocated.⁸⁶ Rather, my point is to look *before* racial profiling. Put differently, before we can talk racial profiling, we must talk race.

To say that the Supreme Court was blind to issues of race in these cases is an understatement. In the majority opinions in these cases, race either remained unstated or was mentioned only in passing.⁸⁷ But are we really to believe that race did not play a role in the DEA agents’ decision to single out Mendenhall? Are we really to believe that race did not play a role in the officers’ singling out Bostick and Drayton for a bag search? Are we really to believe that race did not factor into the DEA agents’ decision to ask Mendenhall to strip, or into Officer Lang placing his face “12 to 18 inches” away from Drayton’s, or into the INS agents’ decision to man the factory exits? Clearly the officers in each of these cases felt empowered by their authority, their uniforms, their badges.⁸⁸ Is it too much to say that they also likely felt empowered because of each suspect’s race; and that conversely, each suspect felt disempowered?⁸⁹ How else do we explain the

85. See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 159 (1997) (describing racial profiling as burdening minorities with a “racial tax”); see also JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13–14 (1997) (using the term “Black Tax” to describe the burden that blacks bear as a result of racial stereotyping).

86. See R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 *STAN. L. REV.* 571 (2003) (arguing that policymakers should abandon efforts to eliminate racial profiling in drug interdiction because such efforts will prove futile; instead, policymakers should focus on the race-related consequences of the war on drugs).

87. In *Bostick*, for example, the majority opinion never mentions Bostick’s race. In his “(E)racing the Fourth Amendment,” Devon Carbado unpacks the social meaning of this elision and how it constructs Bostick and the officers with the racial ideology of colorblindness. See Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *MICH. L. REV.* 946 (2002). Indeed, I am indebted to Carbado for much of my thinking about blindness and the law.

88. Others have written on the dynamic of encounters from the perspective of the citizen/suspect. See, e.g., Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 *SUP. CT. REV.* 153, 155 (noting that “empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures” such as those that are common in police-citizen encounters.). What I am focusing on here is the flip side: not the vulnerability of the citizen/suspect, but the feeling of invulnerability, of being beyond the law, that too often accompanies having a badge.

89. For example, Professor Maclin has argued that “the dynamics surrounding an encounter between a police officer and a black male are quite different from those that surround an encounter between an officer and the so-called average, reasonable person,” and by definition involve a degree of coercion. See Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 *VAL. U. L. REV.* 243 (1991). David Cole and Devon Carbado have also built upon this

fact that none of these individuals—who after all knew that they were engaged in unlawful activity, knew that they could be arrested—that none of these individuals walked away from these so called consensual “encounters,” that none of them declined to consent to searches? How do we explain that these defendants, whom the Supreme Court claimed were free to leave, did not leave?

The Supreme Court was also blind to the impact of its “free to leave” test and *Whren* on law-abiding citizens of color. The “free to leave” test allows law enforcement officers to single out minorities for “encounters” in the hope that criminal activity will be revealed, secure in the knowledge that minorities are less likely to feel free to leave⁹⁰ and secure in the knowledge that these encounters will remain beyond the purview of the Fourth Amendment.⁹¹ The same applies to singling out minorities for pretextual stops. Meanwhile, law-abiding citizens of color endure these encounters continuously. The irony is that while the Supreme Court professes to be colorblind, its decisions have essentially given law enforcement a green light to use criteria that is anything but colorblind in deciding whom to question, whom to target, and whom to harass.

argument. See DAVID COLE, *NO EQUAL JUSTICE* 32 (1999); Devon W. Carbado, *supra* note 87, at 946.

90. As Devon Carbado points out, “people of color are socialized into engaging in particular kinds of performance for the police.” See Carbado, *supra* note 87. Put differently, the burden is often different when it comes to people of color. Since they are already presumed to be guilty, or at least suspect, the burden is implicitly shifted to them to establish their innocence. This means that a person of color who is not engaged in wrongdoing may nonetheless consent to a search or agree to answer questions, foregoing his right to refuse, in order to prove his innocence. On the other hand, a person of color who is engaged in wrongdoing may nonetheless consent to a search or to answer questions, foregoing his right to refuse, because he recognizes he has nothing to gain by asserting his rights: regardless of his response, he has already been identified as guilty or suspect by virtue of the pigmentation of his skin. Indeed, he may assume that he has everything to lose by asserting his rights: As Professor Maclin puts it, “Black men know they are liable to be stopped at [any time], and that when they question the authority of the police, the response is often swift and violent.” Maclin, *supra* note 89 at 253. Finally, a white person may feel neither of these pressures, since a white person is more likely to start from the position of presumed innocence. Moreover, a white person is more likely to feel assured (and be reassured) that his refusal to consent or answer questions will not alter this presumption. As the foregoing should make clear, limiting the analysis in “free to leave” cases to whether a “reasonable person” would feel free to leave not only obscures these differences, it turns a blind eye to them.

