
Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice

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Social psychologists have established that faces of Black males trigger thoughts of violence, crime, and dangerousness, and thoughts of crime trigger thoughts and images of Black males. This presumption of dangerousness increases with darker skin tones (colorism) and greater Afrocentric facial features and affects both men and women. We examine the history of the stereotype of Blacks and crime, violence, and dangerousness arising in the United States from the time of slavery. We focus on the historical development of this stereotype through a lens of history, literature, pseudo-science, emerging neuroscience, media distortion of crime reporting, and the development of the Negro-ape metaphor. We then look beyond the Black-White race dichotomy to

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explore the evolving social science literature examining the influence of skin tone and Afrocentric facial features on the length of criminal sentences. We further explore the social science supporting the presumption of dangerousness and conclude with recommendations to help ameliorate this problem that permeates the United States criminal justice system.

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again⁴ Black girls and women are not immune to the presumption of dangerousness. Nineteen-year-old Renisha McBride was shot after knocking on a resident's door after crashing her car. The shooter said he thought his home was being broken into.

No one should seriously question that race discrimination, in all aspects of American contemporary life, is still a serious problem. Indeed, with respect to the U.S. criminal justice system virtually every aspect has been scrutinized and criticized for showing racial bias — with the toughest criticism often reserved for sentencing decisions. Michelle Alexander has written, in discussing contemporary mass incarceration in the United States, that our criminal justice system has “emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”⁸ While the focus of this Article is on skin tone and Afrocentric features in sentencing, it is important to note that the system of racialized control that Professor Alexander writes about

⁴ This Article examines colorism and Afrocentric facial feature discrimination only in the context of the criminal justice system in the United States. There are important implications for the civil justice system as well, but they fall beyond the scope of this Article. For example, in the federal employment discrimination context, in FY 1997 only 762 charges (0.9% of all charges filed) of “color” discrimination were filed with the federal Equal Employment Opportunity Commission. By FY 2015 that number grew to 2,833 (3.2% of all charges filed). See Charge Statistics FY 1997 Through FY 2016, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 1, 2017). For a thorough discussion of these “color” charge statistics, see Dani Hersch, Characteristics of Color Discrimination Charges Filed with the EEOC, *THE MELANIN MILLENNIUM*:

starts much earlier than sentencing. Numerous empirical studies have “confirmed racial disparities in the probability of experiencing arrest.”⁹

At the next stage — pretrial release following arrest — a study, using felony processing data from large urban courts, found that the odds of detention for Black defendants were 66% greater than White defendants, while the odds for Hispanic defendants were 91% greater.¹⁰ The study also found, controlling for relevant factors, a greater likelihood for Black and Hispanic defendants versus White defendants to be denied bail and to be held on bail for not being able to post bail. The study further found that the amount of bail required for Hispanic defendants was more than for White and Black defendants and that Hispanic defendants were less likely to receive nonfinancial release options, such as own recognizance conditions of release.¹¹

However, concealed within generalized race discrimination in the criminal justice system is the often-ignored problem of skin tone or “colorism” discrimination.¹² In examining the effects of Afrocentric features and colorism in the criminal justice system, it is important to distinguish race from skin tone.¹³ They are distinct, but also

⁹ Jessica Grace Finkeldey, *The Influence of Skin Color on the Likelihood of Experiencing Arrest in Adulthood* 7 (Aug. 2014) (unpublished M.A. thesis, Bowling Green State University) (on file with authors) (citing eight different studies and analyzing longitudinal data to find that the likelihood of experiencing an arrest was greater for individuals with darker skin than for those with lighter skin but finding gender moderated the risk of arrest with some racial/ethnic subgroups). *See* Amelia R. Branigan et al., *Complicating Colorism: Race, Skin Color, and the Likelihood of Arrest* (Jan. 2016) (unpublished manuscript) (on file with authors) (finding that Black males’ probability of arrest remained constant across skin tone variations but that White males’ probability of arrest increased with darker skin tone).

¹⁰ Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, *CRIMINOLOGY* 873, 895 (2003).

¹¹ *Id.* at 895-99. Song

place of towns and rural areas.⁹ The key evidence in many of these cases was the jurors' very observation of the skin tone and facial features of the parties. Indeed, the Mississippi Supreme Court, in 1876, ruled that racial identity as a "colored person" could be "brought to [the jurors'] attention by ocular demonstration" because "jurors may use their eyes as well as their ears." As the present Article reveals, that key evidence, observation of skin tone and facial features, is just as important today, nearly a century and one-half later, or, if you are a defendant in a criminal case, perhaps much more significant.

We think it likely that most people, except for a few specialized social scientists, do not think about the concepts of race, skin tone, and Afrocentric facial features, separately. In fact, research suggests that people are largely unaware of the use of Afrocentric facial features to make judgments about others.¹⁰ This is especially significant for participants in the criminal justice system. Most social science research about criminology and race focuses on the differences between Black and White Americans, not on the heterogeneity within Blacks and Whites.¹¹ This is likely due, in part, to data limitations on skin tone and facial features, which is seldom included in the sentencing data collected by the states and the federal government.

a race (surprisingly including Whites) based on greater Afrocentric facial features and darker skin tone.

What does colorism mean? Why do so many Whites perceive Blacks as more criminal and dangerous than Whites? Where does this presumption of dangerousness come from? How does this presumption of dangerousness and criminality affect the criminal justice system in the United States? Does the darkness or lightness of offenders' skin tone matter in criminal justice outcomes? What about the degree of Afrocentric facial features? What role does stereotyping play in any of this? Is there anything that should or could be done about it?

To unravel these and other questions, this Article analyzes historical, sociological, psychological, medical, and neuroscience literature going back to slavery in the United States. It comes forward to current stereotypes of Blacks and recent empirical studies about colorism, Afrocentric facial features, and the length of sentences. While most of the research has focused on Black men, where relevant evidence exists, the Article highlights how women have also been subjected to colorism.

This Article proceeds in several parts. The next part defines and provides an overview of what skin tone (colorism) and Afrocentric facial features biases mean and their general effects on offenders in the criminal justice system. Part II analyzes the Black criminal, violent, and dangerousness stereotype looking at the deeply rooted historical perspective, the roles of literature and pseudo-science, the emerging neuroscience about the amygdala, the role that television news plays in perpetuating the presumption of dangerousness, and the historical dehumanizing of Blacks through the Negro-ape metaphor. Part III looks closely at the relationship between colorism, Afrocentric facial features, and the length of criminal sentences. Part IV analyzes in depth the cognitive science behind the presumption of dangerousness. Part V describes the authors' suggestions for minimizing the presumption of dangerousness for Blacks in the criminal justice system.

