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Taz: The Legal Academy's Happy (and Erudite) Warrior

WAYNE A. LOGAN*

Published in 1807, William Wordsworth's poem, "Character of the Happy Warrior," begins as follows:

Who is the happy Warrior? Who is he
That every man in arms should wish to be?
– It is the generous Spirit, who . . . hath wrought
Upon the plan that pleased his boyish thought:
Whose high endeavours are an inward light
That makes the path before him always bright:
Who, with a natural instinct to discern
What knowledge can perform, is diligent to learn[.]¹

Andy Taslitz ("Taz") epitomized Wordsworth's polymath "generous [s]pirit," "with a natural instinct to discern [w]hat knowledge can perform," ever so "diligent to learn."² In my talk today, I'll canvass a few of the many knowledge contexts Taz mined, thought very deeply about, and applied in his scholarship.

Preparing for today's event provided me with a welcomed opportunity to step back from and then dig into Taz's remarkable oeuvre. I've always been a dedicated fan of his work, yet this always required considerable effort; it seemed that every few months or so a new article of his landed on my "must read" pile. Taz, as we know, was an uncommonly prolific scholar (in addition to being a top-notch teacher who was supremely dedicated to service and law reform). During his twenty-four years in the legal academy, scholarship absolutely flowed

* Gary & Sallyn Pajcic Professor of Law, Florida State University College of Law. Thanks very much to the Howard University School of Law and the event's organizers for providing me the chance to offer some thoughts on the work of my good friend Andy Taslitz.

1. William Wordsworth, *Character of the Happy Warrior* (1807), reprinted in WILLIAM WORDSWORTH POEMS, VOLUME 1 662–64 (John O. Hayden ed., 1981).

2. *Id.* at 662.

from Taz; by a conservative count, he wrote five books and over sixty articles, along with multiple chapters and other short entries.³ The pieces themselves, moreover, were notable for their thoroughness and breadth. Taz liked to hit the long-ball; as a rule his articles ran in the neighborhood of sixty or seventy pages, with generous helpings of meaty and often quite lengthy footnotes. And these often were just his symposium pieces!

Reflecting on the whole of Taz's work, another thing becomes abundantly evident: the remarkable range of analytic tools that he brought to bear. His orientation was obvious from the very outset of his professorial career at Howard University School of Law where he began teaching in 1989. In 1990, the *Hastings Law Journal* published his piece *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, a modest 119-page effort, which remains the *locus classicus* of the subject.⁴ In *Does the Cold Nose Know?*, Taz laid the benchmark for his many subsequent articles drawing on findings from the social sciences: a thorough marshalling of available evidence combined with fair-minded analysis of how the evidence can and should affect the real-world work of criminal justice actors.⁵

Taz read voraciously and thought deeply about many subjects, and he infused his ready command of doctrine and policy with what he learned, writing in a style that was sophisticated yet accessible. Psychology was of particular interest to him, and he often applied its teachings. Taz commonly focused on its implications for the courtroom, which should not come as a surprise given that he was a former prosecutor (in Philadelphia) and taught Evidence. Just a few of his article titles should suffice to highlight the breadth of his interest in this regard: *Myself Alone: Individualizing Justice through Psychological Character Evidence*;⁶ *Catharsis, the Confrontation Clause, and Ex-*

3. According to the most recent C.V. that I could locate, at the time of his death, Taz not only had twelve articles underway, he also had three book manuscripts in progress: *The Cognitive Fourth Amendment: How Mind Science Helps Us Choose the Best Institutions to Protect Our Privacy and Makes Them Better* (unpublished manuscript); *The New and Improved Prosecutor: Fighting Error and Disesteem in the Land of Outcasts* (unpublished manuscript); *Expressing Justice: Mapping Dissent as the Bridge Between the First and Fourth Amendments* (unpublished manuscript). Curriculum Vitae of Andrew Eric Taslitz, <http://www.wcl.american.edu/faculty/cv/taslitz.pdf> (last visited Oct. 21, 2014). Unless otherwise noted, the written works cited in this article are attributable to the hand of Taz.

4. Andrew E. Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup*, 42 HASTINGS L.J. 15 (1990).

5. *Id.*

6. Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993).

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pert Testimony;⁷ *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and Other) Cases*;⁸ and *Willfully Blinded: On Date Rape and Self-Deception*.⁹ Drawing on recent findings from cognitive psychology, Taz likewise offered thoughtful solutions on how to best address the known problems associated with the cross-racial eyewitness identification of suspects.¹⁰

Taz repeatedly examined the corrosive effects of bias in the criminal justice system. Strikingly, for a white male professor, issues relating to race¹¹ and feminism¹² predominated in his work. He wrote at

7. Andrew E. Taslitz, *Catharsis, The Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103 (1993).

8. Andrew E. Taslitz, *Forgetting Freud: The Courts' Fear of the Subconscious in Date Rape (and other) Cases*, 16 B.U. PUB. INT. L.J. 145 (2007).

9. Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005).

10. See generally Andrew E. Taslitz, "Curing" Own Race Bias: What Cognitive Science and the Henderson Case Teach About Improving Jurors' Ability to Identify Race-Tainted Eyewitness Error, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 1049 (2013) (examining "the causes of own race bias in eyewitness identifications" and its effect in jury deliberations); Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271 (2006) (focusing on how prosecutors use social science to create legal policy in the area of eyewitness identification).

11. See, e.g., *The Slave Power Undead: Criminal Justice Successes and Failures of the Thirteenth Amendment*, in THE PROMISES OF LIBERTY: THE HISTORY AND CONTEMPORARY RELEVANCE OF THE THIRTEENTH AMENDMENT 245 (Alexander Thesis ed., 2010); Andrew E. Taslitz, *Racial Threat Versus Racial Empathy in Sentencing—Capital and Otherwise*, 41 AM. J. CRIM. L. 1 (2013); Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277 (2010); Andrew E. Taslitz, *Judging Jenna's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393 (2009); Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV. 275 (2009); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. L. REV. 1091 (2008); Andrew E. Taslitz, *Racial Blindsight: The Absurdity of Color-Blind Criminal Justice*, 5 OHIO ST. J. CRIM. L. 1 (2007); Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006); Andrew E. Taslitz, *Racial Profiling, Terrorism, and Time*, 109 PENN. ST. L. REV. 1181 (2005); Andrew E. Taslitz, *Foreword: The Political Geography of Race Data in the Criminal Justice System*, 66 LAW & CONTEMP. PROBS. 1 (2003); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221 (2003); Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1287–88 (2000); Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3 (2000); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739 (1999); Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L.J. 219 (1997); "Curing" Own Race Bias, *supra* note 9.

12. Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1 (2002); Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171 (1999); Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1 (1998); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387 (1996).

least fifteen articles focusing on race,¹³ four articles on feminism,¹⁴ and several others joining the two.¹⁵ In his book, *Rape and the Culture of the Courtroom*, Taz, after surveying the distorting effect of cultural narratives commonly associated with sexual assault and male-dominated evidence rules and courtroom customs, he made a compelling case for a “Feminist Evidence Law.”¹⁶

In *Police Are People Too* (short title), Taz provided an insightful treatment of the ways in which cognitive biases hinder the ability of officers on street patrol to make decisions on individualized suspicion.¹⁷ And in a symposium entry published shortly before his death, he offered a creative take on the well-tilled soil of the problems associated with the Sixth Amendment right to counsel; he provided a thorough and insightful treatment of the ways in which status quo bias impedes the ability of system actors, especially defense counsel, to deliver just and fair outcomes.¹⁸

Taz was also a dedicated student of history. His considerable knowledge of American history was on full display in his book, *Reconstructing the Fourth Amendment: A History of Search and Seizure, 1789–1868*.¹⁹ The work provides a panoramic treatment of search and seizure practices during the post-Framing era through Reconstruction, lending emphasis to central themes and purposes that have been lost along the way. In what I find the most interesting and illuminating part of the book, its latter half, Taz ties the Fourth Amendment to the Fourteenth, which took shape in response to repressive historic incidents of the time, including limits on the right of locomotion of freedmen, the violent coercive power of slave patrols, enforcement of the repressive Black Codes, and the widespread disregard for privacy and property rights of African-Americans.²⁰ The book is chock-full of en-

13. See *supra* note 10.

14. See *supra* note 11.

15. See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 785 (1996).

16. ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 11 (N.Y.U. Press 1999).

17. See Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 7 (2010).

18. Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 316–18 (2012).

19. ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868* (N.Y.U. Press 2006).