91. Profiling based on race is but one example, but an example where the literature has flourished. See, e.g., David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560–73 (1997) (detailing stories of pretextual stops targeting African Americans and Hispanics); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344–54 (1998) (examining empirical evidence that police officers target minorities for arbitrary traffic stops); David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1.

When I think of these cases, I try to imagine DEA Agents singling out a Supreme Court justice—any of them, it doesn't matter—at an airport.⁹² I try to imagine the agents asking the justice to accompany them to their office, and to consent to a luggage search or a strip search. Or the highway patrol pulling over one of the justices driving along I-95. But the power dynamic is all wrong, and not just because of race. There is also gender, perceived social status, class, age. But in the end race seems to trump all of this. In the case of the Supreme Court justice, the agents would not dream of pulling over a justice, let alone asking for consent to a search or consent to conduct a strip search, except maybe of Justice Thomas. And none of the justices would dream of consenting. It's that simple.

But back to the “free to leave” test. In *Drayton*, the 11th Circuit had reversed based on its prior decisions which had adopted a simple prophylactic rule: officers, before securing consent to search, give some positive indication that consent could be refused.⁹³ Given that the Supreme Court had little problem adopting the prophylactic warning announced in *Miranda*⁹⁴ when custodial interrogation is at issue, reconfirming *Miranda* in *Dickerson v. U.S.*,⁹⁵ why not adopt one where officers want to engage in a warrantless consent search?⁹⁶

The Warren Court saw that *Miranda* warnings were necessary in part because of the racial dynamics of police interrogations.⁹⁷ The Court today acts blindly by pretending those dynamics do not exist.

92. I assume that the agents do not recognize the justice.

93. See *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998).

94. 384 U.S. 436 (1966).

95. 530 U.S. 428 (2000).

96. The Court's rejection of any warning was of course predicated on its decision in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), which held that the Fourth Amendment requires only that consent be voluntary, not that it also be knowing, and which expressly rejected any requirement that the subject of a search be advised of his or her right to refuse consent. However, Justice Stewart's justification for rejecting this requirements is not satisfactory. His main contention is that it “would be thoroughly impractical to impose on the normal consent search the detailed requirement of an effective warning.” *Id.* at 231. But this assumes that any warning would require substantial detail, an assumption without basis. It also disregards the fact that many officers routinely give warnings that consent is not required. Indeed, in *Bostick*, the officer advised the defendant that he could refuse consent. And, in *Drayton*, Officer Lang testified that he sometimes informed passengers of their right to refuse to cooperate. Which begs the question: how cumbersome or impractical could it be to require officers to advise subjects of their right to refuse consent, if many officers provide such advice already?

97. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 751 (1992) (noting that “[A]n important impetus for the [*Miranda*] decision was the desire to constrain the unchecked policy discretion promoting the official violence that reinforced subjugation of the black underclass.”). Indeed, a draft of the opinion expressly acknowledged the racial dynamics of police interrogations. When Justice Brennan objected, the passage referring to race was omitted from the final opinion. See BERNARD SCHWARTZ,

In his provocative essay “Must Justice Be Blind?” Martin Jay argues that perhaps we should reconfigure *Justitia* as she was depicted in the mid-sixteenth century in the frontispiece to J. de Damhoudere’s *Praxi Rerum Civilium*: as having two faces:

The first has eyes that are wide open, able to discern difference, alterity, and identity, looking in the direction of the hand that wields her sword, while the second, facing the hand holding the calculating scales of rule-governed impartiality, has eyes that are veiled. For only the image of a two-faced deity, a hybrid, monstrous creature that we can in fact see, an allegory that resists subsumption under a general concept, only such an image can do, as it were, justice to the negative, even perhaps aporetic, dialectic that entangles law and justice itself.⁹⁸

The problem with Martin Jay’s reconfiguration is that, in a way, we already have a two-faced Justice. And perhaps this is the crux of the matter. It is not that *Justitia* is always blind. That, we could work with. It is that her blindness is selective and practiced, especially when it comes to matters of race. When it suits her purpose, i.e., in her agents, our law enforcement officers, deciding whom to pull over for a traffic stop, or whom to target for a “consensual” encounter, she sees it. When it does not suit her purpose, i.e., in acknowledging the racial dynamic of police encounters, or the impact its decisions will have communities of color, she turns a blind eye, engages in something akin to conscious avoidance.⁹⁹ This is really my point about these cases. It is not that these defendants should not have been prosecuted. It is not that they should never have been stopped or questioned. Those questions go beyond the limits of this Essay.

SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 591 (1983).

98. Martin Jay, *Must Justice Be Blind?* in *LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* 35 (Costas Douzinas and Lynda Nead, eds., 1999).

99. A conscious avoidance charge, or “ostrich” instruction, is often appropriate in cases where the Government must establish that the defendant had knowledge of a particular fact, and the evidence suggests that he deliberately turned a “blind eye” to avoid knowledge of the fact. My favorite description of the charge comes from Judge Posner.

[Ostriches] do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings. A deliberate effort to avoid guilty knowledge is all the guilty knowledge the law requires.

United States v. Giavannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.).

My point is simpler: that before we can ask these larger questions, we first need some honesty about what justice is and how it is executed. And this means speaking honestly about justice and race.

IV.

However, the issue is about more than just blindness.

In March of 1937, just a few years after Diego Rivera's infamous mural of Lenin in Rockefeller Center, a lesser-known artist, Stefan Hirsch, was commissioned to paint a mural for a new federal courthouse in Aiken, South Carolina.¹⁰⁰ Receiving little guidance from the government, Hirsch turned to an earlier sketch he'd done, *Justice as Protector and Avenger*, and in August 1938 traveled to Aiken, South Carolina to install the painted mural onto the courtroom wall.¹⁰¹ The uproar was immediate. The federal judge called the mural a "monstrosity" and a "disgrace" and ordered it covered.¹⁰² To the extent the source of the offense was unclear, the spectators in the courtroom were direct and to the point: "the central figure, a woman representing Justice, resembled a 'mulatto.'" ¹⁰³ A campaign to remove the mural kept the issue on the front pages of the *Charleston News-Courier* and the *Columbia State* for two years.¹⁰⁴ In the face of claims of states' rights, calls to repaint Justice in pallid hues, and the prospect of vigilante justice for Lady Justice, the government eventually gave in. The mural was removed.¹⁰⁵

I mention this incident because it suggests that Justitia has another attribute that is rarely commented on, beyond her scales, unsheathed sword, beyond her bandaged eyes: whiteness. Clearly the outraged South Carolinians had been expecting a white Justitia, though they may not have realized this beforehand. More likely, her whiteness was a given, something assumed.

But beyond this observation, there is another reason I find this incident intriguing. To me, the incident, or rather the telling of it, contains a gap. What were South Carolina's black residents thinking during this

100. The mural was commissioned by the Treasury Department through its Section of Fine Arts. See KARAL ANN MARLING, *WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST-OFFICE MURALS IN THE GREAT DEPRESSION* 30 (1982).

101. *Id.* at 62–64. Viewers also had trouble with the images on the left, which they believed glorified crooks and valorized a venal public servant. *Id.* at 66. One image was even interpreted as that of a "'shyster' lawyer freeing a prisoner from jail." *Id.* at 65 (quoting from the *Washington Evening Star*, Sept. 27, 1938).

102. *Id.* at 64 (quoting from *The State* (Columbia, South Carolina), Sept. 27, 1938).

103. *Id.*

104. The NAACP even weighed in: "If Judge Myers' sole objection to the mural is the fact that the central figure is that of a person who is not white, then a new low in judicial conduct and racial prejudice would seem to have been reached." *Id.* at 69.

105. *Id.* at 67–71.

brouhaha? And for that matter, what were they thinking, and what do they think today, upon encountering this metonymic image we call *Justitia*? What does it mean, in this Manichean exchange, to “look black” not as an object, but as a subject, as agency, as a way of looking?¹⁰⁶ What does it mean to look black at an image of justice that has been figured as white?