I. OVERVIEW OF SKIN TONE (COLORISM) AND AFROCENTRIC FACIAL FEATURE BIAS

“Skin tone elicits a cognitive bias such that as skin tone moves from light to dark, negative inferences about ability and competence increase.”²⁸

While social scientists have used many terms to describe the phenomenon of colorism (e.g., “racial phenotypicality bias,” “skin tone bias,” “skin color bias,” “skin hue bias,” “perceptual prejudice,”

discrimination that privileges light-skinned people of color over their dark-skinned counterparts,³⁰ or “the prejudice and discrimination that is directed against African Americans with darker skin and, conversely, the benefits that are granted to African Americans with lighter skin.”³¹

Historical origins of colorism include European colonialism, slavery and plantation life, and early Asian class hierarchies. Colorism exists not only in the United States, but also in Asia, Latin America, and India.³³ Skin tone is a form of “social capital” with lighter skin tone generally being ascribed more value than darker skin tone. In fact, the relentless pursuit of lighter skin has been fatal. A Harvard Medical School researcher found outbreaks of mercury poisoning in several countries around the world, including in the Southwestern United States where thousands of Mexican American women were poisoned due to overuse of skin bleaching creams in efforts to achieve lighter and more societally valued skin tone.³⁵

³⁰ Hunter, *Persistent Problem of Colorism*, *supra* note 6, at 237. Professor Hunter has also defined colorism in terms of its effect: “Colorism is a social process that privileges light-skinned people of color over dark-skinned people of color in areas such as income, education, criminal justice sentencing, housing, and the marriage market.” Margaret Hunter, *The Consequences of Colorism*, *THE MELANIN MILLENNIUM*, *supra* note 4, at 247 [hereinafter Hunter, *Consequences of Colorism*].

³¹ Blair et al., *Afrocentric Features in Person Perception*, *supra* note 23, at 7

hair, eyes, and eyebrows.⁴⁵ For “Caucasians” it was skin color, hair, nose, and a tie with eyes and mouth.⁴⁶ At bottom, skin color was the most salient facial feature, across African, Asian, Caucasian, and Hispanic, in determining race.⁴⁷ Table 1 below shows the salience of the facial features by race.⁴⁸ A more recent study similarly examined the salience of the most important facial features in determining race, the results of which can be found in Table 4.⁴⁹

Table 1: Mean Importance Ratings for Major Facial Features

Feature	Unspecified Target	African	Asian	Caucasian	Hispanic	Combined
Skin Color	9.93	9.93	9.27	8.71	9.57	9.49
Hair	7.87	9.47	9.13	8.64	9.07	8.83
Eyes	7.93	6.27	9.73	6.71	7.86	7.71
Nose	6.73	8.40	7.40	7.71	6.50	7.36
Mouth	6.27	8.60	5.20	6.71	5.57	6.48
Cheeks	4.27	4.33	6.07	3.71	6.64	4.62
Eyebrows	3.00	4.27	5.13	3.71	6.86	4.57
Forehead	3.27	3.90	4.33	2.50	4.42	3.70
Ears	2.20	2.80	3.13	2.28	3.28	2.74
All Features	5.72	6.44	6.60	5.63	5.58	————

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id. at 298, 305.

Table 2: Ratings of Features' Importance in Assessing Race

	Mean	Std. Deviation
Skin color	7.8833	2.40826
Nose	6.6333	2.16260
Hair	6.3833	2.17140
Mouth	5.6833	1.64153
Eyes	5.4333	2.30230

Like the conventional thinking toward Native Americans, Thomas Jefferson had suspicion “that the blacks . . . are inferior to the whites in the endowments both of body and mind.”⁶⁷ In these colonial times, Whites viewed Blacks as less than human, the prevailing belief was that “black men were not really men but cattle.”⁶⁸ A particularly horrific example of the view of Black slaves as chattels comes from the description in 1700 of a New Jersey slave master who had children with each of his Black slave women and sold these offspring “in the same manner as he would have disposed of his hogs.”⁶⁹ This fundamental view of Blacks as sub-human, rooted slavery, allowed the narrative of Blacks as violent and dangerous to grow and flourish. The narrative was that Blacks, by their very essence, were “savage brute[s]” who would revert back to their savage nature unless “domesticated” by or “civilized” by the White slave master’s firm control.⁷⁰ This core tenet of slavery — that without it “innate racial traits” of slaves as “savage brutes,” prone to violence and criminality, would resurface — provided “an unequivocal justification of permanent servitude!”

Even Northern abolitionists promoted the notion that Blacks were prone to dangerousness and criminality. “In 1806, a leading Pennsylvania abolitionist described most Philadelphia Negroes as ‘degraded and vicious.’”⁷² In 1808, the New York Manumission Society, an abolitionist society in New York, “announced that it viewed ‘with regret the looseness of manners & depravity of conduct in many of the Persons of Colour in this city.’”⁷³ In 1826, a Boston prison reform group, the Board of Managers of the Boston Prison Discipline Society, wrote in its first annual report “that Negroes constituted a disproportionately large percentage of the prison

TOGETHER WITH THE FAITHFULNESS OF HIS PROMISES DISPLAYED⁶⁷ (Neal Salisbury ed., 1997) (1682)).

⁶⁷ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (Boston, Lilly & Wait 1832).

⁶⁸ JAMES BALDWIN, NOTES OF A NATIVE SON 159 (1964).

⁶⁹ ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 11 (1967) (quoting SAMUEL SEWALL, THE SELLING OF JOSEPH (Boston, Green & Allen 1700)).

⁷⁰ See GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817–1914, at 53–54 (1987); see also Brief for the Nat’l Black Law Students Ass’n as Amicus Curiae in Support of Petitioner at 7–8, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 4073688, at *7–8 (citing full passage from FREDRICKSON, *supra*).

⁷¹ See FREDRICKSON, *supra* note 70, at 53.

⁷² *Id.* at 4 (citing ZILVERSMIT, *supra* note 69, at 223–24).

⁷³ *Id.*

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population of the Northeastern states and concluded that 'the first cause existing in society of the frequency and increase of crime, is the degraded character of the colored population.'"

