

# Discrimination In Sentencing on the Basis of Afro-Centric Features<sup>o</sup>

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## Introduction: Sentencing and Race

With a huge population of approximately two million prisoners,<sup>1</sup> the U.S. has a further problem – the racial makeup of that population. Although African Americans constitute only 13 percent of the population, approximately 48 percent of those incarcerated are African American.<sup>2</sup>

This composition is discouraging and troubling. Not surprisingly, practically a cottage industry has examined our prison population from many different angles in an attempt to explain why African Americans exhibit a rate of incarceration that is six or seven times greater than it is for whites.<sup>3</sup> One area that has come under scrutiny has been judicial sentencing discretion. The numbers are so troubling that it is natural to wonder if some of the disparity might be due to racial discrimination by judges in their sentencing decisions.

But the empirical studies fail to show strong evidence of racial discrimination by judges in sentencing. Probably the most well known of these studies is that of Alfred Blumstein, published in 1982, which examined arrest statistics and prison population statistics both by offense and by race.<sup>4</sup> The Blumstein study concluded that eighty percent of the racial disparity in incarceration statistics was attributable to disparate racial arrest patterns, meaning that the great bulk of the disparity was a result of the fact that African Americans were committing more crimes or at least more crimes likely to result in incarceration.<sup>5</sup> While the study did not account for all of the disproportionality (and Blumstein was careful to point out that his study did not show that sentencing was devoid

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<sup>1</sup> The Justice Department's Bureau of Justice Statistics reported that as of June 2003, there were 2,078,570 prisoners in prisons and jails in the U.S. See <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

<sup>2</sup> *Id.* In our state prisons, the percentage is even higher with close to 55 percent of the inmates being African American. See SAMUEL WALKER, CASSIA SPOHN, MIRIAM DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* Table 9.1 at 262 (2d. ed. 2000).

<sup>3</sup> Michael Tonry reported that as of 1991, the incarceration rate for blacks was 1,895 per 100,000, while the rate for whites was only 293 per 100,000. See MICHAEL TONRY, *MALIGN NEGLECT – RACE, CRIME, AND PUNISHMENT IN AMERICA* 4 (1995)[hereinafter TONRY, *MALIGN NEGLECT*]. Human Rights Watch reports that there are twelve states in which African American men are incarcerated at rates between twelve and sixteen times greater than those of white men. See Human Rights Watch web page at [www.hrw.org/background/usa/race/](http://www.hrw.org/background/usa/race/).

<sup>4</sup> Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. OF CRIM. L. & CRIMINOLOGY 1259 (1982).

<sup>5</sup> *Id.* at 1263.

of racial discrimination<sup>6</sup>), Blumstein’s study found the amount left unexplained differed with the seriousness of the crime so that the differential arrest rate explained almost all the disproportion in the incarceration rate of African Americans for serious crimes, like murder and aggravated assault.<sup>7</sup> Less serious offenses exhibited larger unexplained variations.<sup>8</sup>

The Blumstein study seemed to allow judges to breath a sigh of relief because it suggested that racial discrimination in sentencing was not a major factor in the disproportionate percentage of African Americans in U.S. prisons. In 1983, following up on the Blumstein study and similar research, the National Academy of Sciences Panel on Sentencing Research concluded:

Our overall assessment of the available research suggests that factors other than racial discrimination in the sentencing process account for most of the disproportionate representation of black males in U.S. prisons, although discrimination in sentencing may play a more important role in some regions, jurisdictions, crime types, or the decisions of individual participants.<sup>9</sup>

The Blumstein study was completed more than two decades ago and is based on data that are quite old given the many changes in sentencing laws over the last two decades around the country. But more recent studies have come to the same general conclusion.<sup>10</sup> The literature is nicely summed up by Michael Tonry, a leading criminologist on the subject of sentencing, who states that “[m]ost modern empirical analyses of sentencing conclude that when legitimate differences among individual cases are taken into account, comparatively little systematic difference in contemporary sentencing outcomes appears to be attributable to race.”<sup>11</sup>

Despite what the studies seem to show, not everyone is convinced. Some suggest that racial discrimination may be hidden in some way that makes it difficult to detect in these studies. For example, special circumstances, such as the race of the victim,<sup>12</sup> might

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<sup>6</sup> *Id.* at 1281. (“The results presented in this paper certainly do not argue that discrimination is absent from the criminal justice system, or even that the amount of discrimination is negligibly small or unimportant.”)

<sup>7</sup> *Id.* at 1274.

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

<sup>9</sup> TONRY, *MALIGN NEGLECT*, *supra* note 3, at 67.

<sup>10</sup> For example, Steven Klein, Joan Petersilia, and John Turner found no evidence supporting a presumption of differential sentencing based on race in a study of sentencing in California, see Steven Klein et al., *Race and Imprisonment Decisions in California*, 247 *SCIENCE* 812 (1990) and Professor Blumstein did an update to his earlier study in 1991, that reached conclusions not greatly different from his 1983 study, see Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 *COLO. L. REV.* 743 (1993).

<sup>11</sup> TONRY, *MALIGN NEGLECT*, *supra* note 3, at 68. Tonry argues powerfully in his book that the real culprit in the heavy racial imbalance in U.S. prisons is the “malign neglect” of the war on drugs on African Americans. TONRY, *MALIGN NEGLECT*, *supra* note 3, at 115.