To most whites, the idea of whiteness is salutary, as cultural theorist Richard Dyer lays out in his influential essay “*White*”:

Power in contemporary society habitually passes itself off as embodied in the normal as opposed to the superior. This is common to all forms of power, but it works in a peculiarly seductive way with whiteness, because of the way it seems rooted, in common-sense thought, in things other than ethnic difference. . . . Thus it is said (even in liberal textbooks) that there are inevitable associations of white with light and therefore safety, and black with dark and therefore danger, and that this explains racism (Whereas one might well argue about the safety of the cover of darkness, and the danger of exposure to the light); again, and with more justice, people point to the Jewish and Christian use of white and black to symbolize good and evil, as carried still in such expressions as “a black mark,” “white magic,” “to blacken the character” and so on.¹⁰⁷

But as bell hooks has pointed out, for blacks, whiteness has historically presented itself not as benign, but as associated with the “terrible, the terrifying, the terrorizing. . . . To name that whiteness in the black imagination is often a representation of terror.”¹⁰⁸

In the end, our legal history supports, rather than undermines, the view that the linkage of “white” and “justice” has not always been salutary to blacks, as just a few examples illustrate. The slave codes legitimized the institution of slavery and codified a system which granted whites *carte blanche* to beat, whip, flog, brand, rape, and kill slaves and, in some instances, free blacks as well.¹⁰⁹ The Supreme Court’s Reconstruction-era

106. Again, I raise these questions because I am convinced that understanding how the figuration of *Justitia* functions in our society requires more than merely recognizing that *Justitia* is blind to issues of race. Understanding how *Justitia* functions also requires that we ask what justice looks like in a society where embedded assumptions about race, about the very meaningfulness of the term, appear to have an unlimited shelf life.

107. Richard Dyer, *White*, in 29 *SCREEN*, Vol. 44, 45 (1988).

108. See BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 170, 172 (1992).

109. See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 29–36 (1997); LAWRENCE M. FRIEDMAN, *CRIME & PUNISHMENT IN AMERICAN HISTORY* 84–93 (1993). In *State v. Mann*, for example, the North Carolina Supreme Court reversed the conviction of John Mann for shooting a female slave, essentially on the ground that such a conviction would undermine the very foundation of slavery. The court acknowledged that there was a

decisions in *United States v. Cruikshank*¹¹⁰ and *Hodges v. United States*¹¹¹ functioned to frustrate efforts to convict whites charged with racially motivated violence. In the face of decade upon decade of lynchings, Congress repeatedly refused to pass federal anti-lynching legislation, a refusal that the Senate apologized for only last year.¹¹² In the 1960s, J. Edgar Hoover hounded civil rights leaders such as Dr. Martin Luther King, Jr., wiretapping King's phone, bugging his home and office, planting informants in King's Southern Christian Leadership Conference, not out of any sense that King was engaged in criminal activity, but out of disap-

certain "harshness" in its decision but concluded that the "power of the master must be absolute, to render the submission of the slave perfect. . . . The slave, to remain a slave, must be made sensible, that there is no appeal from his master." *State v. Mann*, 13 N.C. 263, 267 (1829). Nor were free blacks immune from such summary punishments. For example, the North Carolina Code of 1855 made it a crime for any free black to marry or cohabit with a slave, or to "entertain any slave in his house" between "sunset and sunrise," or to carry a weapon. Rev. Code N.C. 1855, chap. 107, pp. 576-77. Playing cards with a slave was also a crime, and could subject the free black to up to "thirty-nine lashes on his bare back" or forced servitude. N.C. Rev. Code Ch. 107 § 63, 75 (1854).

Slave laws also prohibited blacks from testifying. See THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860*, 229-48 (1996). As one court put it:

[I]f the color is not right, the man can not testify. The truth shall not be received from a black man, to settle a controversy where a white man is a party. Let a man be Christian or infidel. . . . let him be of good character or bad; even let him be sunk to the lowest depths of degradation; he may be a witness in our courts if he is not black.

Jordan v. Smith, 14 Ohio 199, 201 (1846). Because federal courts adopted the rules of evidence of the states in which they were located, blacks were often denied the ability to testify in federal court as well. See U.S. Congress, Senate Committee on Slavery and the Treatment of Freedmen, "Equality Before the Law in the Courts of the United States," S. Rep. No. 25, 38th Cong., 1st Sess. 35 (1964).

110. 92 U.S. 542 (1876). *Cruikshank* involved the conviction of three whites—out of a total of 97 that were indicted—pursuant to federal criminal civil rights laws in connection with the 1872 massacre in Colfax, Louisiana that resulted in the killing of approximately 280 black residents. The Supreme Court reversed their conviction on a variety of grounds, including the technicality that the indictment, though describing the racial identities of the parties involved, had failed to explicitly allege that the violence was motivated by race. For more on the *Cruikshank* case, see KENNEDY, RACE, CRIME & THE LAW, *supra* note 108, at 50-51.