The relationship between Blacks and dangerousness and criminality takes on a more covert tone in Poe's short story "Murders in the Rue Morgue" published in Graham's magazine in 1841, in which two Parisian women are mysteriously and brutally murdered by an escaped orangutan.⁸¹ Literary critics have described this work as "a thinly disguised allegory for the doctrine of black animality."⁸² There has been speculation that Poe may have been influenced by one of several popular primate displays that appeared in Philadelphia, where Poe was then living.⁸³ The eighteenth and nineteenth centuries saw the rise of proto-evolutionary theory, which "presaged Darwin's assertion in *The Descent of Man* (1871) that humans are apes."⁸⁴ Thus, it was no surprise "that eighteenth-and-nineteenth-century discourse also frequently equated apes with blacks."⁸⁵ Sterling Brown, in his well-known essay, "Negro Character as Seen by White Authors," argued that the early stereotype of the Black slave as docile, changed after Reconstruction to the "Brute Negro" which connected the slaves' emancipation with Black animality.⁸⁶

Charleston pro-slavery lawyer William Drayton circulated pamphlets that Black slaves were prone to vice and that slavery was a "natural consequence of [Black] inferiority of [. . .] character."⁸⁷ He also wrote that emancipation of Black slaves would release a "wild frenzy of revenge and the savage lust for blood," uniting to give liberated Black slaves "traits of cruelty and crime that nothing earthly can equal."⁸⁸

Poe's novel, see Alyssa M. Amaral, "Racial and Cultural Anxieties in Poe's Narrative of Arthur Gordon Pym," 11 *BRIDGEWATER ST. U. UNDERGRADUATE REV.* 17 (2015).

⁸¹ See EDGAR ALLAN POE, *THE MURDERS IN THE RUE MORGUE* 38, 60-62 (O[al,

When Richard Wright's protest novel *Native Son* was published in 1940, the Black protagonist, Bigger Thomas, a vicious murderer of a White woman in Chicago, was depicted in the Chicago newspapers as an "ape," and a "jungle beast," and a "missing link in the human species."⁸⁹ A recent book reviewer, in discussing James Baldwin's reaction to *Native Son* described Bigger Thomas as "a rapist and a murderer motivated only by fear, hate and a slew of animal impulses. He is the black ape gone berserk that reigned supreme in the white racial imagination."⁹⁰

In 1900, *The Negro a Beast* by Charles Carroll, was published by a religious publishing company.⁹¹ Carroll described Blacks ("Negros") as ape-like and reserved his harshest criticism for the mulattoes who lacked "the right to live" and were "the rapists and criminals of the present time."⁹² Thomas Dixon, a prominent Baptist minister turned fear mongering novelist, wrote bestselling novels exploiting the fear of the "black brute."⁹³ His most popular one, *The Clansman*, published in 1905, was the basis for the film *The Birth of a Nation* and features a description of the "negro" as a "half-child, half-animal . . . whose passions, once aroused, are as the fury of the tiger!"⁹⁴ In the story, a former slave and Black militia captain, described as bestial, rapes a White woman, resulting in her and her mother's death by suicide and in his lynching by the Ku Klux Klan.⁹⁵

So, too, did the "science" of the times promote the notion that Blacks were inferior, fueling the connection to violence and dangerousness. Dr. Samuel George Morton, a leading physician and scientist in the nineteenth century and a proponent of "scientific racism" who believed that races had different origins (polygenesis), collected more than one thousand skulls to argue that the larger White skulls proved Black intellectual inferiority.

common with Orangutans and dogs than other human species.¹⁰⁷ This book also discusses the many scientific fads that were used to justify various “scientific” theories of Black inferiority, and hence their subordination: phrenology (of which there were many converts), craniometrics, brain-weight analysis, and brain suture study in children.¹⁰⁸ The brain suture “science” postulated that both the coronal and central frontal sutures of the brains of Black children close faster than in other races, and thus Blacks, like orangutans, “became incapable of further progress!”¹⁰⁹

Haller’s book is especially important for his detailed discussion of the study of racial types in the Union army in the form of the U.S. Sanitary Commission.¹¹⁰ This proven “science” of anthropometric investigation was perhaps the “greatest irony of the Civil War” because it was “used in the late nineteenth century to support institutional racism.”¹¹¹

Scientific racism is still alive and well. A recent article, *Physiognomy’s New Clothes*,¹¹² sharply criticizes a new non-peer reviewed paper that claims artificial intelligence and machine learning software can predict, with close to 90% accuracy, the likelihood that an individual has a criminal conviction using only an identification-style face photo.¹¹³ Physiognomy is the practice of using one’s physical appearance to determine character traits, a practice which historically has had deeply prejudiced applications.¹¹⁴ Rather than being an objective predictor of criminality, the alleged “criminality detector” in the current study simply reinforces the notion that social perception of facial images leads to judgments about criminal behavior.

C. The Emerging Neuroscience of Facial Race Bias — Psychological Development and the Role of the Amygdala

Psychological research in a variety of cultures shows that norms and biases involving race develop in childhood and adolescence and that the social environment plays a significant role in shaping these

¹⁰⁷ See *idat* 9.

¹⁰⁸ See *idat* 4-38.

¹⁰⁹ *Id.* at 35-36.

¹¹⁰ See *idat* 19-34.

¹¹¹ *Id.* at 34.

¹¹²

processes.¹¹⁵ Learned racial preferences start as early as three months and appear to vary with exposure to members of different racial groups.¹¹⁶ Psychologists have theorized that children also learn biases when groups are labeled, sorted, or treated differently (e.g., segregated).¹¹⁷ Although implicit biases appear at least by age six, there is some evidence that children — at least White American children — adopt cultural race-related norms (e.g., avoiding race) at about age ten or eleven.¹¹⁸ Consistent with this finding, research suggests that implicit and explicit attitudes begin to diverge at age ten.¹¹⁹ According to one study, the heightened amygdala activity to Black faces found in adults is not present in early childhood and does not emerge until around age fourteen.¹²⁰ Explicit and implicit stereotypes about Blacks likely explain the heightened amygdala activity.¹²²

The emerging trend in psychology, addressed here, is the ability to use non-invasive neuroimaging, primarily functional magnetic resonance imaging (“fMRI”), to understand how cognition is linked to brain functioning.¹²³ Research has focused on the amygdala as a brain area of particular relevance to racial prejudice, though it is, of course, not the only brain area associated with prejudice. As researchers

¹¹⁵ See generally Yair Bar-Haim et al., Nature and Nurture in Own-Race Face Processing, 17 PSYCHOL. SCI. 159 (2006); Eva H. Telzer et al., Amygdala Sensitivity to Race is Not Present in Childhood but Emerges Over Adolescence, 23 COGNITIVE NEUROSCIENCE 234 (2013).

¹¹⁶ See Bar-Haim et al., *supra* note 115, at 162; David J. Kelly et al., Three-Month-Olds, but Not Newborns, Prefer Own-Race Faces, 2 DEVELOPMENTAL SCI. F31, F31-F36 (2005).

¹¹⁷ See Rebecca S. Bigler & Lynn S. Liben, Developmental Intergroup Theory: Explaining and Reducing Children’s Social Stereotyping and Prejudice, 16 CURRENT DIRECTIONS PSYCHOL. SCI. 162, 162-66 (2007).

¹¹⁸ See Andrew Scott Baron & Mahzarin R. Banaji, The Development of Implicit Attitudes: Evidence of Race Evaluations from Ages 6 and 10 and Adults, 11 PSYCHOL. SCI. 53, 55 (2006).