20. *Id.*

grossing richly detailed realities of the time, such as the slave practice of masking scent from slave patrol dogs by rubbing their feet with turpentine.²¹ Taz draws upon this often overlooked historical background to make the case for affording increased modern constitutional weight to the right against group subordination and individual insult and humiliation, as well as the right to bodily movement and informational privacy.²²

Taz, however, also had a somewhat whimsical side, as evidenced in his devotion to popular culture. In a 2009 article, he deployed the character Tinkerbell, from J.M. Barrie's classic *Peter Pan*,²³ to deliver an extended and insightful exegesis on sympathy's role in differentiating complete and partial excuses. In the article, he used the cognitive psychology of imagination, philosophy, and social norms to offer thoughts on the relative decision making competence of juries and legislatures vis-à-vis the two species of excuse.²⁴ Five years earlier, the comic book (and later movie) character, Daredevil,²⁵ served as the vehicle for Taz to deploy social science—highlighting the connection between high execution rates and a state's history of vigilantism, and showing us how a more nuanced understanding of the Daredevil can point the way toward a more just resort to capital punishment.²⁶ It is highly likely that another academic tasked with drawing serious lessons from Tinkerbell and Daredevil would falter, offering a pedantic deconstruction, or tritely espousing the benefits of using popular culture as a lens into modern affairs. Taz, however, as is his wont, goes deep and invokes social science findings from a broad array of areas to deliver a rich, multifaceted take on his subjects.

Finally, I would be remiss if I did not mention that Taz was not only an omnivorous consumer and disseminator of knowledge, he also was actively involved in its creation. Taz regarded his professional service obligation as entailing much more than institutional committee work; he actively sought out, and was asked to provide, law reform-related work with a research component. Among other things, he conducted a comprehensive overview of electronic recording of interroga-

21. *Id.*

22. *Id.*

23. Andrew E. Taslitz, *Why Did Tinkerbell Get Off So Easy?: The Roles of Imagination and Social Norms in Excusing Human Weakness*, 42 TEX. TECH. L. REV. 419, 421 n.10 (2009).

24. *Id.* at 420–21.

25. DAREDEVIL (20th Century Fox 2003).

26. Andrew E. Taslitz, *Daredevil and The Death Penalty*, 1 OHIO ST. J. CRIM. L. 699, 707, 716–17 (2004).

tions, for the Uniform Law Commission (formerly National Conference of Commissioners on Uniform State Laws), and served on ABA committees addressing eyewitness identification and the third-party doctrine. True to form, the findings of this work often found their way into print.²⁷ At the time of his death, moreover, Taz had five empirical projects underway, working with others collecting data on such varied matters as search and seizure warrant practices among police (with David Harris); the impact on jurors of instructions concerning the videotaping of confessions (with Richard Leo and Neil Vidmar); and popular attitudes regarding the reasonableness of searches and seizures (with Song Richardson and Audrey Miller).

I hope that my remarks today provide a sense of the reach of our friend Taz's intellectual ambition and curiosity. I said at the outset that I welcomed the chance to sit down and review his work *en masse*, and having done so, I now have an even greater appreciation for Taz's scholarship. The work he left behind provides us with a tangible and enduring reminder of just how special an intellect he was.

I remain, however, curious about what motivated our friend; what drove him to seek out and think so deeply about so many varied and often quite complex academic disciplines? I think I found at least partial answers in his work itself. In explaining to readers in 2004 why the Daredevil character had meaning to him, he offered with characteristic humility that, "perhaps such movies reach only my soul, which is in many ways still that of a twelve-year old child."²⁸ The other snippet I found illuminating is contained in the preface to his 2009 book, *Reconstructing the Fourth Amendment*; when reflecting on why he undertook the effort, he offered that the criminal justice system's racial disparities and other inequities hit home early, affecting him as a "twelve- or thirteen-year old boy," "a bookish kid who read widely and was always sensitive to unfairness."²⁹ I tell my own children that

27. See, e.g., Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. CRIM. L. & CRIMINOLOGY 839, 840–42 (2013) (relating to his work with the ABA committee drafting Standards on Law Enforcement Access to Third Party Records); Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J.L. & SOC. POL'Y 400, 400 (2012) (relating to his work as Reporter for the Uniform Law Commission addressing videotaping confessions).

28. *Daredevil and the Death Penalty*, *supra* note 24, at 712.

29. RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 18, at vii. For other examples of Taz's abiding concern for fairness in his written work: See, e.g., Andrew E. Taslitz, *The People's Peremptory Challenge and Batson: Aiding the People's Voice and Vision Through the "Representative" Jury*, 97 IOWA L. REV. 1675, 1710–12 (2012); Andrew E. Taslitz, *The Criminal*

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the character traits of the sixth and seventh graders that they know will very often mark the adults that they one day will be. I can now offer Taz as a prime example, and hope that my kids turn out to be anything like the extraordinarily decent, intellectually curious, and eternally optimistic individual we knew our dear friend Andy to be.

Republic: Democratic Breakdown as a Cause of Mass Incarceration, 9 OHIO ST. J. CRIM. L. 133, 137 (2011); Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 15 (2003); Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2261 (2002); *Fourth Amendment Federalism and the Silencing of the American Poor*, *supra* note 10, at 277, 311.