111. 203 U.S. 1 (1906) (reversing the conviction of several whites in connection with their participation in forcing blacks out of jobs at a lumber mill under threat of violence on the ground that the federal statute exceeded Congress's powers insofar as it proscribed private acts). The Supreme Court did not overrule *Hodges* until more than 60 years later in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

112. See Sheryl Gay Stolberg, *Senate Issues Apology Over Failure on Antilynching Law*, N.Y. TIMES, June 14, 2005, at A15; PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA* (2001) (describing congressional opposition to passing anti-lynching legislation or otherwise protecting blacks from white violence); and Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1998).

proval of King's efforts to disrupt the status quo of *de jure* segregation.¹¹³ Not surprisingly, even the decisions that ostensibly benefit blacks—*Brown v. Board of Education*,¹¹⁴ for example—are occasionally viewed with skepticism, as examples of the Court “saving face” or as protecting other interests.¹¹⁵ And not surprisingly, the impression left by our legal history, at least in the minds of many blacks, is one of exclusion rather than inclusion. Instead of justice as protector, our legal history suggests justice as indifferent. Blind.

Our legal history further complicates *Justitia*'s other rarely examined attribute: her gender.¹¹⁶ Women have been victimized by the justice system. One has only to think of our history of coverture, or of requiring women to “follow the natural instinct of every proud female”¹¹⁷ and resist sexual attack “until exhausted or overpowered”¹¹⁸ in order to establish rape (to say nothing of insulating their husbands from the charge),¹¹⁹ or our history of indifference to issues of domestic violence. Indeed, given our history of sanctioning the exclusion of women from the practice of

113. See generally KENNETH O'REILLY, *RACIAL MATTERS: THE FBI'S SECRET FILE ON BLACK AMERICA, 1960–1972* (1989). As Randall Kennedy has pointed out, Hoover's secret surveillance of black leaders was prompted in large part by racism and his view that any demand by blacks for equality “tended toward treason.” KENNEDY, *RACE, CRIME & THE LAW*, *supra* note 108, at 108.

114. 347 U.S. 483 (1954).

115. See, e.g., Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

116. This is not to suggest *Justitia*'s gender has gone unnoticed. As Martin Jay has observed, *Justitia* is unique in the depiction of women: she carries a sword, a far cry from the maternal or sexualized images we associate with Western art. Borrowing from feminist theorists Carol Gilligan and Seyla Benhabib, Jay suggests that the blindfold is in fact inseparable from *Justitia*'s gender:

Whereas male judgment tends to be abstractly universalist, decontextualized, and formalistic, its female counterpart, [Gilligan and Benhabib] tell us, is more frequently sensitive to particular detail, narrative uniqueness, and specific context. Instead of acknowledging only an imagined “generalized other,” it focuses on the actual “concrete other” before it. The blindfolding of *Justitia* is thus not a thwarting of the gaze per se, but of the specifically female gaze, or at least of those qualities that have been associated with it in our culture.

Jay, *supra* note 99 at 28–29; Recall that former Attorney General Ashcroft was so flummoxed by *Justitia*'s bare breasts at the Department of Justice that he had them covered See, e.g., Christopher Newton, *Ashcroft Loses Revealing Backdrop*, CHI-SUN TIMES, Jan. 30, 2002, at 38; *Justice Has it Covered*, NEWSDAY, Jan. 31, 2002, at A17.

117. State v. Rusk, 424 A.2d 720, 733 (1981) (Cole, J., dissenting).

118. People v. Dohring, 59 N.Y. 374, 386 (1874).

119. At common law, a husband who forced his wife to engage in sex was not guilty of rape. See 1 MATTHEW HALE, *HISTORY OF THE PLEASURES OF THE CROWN* 628–29 (1736); see also Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

law,¹²⁰ and from serving on juries,¹²¹ and that even *now* we seem content with having only one female justice on the Supreme Court, our figuration of justice as female is more than a little ironic.