¹¹⁹ See Evan P. Apfelbaum et al., Learning (Not) to Talk About Race: When Older Children Underperform in Social Categorization, 14 D

explain, “[t]he term ‘amygdala’ (Latin for almond) was first used in 1819 by the anatomist Burdach, to describe an almond-shaped cell mass located deep in the human temporal cortex.”¹²⁵ Among other functions, the amygdala is involved in processing stimuli that based on one’s prior experience have attained emotional significance.¹²⁶ It plays a role in fear learning and contributes to threat detection; it “reflects arousal triggered by fast unconscious assessment of potential threat elicited by sensory, social and emotional stimuli.”¹²⁷

In 2000, the first fMRI study was published investigating race-related amygdala activity.¹²⁸ Looking at Black and White participants observing Black and White male and female faces, the study found greater amygdala activation to outgroup faces (but not ingroup faces) during later stimulus presentation.¹²⁹ Thus the study concluded that “the rate of response habituation within the amygdala to face stimuli is dependent upon an interaction between the race of the subjects and the perceived race of the face stimuli.”¹³⁰

In a series of two experiments also in 2000, researchers established that the magnitude of amygdala activation in White participants to Black (versus White) male faces was correlated with measures of racial bias on the Implicit Association Test and an eyeblink startle test that in prior studies has been linked to negative or fear stimuli and to amygdala function in response to such stimuli.¹³¹ Interestingly, there was no correlation between amygdala activation and a measure of self-

¹²⁵ M. Davis & P.J. Whalen, *The Amygdala: Vigilance and Emotion*, *MOLECULAR PSYCHIATRY* 13, 13 (2001) (“As originally described, the amygdala is composed of several distinct groups of cells, usually termed the lateral, basal and accessory basal nuclei, and now collectively termed the basolateral amygdala. Several structures surrounding the basolateral amygdala, including the central, medial and cortical nuclei, are traditionally included in the ‘amygdaloid complex’. These surrounding structures, together with the basolateral amygdala, have come to be called ‘the amygdala.’”).

¹²⁶ Telzer et al., *supra* note 115, at 234.

¹²⁷ Jaclyn Ronquillo et al., *The Effects of Skin Tone on Race-Related Amygdala Activity: An fMRI Investigation*, *SOC. COGNITIVE AFFECTIVE NEUROSCIENCE* 39, 39 (2007) (citation omitted); see also Ralph Adolphs et al., *Fear and the Human Amygdala*, *J. NEUROSCIENCE* 15, 5879 (1995) (discussing that the amygdala processes stimuli related to fear).

¹²⁸ See Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, *NEUROREPORT* 2351, 3351-53 (2000).

¹²⁹ *Id.* at 2352-53. Participants were asked to classify the faces by gender.

¹³⁰ *Id.* at 2353.

¹³¹ Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, *J. COGNITIVE NEUROSCIENCE* 29, 729-33 (2000).

reported explicit racial bias³²

Renowned historian and expert on slavery and racism in the United States, Winthrop D. Jordan, traced the history of the Negro-ape metaphor to the English exploring Western Africa and the slave-trade at the turn of the seventeenth century.¹⁴⁹ Jordan wrote: "If Negroes were likened to beasts, there was in Africa a beast which was likened to men. It was a strange and eventually tragic happenstance of nature that the Negro's homeland was the habitat of the animal which in appearance most resembles man."¹⁵⁰ In describing visual representation of Negroes in pictures at the turn of the twentieth century, Professor of Sociology, Dr. Franklin Frazier, wrote: "in every representation of the Negro, he was pictured as a gorilla dressed up like a man."¹⁵¹ In newspapers in the South, Negro pictures were not used "unless he had committed a crime."¹⁵² In the newspapers, Negroes were described as ape-like and even very light skinned Negroes were represented in cartoons as "black with gorilla features."¹⁵³ This fit the stereotype of the time "which represented the Negro as subhuman or a beast, without any human qualities."¹⁵⁴ A so-called authoritative doctoral dissertation published by Columbia University in 1910 accepted as scientific evidence that the Negro was "as destitute of morals as any of the lower animals."¹⁵⁵

However, dehumanizing representations of Blacks date back almost to Europeans' first encounters with Blacks in West Africa.¹⁵⁶ Maritime writings of early European explorers described primitive people as more ape-like than the White explorers.¹⁵⁷ As late as 1906 the New York Zoological Society, now the Bronx Zoo, had a monkey exhibit that included a chimpanzee and a young man from Africa.¹⁵⁸ Several

213 (1998). Ms. Felton was responding to a newspaper editorial as part of her personal crusade to arouse the public about the dangers Blacks posed to White women. See *id.* at 526 n80.

¹⁴⁹ WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812*, at 28-32 (1968).

¹⁵⁰ *Id.* at 28-29. "Almost certainly that fortuitous proximity played a crucial role in shaping the eighteenth century's consensus that on the Great Scale of Beings the place just above the ape was occupied by the Negro." *Id.* at 229.

¹⁵¹ FRAZIER *supra* note 77, at 144.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 144-45.

¹⁵⁵ *Id.* at 145.

¹⁵⁶ Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 104 *J. PERSONALITY & SOC.*

held up a bedsheet that read “Ewing Is An Ape” and threw a banana peel on the court!¹⁶⁹

One does not have to look very far on the internet to find websites hosting disgusting and abhorrent Photoshopped images of President Obama and the First Lady as apelike, one of them under the heading “Primate-In-Chief.”¹⁷⁰ Many of these images are on T-shirts presumably for sale.¹⁷¹ Author and blogger Earl Ofari Hutchinson recently blogged:

The long, sordid and savage history of racist stereotyping of African-Americans has been the stock in trade of race baiting and racial ridicule for more than [a] century. A few grotesque book titles from a century ago, such as *The Negro, a Beast*; *The Negro, a Menace to American Civilization*; and *The Clansman* depicted blacks as apes, monkeys, bestial, and animal-like. The image stuck in books, magazines, journals, and deeply colored the thinking of many Americans of that day. . . that day.¹⁷²

In November of 2016, two local West Virginia officials in Clay County faced mounting pressure to resign after a racist post about Michelle Obama: “It will be refreshing to have a classy, beautiful, dignified First Lady in the White House. I’m tired of seeing [an] Ape in heels.”¹⁷³

¹⁶⁹ Gary Pomerantz, *Ewing Under Siege* WASH POST (Feb. 9, 1983), <https://www.washingtonpost.com/archive/sports/1983/02/09/ewing-under-siege/a17fe474-6ec8-42a9-8ad6-19880d4d9990>.

