BLIND JUSTICE, COLORED TRUTHS AND THE VEIL OF IGNORANCE

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I. INTRODUCTION

American citizens are guaranteed "equal protection of the laws" by the Fourteenth Amendment[1] and an "impartial jury" by the Sixth Amendment.[2] The Supreme Court has emphatically reinforced that ascertaining truth is the very function of the trial[3] and has endorsed a complex code of evidence law to ensure so far as possible that only relevant and accurate information affect the jury's decision-making.[4] It is, however, increasingly recognized that our judicial system is failing its citizens on all four of these promises.

There is an "overwhelming" body of empirical evidence supporting two propositions.[5] First, juries are unable to assess the credibility of testimony.[6] Second, juries are unable to respond to blacks and whites equally.[7] Either conclusion is sufficient to "rock the foundations of the jury system."[8] While the problems of jury lie-detection and jury bias have been extensively discussed independently, little attention has been drawn to the *intersection* between race and credibility and to the processes by which these twin failings of jury cognition are able to reinforce each other. Furthermore, although cognitive processes have provided convincing explanations for both jury failings, reform measures that have been proposed so far either underes-

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1. U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. amend. VI.

3. *E.g.*, Coy v. Iowa, 487 U.S. 1012, 1032 (1988) (Blackmun, J., dissenting) (stating that lack of effective testimony may undermine the truth-finding function of the trial).

4. *See generally* FED. R. EVID.; *see also* Stephan Landsman, *Of Mushrooms and Nullifiers: Rules of Evidence and the American Jury,* 21 ST. LOUIS U. PUB. L. REV. 65 (2002) (discussing the jury's role in evaluating evidence).

5. Jeremy A. Blumenthal, *A Wipe of the Hands, a Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility,* 72 NEB. L. REV. 1157, 1163 (1993).

6. *See infra* Part II.B.

7. *See infra* Part III.

8. Steven I. Friedland, *On Common Sense and the Evaluation of Witness Credibility,* 40 CASE W. RES. L. REV. 165, 187 (1989-90).

timate the power of these processes and are unlikely to succeed or disregard the accepted constitutional framework and are unlikely to be adopted.

Race has been conceptualized in a broad and inventive variety of terms, which relate to power, identity, stigma, status, perspective and culture. However, only when race is conceptualized in terms of *evidence* does a potential reform present itself that will address both lie detection and racial bias at their point of intersection. This conceptualization of race in terms of evidence remains consistent with both cognitive forces and constitutional boundaries.

Many scholars have responded to these problems by inserting race *into* the jury, through guarantees or quotas of minority representation on juries.[9] This Article, in contrast, argues that race should be taken *out* of the jury, by obscuring and minimizing the information that impairs both racial neutrality and accurate credibility assessments. What this Article proposes is to obscure the jury's view of those testifying at trial with a translucent screen. Although such a suggestion may at first seem radical or ridiculous, it is uniquely consistent with both constitutional doctrine and empirical evidence. This proposal lives up to the much-vaunted but seldom-obtained promise that "justice is blind," both metaphorically and literally.

Before turning to solutions, however, it is necessary to consider both the problem and its underlying mechanisms in some depth. Part II of this Article considers the jury's role and ability as the final arbiters of witness credibility. Part III reviews the racial inequalities of our justice system. Parts IV and V consider the interactions between race and credibility, and Part VI reviews the major harms suffered from this interaction. Part VII establishes the legal and constitutional framework under which reform proposals must operate, and Part VIII considers the proposals that have so far been advanced. Finally, Part IX returns to the proposal of a sight-obscuring screen and considers its efficacy, constitutionality and costs.

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9. *See infra* Part VIII.