Although women have been victims of our justice system, they have also been privileged. This is especially true in the case of white women. Consider *Muller v. Oregon*,¹²² in which the Supreme Court upheld a law limiting to ten hours the workday of women in factories and laundries. Read as a case in which, through paternalism, women are both victimized and privileged, the case should also be read as one reflecting racial preference in the form of white privilege. After all, the Court's concern, however misguided, that a woman's "physical structure and a proper discharge of her maternal functions—having in view not merely her own health, *but the well-being of the race*—justify legislation to protect her,"¹²³ was decidedly not with women of color, and was decidedly not with any non-white race.¹²⁴

Again, of course women have been victimized by our justice system. But my focus here is what it means to look through the prism of a black male gaze at an image of justice that has been figured as white and female. Viewed this way, it is impossible to consider Justitia's race and gender without thinking of injustice. Of course, I'm referring to lynchings, many of which were predicated on allegations of assault on "white womanhood." But not just our extrajudicial legal history of lynching, which was never entirely extrajudicial in any event. Even in our "legitimate" prosecutions, race and gender were often determinative. Are often determinative. One only has to consider the Scottsboro Boys case, in which nine black youths were wrongfully convicted of raping two white

120. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873) (upholding a law that forbade women to practice law, noting the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

121. See *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding a law that in effect limited jury service to men; women could serve, but only if they specifically requested to be included on jury lists.) *Hoyt* was not overruled until 1975 in *Taylor v. Louisiana*, 419 U.S. 522 (1975).

122. 208 U.S. 412 (1908).

123. *Id.* at 422 (emphasis added).

124. And this privileging continues today. Consider the attention paid to solving crimes involving white female victims and the relative inattention paid to solving crimes involving black female victims. It is revealing that I can name several white female victims without giving it much thought. Nicole Brown Simpson. Natalee Holloway. Elizabeth Smart. Laci Peterson. Chandra Levy. JonBenet Ramsey. I am unable to name a single black female victim. Or consider the Central Park Jogger case. The case dominated the media for months. In fact, there were 3,254 other reported rapes that year, including "one the following week involving the near decapitation of a black woman in Fort Tryon Park and one two weeks later involving a black woman in Brooklyn who was robbed, raped, sodomized, and thrown down an air shaft of a four story building." These black women, however, were not *newsworthy*. JOAN DIDION, *AFTER HENRY* 255 (Simon & Schuster 1992).

women, setting off one of the most significant cases in legal history.¹²⁵ Or the much more recent case of the Central Park Jogger, in which “wilding” black youths were wrongfully convicted of raping a white woman.¹²⁶ Or of the 1913 prosecution of boxing champion Jack Johnson for violating the White Slave Traffic Act by taking a white woman across state lines on a date.¹²⁷ Or the recent prosecution of 18-year old Marcus Dixon on statutory rape charges for sleeping with his white girlfriend, three months shy of her 16th birthday.¹²⁸ Or the prurient frenzy that accompanied the prosecution of O.J. Simpson on murder charges; and the frenzy that accompanied the prosecution of Kobe Bryant on rape charges. And here’s the rub. All of this implicates looking.¹²⁹ Any encounter with *Justitia*

125. On the Scottsboro Boys case generally, see DAN T. CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH* (1969).

126. For more on the Central Park Jogging case, see N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 *CARDOZO L. REV.* 1315 (2004), and Susan Saulny, *Convictions and Charges Voided in '89 Central Park Jogger Attack*, *N.Y. TIMES*, Dec. 20, 2002, at A1.

127. For more on Jack Johnson generally, see Denise C. Morgan, *Jack Johnson: Reluctant Hero of the Black Community*, 32 *AKRON L. REV.* 529 (1999), and GEOFFREY C. WARD, *UNFORGIVABLE BLACKNESS: THE RISE AND FALL OF JACK JOHNSON* (2004).

128. Marcus was an 18-year-old high school athlete and honor student who was prosecuted for rape, aggravated assault, false imprisonment, and sexual battery when it was discovered that he had had sex with a 15-year-old classmate who was three months shy of her 16th birthday. Marcus was black. She was white. Marcus was in fact adopted, his legal guardians were white, his friends and associates were white. Still, that did not immunize him from the “white letter” law of racial trespass. It seems that the girl, fearing that her father would be angry if he learned that she had been with a black boy, claimed that the sex was non-consensual. Never mind that the medical evidence of bruised arms was undermined by the testimony of three classmates who said the bruises were there days before the alleged rape. Given the option of believing the white girl or the black boy, the district attorney believed the white girl. Although the jury of nine whites and three blacks rejected the charges based on non-consensual sex, they convicted Dixon of misdemeanor statutory rape based on the evidence of consensual sex. Never mind that the misdemeanor statutory rape law had never before been applied to two teenagers with less than three years’ age difference. Never mind that the misdemeanor statutory rape law carried a mandatory sentence of ten years’ imprisonment. By the time Georgia Supreme Court overturned the conviction, Marcus Dixon had already served more than a year in prison. See Ariel Hart, *Child Molesting Conviction Overturned in Georgia Classmate Case*, *N.Y. TIMES*, May 5, 2004, at A20; Courtland Milloy, *Marcus Dixon Doesn’t Belong in Ga. Prison*, *WASH. POST*, Jan. 25, 2004, at C1; Andrew Jacobs, *Student Sex Case in George Stirrs Claims of Old South Justice*, *N.Y. TIMES*, Jan. 22, 2004, at 14.