¹⁷⁰ See, e.g. Abe Sauer, *Primate in Chief: A Guide to Racist Obama Monkey Photoshops* AWL (Apr. 19, 2011), <https://www.theawl.com/2011/04/primate-in-chief-a-guide-to-racist-obama-monkey-photoshops>.

¹⁷¹ See id.

¹⁷² Earl Ofari Hutchinson, *Nothing New in the Ape Crack About Michelle Obama* HUFFPOST: THE BLOG (May 15, 2015), http://www.huffingtonpost.com/earl-ofari-hutchinson/nothing-new-in-the-ape-crack-about-michelle-obama_b_6869650.html.

¹⁷³ Hannah Parry, *West Virginia Officials Under Fire for Racist Facebook Post Which Described Michelle Obama as an ‘Ape in Heels’ Compared to ‘Classy, Beautiful’ Melania Trump*, DAILYMAIL (Nov. 15, 2016, 2:34 AM), <http://www.dailymail.co.uk/news/article-3935342/West-Virginia-officials-fire-racist-Facebook-post-described-Michelle-Obama-Ape-heels-compared-classy-beautiful-Melania-Trump.html#ixzz4RvWUmEPL>.

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Does race play a role in the length of sentences? That is, all other sentencing factors being equal, do Blacks, on average, serve longer sentences than Whites? A brief review of studies on race and sentencing seems to suggest that Blacks receive harsher sentences, more lenient sentences, or similar sentences to Whites. One study looked at forty published studies that had statistically examined the association of race and sentencing severity using data on non-capital sentences imposed at the State (thirty-two) or Federal (eight) level in the 1980s and 1990s and had controlled for criminal history and seriousness of the crime.⁷⁹ This review concluded that young, male, and unemployed Blacks and Hispanics had both a greater likelihood of incarceration and longer sentences than comparable White offenders, and that these effects appeared at the state and federal level and were not limited to a particular region of the country.⁸⁰ It also stressed the importance of examining other interacting variables such as the type of crime (e.g., drug offense) and process-related factors (pretrial release).⁸¹ Other studies have looked more closely at mechanisms of racial disparities in sentence length, finding, for example, that disparities in federal courts stemmed primarily from departures from sentencing guidelines.⁸² Others have suggested the importance of looking at a host of discretionary points in case processing. Yet other social scientists claim that “empirical studies fail to show strong evidence of racial discrimination by judges in sentencing.”⁸³ Fortunately, we need not and do not decide this controversy. We are looking beyond race to the next frontier of sentencing. The first seven of the studies analyzed below used actual sentencing data, each from a different state, and are discussed from earliest to most recent.

(2012).

¹⁷⁸ See Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process* (2012).

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A. The Florida Study

In 2004, *The Influence of Afrocentric Facial Features in Criminal Sentencing* (“the Florida study”), was the first published study to examine the relationship between the degree of Afrocentric facial features and the length of a criminal sentence.⁸⁵ The researchers used a public database of photographs of incarcerated inmates in the State of Florida, maintained by the Florida Department of Corrections, to create a random sample of eighteen- to twenty-four-year-old Black and White male inmates.⁸⁶ The researchers then coded the sample for a number of sentencing factors Florida trial court judges were allowed to consider.⁸⁷ The sample was then coded for Afrocentric facial features using a scale of 1 (not at all) to 9 (very much).

not true for Afrocentric facial features. The stronger the Afrocentric facial features, the longer the sentence.

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rate the stereotypicality of the faces on a scale of 1 (not at all

examine colorism as it relates to sentencing of female offenders. The sample included over 12,000 records of Black females taken from inmate records in the state of North Carolina from 1995 to 2009. No photographs, independent evaluation of skin tones, scales of continuous skin tones, or measures of Afrocentric facial features were used.²¹⁶ Instead, offenders were assessed by correctional officers on admission with a binary code, 0 for non-light skin and 1 for light skin.²¹⁷ Only 4% of Black female offenders were scored with “light skin,” suggesting to the researchers that the “average baseline for determining skin lightness was individuals of European descent.”²¹⁸ Due to the overall large sample size, this still left several hundred “light skinned” Black female offenders.²¹⁹

The study found that the offenders designated “light skinned” received approximately 12% less time than darker skinned counterparts, controlling for other relevant sentencing factors.²²⁰ This study extends previous research that had focused on Black men, and, as the researchers conclude, it “adds to a growing body of colorism research that underscores the complexity of racism in our society.”²²¹

E. The Oregon Study

In 2014, a study by Amanda Mae Petersen, *Beyond Black and White: an Examination of Afrocentric Facial Features and Sex in Criminal Sentencing* (“the Oregon study”), became the latest empirical study in this area.²²² The purpose of the study was to “utilize[] multivariate regression analyses to examine the influence of Afrocentric facial features and sex on sentence length in Oregon.”²²³ One of Petersen’s hypotheses was that, because prior research has established Afrocentric facial features are connected to stereotyping and skin tone is related to different stereotypes for men and women, sentencing outcomes may differ based on the combination of facial features and sex.²²⁴

²¹⁴ See *id.*

²¹⁵ *Id.* at 251.

²¹⁶ See *id.* at 253-54, 257.

²¹⁷ *Id.* at 253.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 255.

²²¹ *Id.* at 257.

²²² Petersen, *supra* note 39.

²²³ *Id.* at 2.

²²⁴ *Id.* at 2-3.

Petersen's study analyzed data on sentencing outcomes for White and Black offenders incarcerated in Oregon as of January 2014. The dependent variable was the length of the sentence, expressed in months.²²⁶ Twenty-eight undergraduate students were recruited as participants for the Afrocentric facial features portion of the study. They rated the photographs of the Black offenders on a scale of 1 to 9, with 1 being not stereotypical of a Black person and 9 being the most stereotypical. They were instructed that: "Some of the individuals would have features that are more typical of Black individuals than

Table 3: Afrocentric Facial Feature Rating on Sentence Length

	8	7	6	5	4	3
9	5.69%	12.53%	20.99%	31.82%	46.39%	67.59%
8		6.48%	14.48%	24.72%	38.51%	58.56%
7			7.51%	17.13%	30.09%	48.92%
6				8.95%	20.99%	38.51%
5					11.06%	27.13%
4						14.48%

F. The Georgia Study

The 2015 study, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing* (the Georgia study), analyzed sentencing data of incarcerated first-time felony offenders in Georgia collected by the Georgia Department of Corrections (“GDC”). Blacks are 31% of the state of Georgia’s population but comprise nearly 62% of persons serving prison time in Georgia. The GDC data came “from two files . . . in the fall of 2003.”³⁶ The data used was from first-time felony convictions from 1995 to 2002, totaling 67,379 inmates, 23,840 Whites and 43,539 Blacks. For Blacks, skin color was recoded from thirteen original categories into three: light-, medium-, and dark-skinned.³⁸

The study found that dark-skinned Blacks received sentences that were 4.83% longer than Whites, medium-skinned Blacks received sentences that were 4.80% longer than Whites, and light-skinned Blacks did not receive statistically significantly different sentences than Whites.³⁹

dark-skinned Blacks held even when socioeconomic status was included in the model.²⁴²

The study concludes: “this research shows that a skin color disparity in criminal sentencing also exists and helps make salient within-group phenotypic differences.²⁴³ Finally, the skin tone bias established by this study “seems to follow the age-old pattern of disfavoring African-ness, however measured.”²⁴⁴

G. The Minnesota Study

In 2016, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice* (“the Minnesota study”), became the latest and most far reaching of the empirical studies on this subject.²⁴⁵ This study used a sampling frame of all adult felony cases in two counties that include St. Paul and Minneapolis, which account for more than one-third of felony convictions in Minnesota and more than 70% of the state’s Black population.²⁴⁶ This large sample included twenty-six different criminal offenses spanning drug, property, and violent crimes.²⁴⁷ Unlike two of the prior studies, this study included both Black and White (and Hispanic) offenders and is the first study to analyze race, skin tone, and Afrocentric facial features with Black, White, and Hispanic offenders.²⁴⁸ Another unique feature of this study is that, in addition to length of the sentence, it analyzes the association of race, skin tone, and Afrocentric facial features with the likelihood of different types of sentences (prison and two forms of probation);²⁴⁹ further, it analyzed the role of race of the sentencing judge in sentencing outcomes.²⁵⁰

The first critical finding of this study is that race alone (Black and White) did not affect the length of sentencing.²⁵¹ The second critical

²⁴² Id. at 408, 409 tbl. 2 (adding socioeconomic status as a control in Model 3).

²⁴³ Id. at 413.

²⁴⁴ Id.

²⁴⁵ See King & Johnson, *supra* note 24.

²⁴⁶ Id. at 97.

²⁴⁷ Id. at 97-98.

²⁴⁸ Id. at 97, 110-11. The study coded offenders for perceived skin tone on a scale of 1 (very light skin) to 7 (very dark skin) and for Afrocentric facial features on a scale of 1 to 7. Id. at 99-100.

²⁴⁹ Id. at 98.

²⁵⁰ Id. at 112.

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chances of a White offender with Afrocentric facial features receiving a prison sentence is closer to that of Blacks than that of Whites. Finally, the race of the sentencing judge was not correlated with any of the findings.²⁶¹

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decision to send an offender to prison; and, while the study contradicts both the Oregon and Florida findings that Whites with

Blacks associated with crime and violence.²⁸² Study 1 tested the implicit association between stereotypical Black facial features and perceptions of criminality.²⁸³ Interestingly, there were more than twice as many Black participants as White participants in Study 1.²⁸⁴ The participants were asked to quickly sort male stereotypical Black faces and male atypical Black faces (lighter skin tones and less strong Afrocentric facial features) into three categories purportedly for a movie role: artist, teacher/professor, or drug dealer.²⁸⁵ They also took an established self-reported test of explicit bias against Blacks, the Social Distance Scale.²⁸⁶ The results confirmed that the stereotypical Black faces were associated with crime (that is, the drug dealer, not the artist or teacher/professor).²⁸⁷ The quickness of the judgments on this task suggested that the “stereotypical associations to criminality are automatic and culturally entrenched.”²⁸⁸ These findings were unrelated to the participants’ race or prejudicial attitudes against Blacks.²⁸⁹

The next three studies examined the possibility that stereotypical facial features would guide memory in a way that was consistent with stereotypes.²⁹⁰ Study 2 found that stereotypical features acted as memory cues for Black men, and Study 3 critically established that the Black man stereotypical facial feature stereotype extends to Black women as well.²⁹¹ Combined, studies 3 and 4 established even more surprising results. Both Black women and White men with stereotypical Black facial features trigger the stereotype of Black male criminality, violence, and dangerousness.²⁹² This is consistent with the Blair studies in 2002, which found that Black Afrocentric facial features trigger the stereotype of criminality, violence, and dangerousness even when the target is male and White so long as the White face has Afrocentric facial features.²⁹³ In sum, Studies 1 through

²⁸² Kleider et al.,supranote 177, at 1200-01.

²⁸³ Id. at 1203.

²⁸⁴ Id.

²⁸⁵ Id.

²⁸⁶ Id.

²⁸⁷ Id. at 1204.

²⁸⁸ Id.

²⁸⁹ Id. Studies 2 to 4 confirmed that stereotypical Black facial features, rather than demographics, drive the association with crime, violence, and dangerousness at 1212.

²⁹⁰ Id. at 1204-05.

²⁹¹ Id. at 1205-06, 1208.

²⁹² Id. at 1210.

²⁹³ Id.; see also Blair et al., Afrocentric Features in Person Perceptions, supranote 23,

4 consistently found that Afrocentric facial features drive the presumption of dangerousness across society as a whole rather than just among subgroups who hold certain racial beliefs.

In another set of studies, researchers examined the relationship of racial phenotypic stereotypicality to perceptions of “physical formidability,” including not only size and strength, but also perceptions of capacity to do harm, and to justification of use of force.²⁹⁵ First, the researchers found that Black men were perceived as being taller and heavier than White men (even controlling for actual height and weight), more muscular, stronger (even controlling for actual strength), and, at least among non-Black participants, as more capable of doing physical harm (even when matched for actual size).²⁹⁶ The researchers also found racial bias in participants’ ratings of the appropriateness of use of force by police against a hypothetical unarmed suspect, an effect attributable at least in part to racial differences in perceived size and harm capacity. They then recruited a separate set of participants to rate Black and White male faces for global Afrocentricity, specific Afrocentric features, or skin tone.²⁹⁷ For the specific features ratings, line drawings were used in order to eliminate skin tone, and for the skin tone ratings, the features were obscured.²⁹⁹ The researchers then correlated these ratings with previous participants’ ratings of perceived formidability (weight, muscularity, strength, and harm capacity) and appropriateness of police use of force.³⁰⁰ Across all three measures of Afrocentricity, the more prototypically Black the faces looked, the more those individuals were seen as being physically formidable and the more force was seen as justified.³⁰¹ In other words, Black phenotypic stereotypicality predicted perceptions of physical threat.