129. As Vron Ware put it in her pioneering study of white women and racism, “If a black man so much as looked a white woman in the eye he risked being accused of lechery or insolence, and in some cases this was as good as committing an actual assault.” VRON WARE, *BEYOND THE PALE: WHITE WOMEN, RACISM, AND HISTORY* 182 (1992). Cultural theorist bell hooks takes the danger of looking even further, reminding us that both prior to Emancipation and for decades afterwards, blacks “could be brutally punished for looking, for appearing to observe the whites they were serving, as only a subject can observe, or see.” BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 168 (1992). Black looks “were seen as confrontational, as gestures of resistance, challenges to authority.” *Id.* at 115.

comes with its own baggage, its own history, its own associations. Just by looking, every black male is Tom Robinson to her Mayella Ewell.¹³⁰ Just by looking, every black male is Bigger Thomas to her Mary Dalton.¹³¹ Just by looking, every black male is Willie Horton to her Single White Female.¹³² To borrow from Franz Fanon, without saying a word, every black male has already been “woven out of a thousand details, anecdotes, stories.”¹³³ So has Justitia.

Because this is a personal Essay, I have asked myself what I see when I look at Justitia and make the linkage of “white” and “justice.” When I thought along these lines, I realized that the linkage holds for me some of the same terror the linkage of the words “black” and “crime” holds for others. And I realized that what came to mind were images, so many that after a while they seem to play in a continuous blur, an endless loop-d-loop, from police beating civil rights marchers with billy clubs and batons, to police beating Arthur McDuffie in Miami, to police beating Rodney King in Los Angeles, to police fatally beating Nathaniel Jones in Cincinnati, to police beating Robert Davis in New Orleans, to police fatally shooting Amadou Diallo and sodomizing Abner Louima in New York. Of course, I know that only some of these incidents were caught on camera, that purported legitimizer of truth. Little matter. The other images are ingrained on my brain nonetheless.

The rush of images becomes more graphic when I add gender to the equation. After all, so many lynchings were captured on camera, circu-

130. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960). Although the center of the novel is arguably Scout and her father Atticus Finch, Esq., pressing at the margins are Tom Robinson, a black man on trial for attempted rape, and Mayella Ewell, his white accuser. Through Finch's defense of Robinson, the reader is assured of Robinson's innocence. The jury, however, convicts.

131. See RICHARD WRIGHT, *NATIVE SON* (1940). I explore the racial and gender dynamics of this novel elsewhere. See Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, & Trespass*, 31 N.Y.U. REV. OF LAW & SOC. CHANGE 101 (2006).

132. Willie Horton, of course, was the convicted killer who raped a white woman while on furlough, and whose image was used by George H.W. Bush in his presidential race against Massachusetts Governor Dukakis. The point was to depict Dukakis, who was opposed to capital punishment, as soft on crime. And the point was made by invoking the trope of the black rapist. As Regina Austin put it, “Willie Horton symbolized the threat that black males, aided by white liberal politicians, pose to innocent whites. Playing on racial fears, the ads' significance was not limited to the criminal element; every black man was a potential Willie Horton, rapist, and murderer.” See Regina Austin, *Beyond Black Demons and White Devils: Anti-Black Conspiracy Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021, 1024 (1995). For more on this appeal to race, see D. Marvin Jones, “*We're All Stuck Here for a While*”: Law and the Social Construction of the Black Male, 24 J. OF CONTEMP. L. 35 (1998); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Samuel R. Gross, *Crime, Politics, and Race*, 20 HARV. J.L. & PUB. POL'Y. 405 (1997).

133. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 111 (Charles Lam Markmann trans., Grove Press 1967, 1952).

lated like trading cards.¹³⁴ Of course, for me, there's one image that stands out. It's not the photograph of the mutilated body of Emmett Till, the black 15-year old who was lynched in Mississippi for looking and whistling at a white woman the year after the Supreme Court decided *Brown v. Board of Education*,¹³⁵ and whose lynchers were acquitted by an all-white jury that deliberated for only an hour and seven minutes. Instead, it's the image of Till's mother Mamie Till Mobley next to her son's mangled body, insisting on an open-casket funeral, daring the world to look at him.¹³⁶ To see.

These are the images that come to mind when I think of justice and whiteness and gender. These images, which are part of the public conscience, part of the public domain, and other images which, for the most part, are purely private. That of police cars slowing down when they see me strolling through my mostly white neighborhood. That of officers giving me that extra look. That skeptical look. That suspicious look. That dirty look. Peggy Davis has written of law as microaggression.¹³⁷ But that's only part of it. Because in the end, we have done more than simply authorize certain agents of justice, namely, law enforcement, to look at me differently while other agents of justice, namely, our courts, profess to look at me indifferently. We have authorized a system that reminds me and reminds me: I am second-class.¹³⁸

V.

Part of me hopes that I have at least shed some light on our figuration of justice. I also hope that I have at least raised serious questions about how our figuration impacts how justice is seen. Put differently, our conception of what will occur once we enter the hallowed halls of a courthouse is necessarily informed by the image of justice that greets us, that assures us equality in the eyes of the law. And I hope I have made a persuasive argument, even through my roundabout musings, that our

134. See, e.g., JAMES ALLEN ET AL., *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* 11 (2000).

135. 347 U.S. 483 (1954).

136. For more on the murder of Emmett Till, see STEVEN J. WHITFIELD, *DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

137. Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989). Similarly, see Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 *U. MIAMI L. REV.* 127 (1987) (describing the invisible lacerations suffered by victims of racism).

138. Professor Maclin, without expressly invoking race, makes a similar argument: "the Court sees the typical Fourth Amendment claimant as a second-class citizen," and that this perception "may explain the Court's reluctance to subject police conduct to vigorous judicial oversight." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 *WM & MARY L. REV.* 197, 238 (1993).

figuration of justice also tells us a lot about how justice functions. How we allow it to function.

Another part of me merely hopes that in giving voice to those who lack voices, or at least pulpits, I have been true. And that's because when I gaze at Justitia, I'm not gazing as a black defendant in a justice system, or as even a black youth for whom suspicionless stops are a way of life. Instead, my gaze is that of a black academic, and before that as a black prosecutor. When I write about justice, speak about justice, I do so not from the outside, but from a privileged, if still not entirely comfortable, position on the inside. This is my hope: that in theorizing about justice, I have not forgotten where I've from, where I've been, and that I carry proudly my mark of blackness.¹³⁹

Still, I linger in front of Justitia. I recall the lines from Langston Hughes's poem "Justice":

That Justice is a blind goddess
Is a thing to which we blacks are wise.
Her bandage hides two festering sores
That once perhaps were eyes.¹⁴⁰

But are there sores there? After all, her eyes have not been gouged. Nor is her blindness congenital. She does not suffer from amaurosis. Nor does she, like one of Oliver Sacks's patients, suffer from agnosia, hysterical blindness. We need not wring our hands pondering the etiology of her condition. It's only a veil over her eyes. And who's to say a veil can't be removed?

The challenge for those of us concerned with making our criminal justice system fair is two-fold. We must eliminate actual unfairness, and we must eliminate the perception of unfairness. But a personification of justice as blind does neither. Indeed, it has the contrary result. In actuality, her blindness perpetuates unfairness by turning a blind eye to what everyone else sees: that "there is no exit from race."¹⁴¹ And in perception, her blindness comes across as selective, studied, and self-serving. In short, as anything but just. And of course, this is only exacerbated by her raced body, by her gendered body.

In the end, this is my hope. That one day, we will desex her. That one day, we will derace her. And that we will begin with this first step: removing her blindfold. Only then will she see how her scales are tipped,

139. Of course, the mark of blackness is usually viewed as stigmatic. See, e.g., Robin A. Lenhardt, *Understanding the Mark: Race, Stigma, & Equality*, 78 N.Y.U. L. REV. 803 (2004). What I am suggesting here are other associations, including that of responsibility and ownership.

140. LANGSTON HUGHES, "Justice," in *A NEW SONG* (1938).

141. I'm indebted to Professor Carbado for this turn of phrase. See Carbado, *supra* note 87 at 996.

and see what havoc she's wrought with her sword. And maybe, just maybe, in seeing, justice too will be transformed.