C. The “Shooter Bias” Studies

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by psychologist Joshua Correll and his colleagues. These studies use a video simulation where the participant is instructed to “shoot” anyone holding a gun but not to shoot targets carrying anything else (e.g., a

In a follow-up study, Correll found that priming “shooter bias” study participants by having them read newspaper stories of armed robberies by either Black or White criminals biased the decision to shoot.³¹² The Black criminal newspaper prime (in contrast to the White criminal prime) dramatically magnified the racial bias in the decision to shoot.³¹³ This was attributed to the accessibility of racial stereotypes linking Blacks to crime and dangerousness.³¹⁴ In a second study, participants were either overexposed to armed Black targets (the stereotype congruent condition linking Blacks and criminality), overexposed to armed White targets (the stereotype inconsistent condition), or shown an equal number (the control condition).³¹⁵ Just as participants who read about the Black armed robbers in the first study showed a greater racially motivated bias in the decision to shoot or not shoot, participants who were exposed more to stereotype congruent targets (Blacks with guns) shot armed Blacks faster than armed Whites.³¹⁶ They also were quicker to not shoot unarmed Whites than unarmed Blacks.³¹⁷ In conclusion, this article noted that the pervasive “association between Blacks and violence in American culture” was “striking and disconcerting” and that the race-danger stereotype drives the shooter bias.

Importantly, subsequent research suggests that racial phenotypic stereotypicality — not just the Black-White binary — also affects the decision to shoot. Kahn and Davies created a videogame task similar to Correll’s but varied the stereotypicality of the Black target by changing his facial features and skin tone (the stereotypicality of the White target was not varied).³¹⁹ In their first study, they found that non-Black participants mistakenly shot unarmed highly stereotypical Black targets more often than less stereotypical Black targets or White targets and decided not to shoot armed less stereotypical Black targets

more criminal and dangerous than Whites; nearly instantaneous neural activity related to threat perception and control; and subsequent behavioral responses on the stimulation about shoot/don’t shoot. *id.* at 126.

³¹² Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 51 *J. SOC. PSYCHOL.*

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and White targets more often than highly stereotypical Black targets³²⁰ They also set a lower threshold for shooting at highly

becoming increasingly clear.²⁸ The participants then were asked to hit the space bar on the computer keyboard when they could first identify the object.²⁹ The participants were then given two tests to determine their explicit racial prejudices.³⁰ Priming with Black faces “dramatically reduced the number of frames needed to accurately detect crime-relevant objects” compared to crime irrelevant objects and compared to the participants with the White face prime. In contrast, subliminal exposure to White face³¹ the fac

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and memory³³⁹ A pretest first identified crimes that were stereotypically associated with Blacks (e.g., drive-by-shooting, pimp) or Whites (internet hacker, serial killer)³⁴⁰ Study 1 then found that people associated more phenotypically stereotypical Black faces with stereotypically Black crimes³⁴¹ In Study 2, the researchers had participants watch a video purportedly showing a perpetrator who had committed a stereotypically Black or White crime (or no crime) and then identify the perpetrator from a set of pictures of Black men that varied in phenotypic stereotypicality³⁴² Participants showed memory biases such that they recalled the suspect as being more phenotypically stereotypical in the stereotypically Black crime condition than did participants in the stereotypically White crime or no crime conditions³⁴³ Study 3 obtained similar results using a different pair of crimes³⁴⁴ The researchers speculate that this phenotypic stereotypicality bias may have implications for sentencing, as other research has found that having an appearance that is consistent with crime stereotypes is associated with greater perceived culpability and harsher punishment³⁴⁵

E. The Biased Evidence Hypothesis and Guilty/Not Guilty Implicit Bias Studies

Based on an empirical study with mock jurors, Levinson and Young found support for the Biased Evidence Hypothesis, a new hypothesis that had never been tested³⁴⁶ That is, mock jurors who saw a photo revealing dark skin on the forearm of an armed robbery perpetrator judged subsequent ambiguous evidence as significantly more probative of guilt than did mock jurors who saw the identical photo

except the forearm was light skinned.⁴⁷ Thus, simply showing the photo of the darker skinned forearm of the perpetrator injected racial bias of the mock jurors into the most important function of a jury — their evaluation of trial evidence.⁴⁸ Their evaluation of the evidence mattered because it predicted guilty and not guilty verdicts.⁴⁹

The researchers recognized that “priming” research establishes that

F. Summary

The presumption of dangerousness for Black males based on the stereotype of Blacks as criminal, violent, and dangerous has been repeatedly documented in numerous empirical studies spanning nearly six decades. Over forty years ago Duncan established that an “ambiguous shove” was deemed more violent when a Black rather than a White was giving the shove. Four years later, Sagar and Schofield established that both Black and White sixth-graders viewed a variety of school situations as more threatening when done by a Black student than a White student. Kleider and colleagues found that Black faces (male and female) with darker skin tones and greater Afrocentric facial features triggered the stereotype of Blacks as criminal, violent, and dangerous. This was also true for White faces that were perceived as being strong in Afrocentric facial features. Wilson and colleagues found that Afrocentric facial features and skin tone affected perceptions of physical formidability, harm capacity, and justification of police use of force. Correll and colleagues’ “shooter bias” studies established that participants shot armed targets more frequently and sooner when they were Black rather than White and decided not to

Taking this all together, even beyond studies documenting the association between race and perceptions of criminality and dangerousness, recent research also points to the important role of Afrocentric features and skin tone in the presumption of dangerousness.

V. SUGGESTIONS FOR DECREASING THE IMPACT OF SKIN TONE AND AFROCENTRIC FACIAL FEATURE BIAS IN THE CRIMINAL JUSTICE SYSTEM

“Some may remember, if you have good memories, that there used to be a concept in Anglo-American law called a presumption of innocence, innocent until proven guilty in a court of law. Now that’s so deep in history that there’s no point even bringing it up, but it did once exist.³⁵⁷ — Noam Chomsky

While Professor Chomsky was not talking about the presumption of dangerousness that arises for Black criminal defendants, he could have been. Traditionally, the presumption of innocence is the bedrock of our nation’s criminal law. Described by the U.S. Supreme Court as: “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”³⁵⁸

As we have described in some detail above, the presumption of innocence for Black defendants has become more likely a presumption of dangerousness — especially for Blacks with darker skin tones and greater Afrocentric facial features. Of course, we acknowledge that these effects may not necessarily be easy or straightforward to address. Blair and colleagues suggest that feature-based stereotyping may be difficult to control.³⁵⁹ Therefore, we offer the following multi-pronged

³⁵⁷ Noam Chomsky on Israel-Palestine Prisoner Exchange, U.S. Assassination Campaign in Yemen DEMOCRACY NOW! (Oct. 18, 2011), https://www.democracynow.org/2011/10/18/noam_chomsky_on_israel_palestine_prisoner (containing Professor Chomsky’s statement at 46:44).

³⁵⁸ Coffin v. United States, 156 U.S. 432, 453 (1895). Justice White’s opinion then indicates that the presumption is as old as Roman Law and quotes an evidence scholar that the presumption has been traced “to Deuteronomy, and quotes Mascardius Do Probationibus to show that it was substantially embodied in the laws of Sparta and Athens.” *Id.* at 454.

³⁵⁹ Blair et al., Automaticity of Race, *supra* note 23 (finding that participants were largely unaware of their use of Afrocentric features in making social judgments and that they had difficulty avoiding this tendency when asked to do so).

approach that involves both education and the adoption of practices to track and mitigate against these effects.

Research on the effects of implicit bias education is sparse, especially research examining the longevity of the effects of such efforts. This makes it difficult to make empirically supported claims about the potential effectiveness of education about one's biases. It is important to distinguish between "training" that attempts to diminish implicit bias itself and education about bias. The literature suggests that while some attempts at decreasing implicit bias may be successful for short amounts of time, these effects are short-lived. Furthermore, it is unclear whether reducing implicit bias leads to behavioral change.³⁶² There may be more promise in interventions that spur knowledge and motivation.³⁶³

According to some researchers, awareness of prejudice is "one of the important first steps in reducing prejudice and discrimination."³⁶⁴ One study examining racial bias of professional basketball referees, for example, found a reduction in biased decision-making following

³⁶⁰ Our suggestions are geared primarily at individual decision-making through system-wide education, practical modifications, and data collection and monitoring. It is currently not clear from the extant research exactly what structural characteristics (e.g., disparities at the statutory level; diversity of the judiciary) are responsible for feature-based sentencing disparities. Future research could identify contributing factors at the structural level, providing insight into other solutions that would complement ours.

³⁶¹ See generally Calvin K. Lai et al., Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time, *J. EXPERIMENTAL PSYCHOL. GEN.* 1001 (2016).

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that trainings are conducted carefully and that their effects are assessed.

It is both vital and daunting for judges to take the lead in encouraging and mandating this training. It is daunting because most state and federal judges are overworked and under resourced. It is even more daunting because studies indicate that both judges and probation officers have significant cognitive “blind spots” about racial bias. That is, as penned in a recent opinion by Supreme Court Justice Anthony Kennedy: “Bias is easy to attribute to others and difficult to discern in oneself.”³⁷⁷ In one of the studies conducted in 2016 by one of the authors of this Article it was determined that “92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial services officers ranked themselves in the top 25% of respective colleagues in their ability to make decisions free from racial bias.”³⁷⁸ In the earlier study it was determined that 97% of a group of state court administrative law judges attending an educational conference rated themselves in the top 50% in terms of their ability to “avoid racial prejudice in decisionmaking.”³⁷⁹

Given the difficulty of identifying and acknowledging one’s own biases, it might be helpful for judges, court staff, probation officers, prosecutors, and defense lawyers to have the experience of taking an implicit association test, not as a “diagnosis” of their own bias but rather to experience the difficulty of overriding habitual responses. For example, they could take a test on the Project Implicit website.³⁸⁰

Article.³⁸¹ The results remain confidential and no one would know the results but the IAT test takers.

In addition to judges being educated on the serious effects of racial priming affecting the length of sentences³⁸², there are some practical steps that judges can take now. At least in federal court, for over a decade, pre-sentence reports have contained a full-face photo of the defendant to be sentenced. It is likely that many state courts follow this procedure. The ostensible purpose of this photo practice was to refresh the judge's memory of the defendant if the judge took the guilty plea or tried the defendant. Most busy judges who sentence the defendants sometime after the plea or trial thought this refresher might be helpful. The judge author of this Article had this photo removed several years ago for offenders he was sentencing due to concerns of racial priming, especially colorism and Afrocentric facial feature priming, well-documented in the social psychological literature discussed in this Article. We suggest all sentencing judges do the same. While it is impossible to avoid the priming when seeing the defendant in person in the sentencing, we suggest the following procedure to avoid the potential impact of the racial prime: determine a potential sentencing range based on the pre-sentence report, any sentencing memoranda from the parties, character letters, and other materials reviewed prior to sentencing. This is consistent with research suggesting that setting criteria in advance of decision-making can help reduce bias.³⁸³ Once in the courtroom, if the sentencing range changes upward because of something that happens in the sentencing hearing, (e.g., a particularly powerful and persuasive argument by the prosecutor, evidence not anticipated, or a particularly terrible allocution by the defendant) make sure the upward increase from the original anticipated sentencing range is based on objective factors unrelated to the racial characteristics of the offender.

³⁸¹ Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of and Proposed Solutions* 4 HARV. L. & POL'Y REV. 149, 149-50 (2010) (explaining his shock and awe at finding out as a former civil rights and civil liberties lawyer he had a high anti-Black implicit bias).

³⁸² U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2-3 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf (finding, es/1720171114_EN6(NC)-82s.8(p(17)620)6.7t9(e7.0Tm 1n8v)TJ 0 -1.1 TD .3597 Tw [(TJ -.96d s)-6.5(o)6.7(20

Because the empirical evidence in the existing few studies on the effect of colorism and Afrocentric facial features is mixed on affecting the length of sentences, we urge further empirical study. We hope that judges will cooperate in these studies. Because both colorism and Afrocentric facial feature bias likely affects each stage of the criminal justice system from stop-and-frisk, arrest, decisions to prosecute, bail, adequacy of representation, conviction rates, and length of sentencing, we hope this Article will spur significant research in these previously unexplored or under-explored areas. In addition, where possible, we would encourage judges and other actors in the criminal justice system to collect data on the potential influence of these biases, to look for patterns, and to brainstorm solutions if disparities are found.

Lastly, as described in this Article, there is substantial evidence that most Whites presume Black defendants guilty in criminal cases, thus subverting the presumption of innocence. This is due to, as we have argued and overwhelming social science evidence supports, the deeply rooted and entrenched stereotyping of Blacks as criminal, violent, and dangerous. Should juries be instructed that strong social science evidence suggests that White jurors have a more difficult time giving Black defendants the full benefit of the presumption of innocence? Because the focus of this Article is on the effect of colorism and Afrocentric facial features in sentencing, and the clear majority of criminal defendants are sentenced by judges not juries, we leave this intriguing question, and proposed language for the instruction, to others to scrutinize and develop.

CONCLUSION

Psychological science has established the existence of robust cognitive associations of Blacks with crime, violence, and dangerousness. The vast majority of this work — and that examining the effects of these stereotypes within the criminal justice system — has focused on broad racial categories (e.g., Black and Whites). In this Article, we have argued that the presumption of dangerousness to which Blacks are subjected is even more pronounced for those with darker skin tones and greater Afrocentric facial features. The Black-danger stereotype and its connection to skin tone and facial features has a deep history in colonialism and slavery. In fact, the presumption of dangerousness has become entrenched in U.S. culture and psyche, as suggested by our survey of racist historical institutions and representations of non-White peoples, literature and pseudo-science that developed to justify these institutions, cutting edge neuroscience research on race-related fear, the cultural spreading of the stereotype