<sup>12</sup> The worry that offsetting forms of discrimination may be hidden beneath aggregate imprisonment data based on the victim finds support in the study that was at the heart of *McClesky v. Kemp*, 481 U.S. 279 (1987), the famous case challenging the imposition of the death penalty in Georgia on equal protection grounds. The data from the study would seem to show that there was no discrimination if one looked only at the race of the defendants: only 4% of African American defendants received the death penalty, while 7% of white defendants were sentenced to death. But beneath the surface equality, there

trigger racial discrimination in a way that the studies miss. Or it has been suggested that there might be data showing racial discrimination if the studies were to examine more discrete aspects of sentencing, such as particular crimes or particular jurisdictions, but which results are missed when large amounts of data are analyzed.<sup>13</sup> Finally, some insist that the data on which the studies are based are incomplete and therefore that the results of the studies are flawed.<sup>14</sup>

This article does not challenge the prior research on discrimination between racial categories. In fact, in the jurisdiction we<sup>15</sup> investigated, Florida, our study found no discrimination between African Americans and whites in the sentences imposed on defendants looking only at racial category differences.<sup>16</sup> But rather our research suggests that in focusing exclusively on discrimination between racial groups, the research has missed a type of discrimination related to race that is taking place within racial categories, namely, discrimination on the basis of a person's Afro-centric features. By Afro-centric features, we mean those features that are perceived as typical of African Americans, e.g., darker skin, fuller lips, or a broader nose. What our research found was that when one examines sentencing from this perspective, those inmates who have more pronounced Afro-centric features tend to receive longer sentences than others within their racial category who have less pronounced Afro-centric features.<sup>17</sup>

That there may be no discrimination in sentencing between African Americans and whites and yet there is definite discrimination against those with more pronounced Afro-centric features within each of these racial groups may seem puzzling. But it is our thesis that judges have learned to be more careful in sentencing between racial groups, but they have not been similarly sensitized to the possibility of discrimination based on Afro-centric features within racial categories. It is the purpose of this article to begin the process of making the legal community aware of the potency that a person's Afro-centric features may have in biasing judgment within racial categories.

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appeared a very troubling inequality when the race of the defendant was combined with the race of the victim. African American defendants who killed white victims were much more likely to receive a death sentence than African American defendants who killed African American victims or white defendants who killed white or African American victims. The study concluded that even after taking into account 39 nonracial variables, African American defendants charged with killing white victims were 4.3 times more likely to receive a death sentence than white defendants charged with killing either African American or white victims. *Id.* at 286-87.

<sup>13</sup> See, e.g., Samuel L. Myers, Jr., Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment, 64 COLO. L. REV. 781, 783-84 (1993); SAMUEL WALKER, CASSIA SPOHN, MIRIAM DELONE, *supra* note 2, at 204-04.

<sup>14</sup> See Paul Knepper, *Race, Racism and Criminal Justice Statistics*, S. U. L. REV. 71, 108 (1996); CORAMAE RICHEY MANN, *UNEQUAL JUSTICE – A QUESTION OF COLOR* 23-24(1993).

<sup>15</sup> Throughout this article the authors use the term “we” to discuss a line of empirical research conducted in the Psychology Department at the University of Colorado at Boulder. This term is imperfect, because as the footnotes to the four articles described in this paper will show, there were other co-investigators involved in some parts of the research. The term is also imperfect in that one of the authors of this Article is a law professor who did not participate in any of the research.

<sup>16</sup> See text at note *supra*.

<sup>17</sup> See Irene V. Blair, Charles M. Judd & Kristine M. Chapleau, *The Influence of Afrocentric Facial Features in Criminal Sentencing*, P SYCH. SCIENCE (2004) [hereinafter Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*].

The research that is the basis of this article is related to research on what is referred to as “colorism,”<sup>18</sup> which deals with prejudice and discrimination directed against African Americans with darker skin so that, for example, benefits are more likely to be given to those with lighter skin.<sup>19</sup> But important differences separate the research on colorism from our research. For one thing, colorism focuses primarily on skin color and our research is broader and includes any facial feature associated with African Americans including, for example, hair texture, nose width, and the fullness of one’s lips. But even more important, our research is not limited to bias toward African Americans. Our research finds a biasing effect from Afro-centric features among whites that mirrors the biasing effect of Afro-centric features among African Americans. The bottom line is the same for the two racial categories: African American and white inmates who are perceived as having stronger Afro-centric features within their racial category receive longer sentences than those who have less pronounced Afro-centric features.

Section I of this article describes a series of experiments – classic social science studies using primarily undergraduate students – in which the willingness of subjects to affix positive and negative stereotypical descriptions to a person was shown to be related to the strength of the person’s Afro-centric features, whether the person was African American or white. Section I is important because it provides the framework for the research described in Section II in which we studied the influence of Afro-centric features on sentencing in Florida. The consistent results in Section I, showing the strong biasing of a person’s Afro-centric features on judgment, shows why we were not surprised that a person’s Afro-centric features might have a biasing effect when it comes to sentencing decisions.

Section II describes the study we did on sentencing among inmates in the Florida prison system. Using photographs and other information about inmates, including their conviction offense (or offenses) and their prior criminal record, we found that if one compares the sentences given to defendants who committed similar crimes and who had similar criminal histories, inmates who had stronger Afro-centric features tended to receive longer sentences than others within their racial category who had less pronounced Afro-centric features.

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<sup>18</sup> Professor Trina Jones, in an article about discrimination based on shades of skin color among African Americans, traces the term “colorism” to the writer Alice Walker. See Trina Jones, Shades of Brown: The Law of Skin Color, 49 DUKE L. J. 1487,1489 (2000). Professor Jones demonstrates in her article a long history of economic and social discrimination against darker-skinned African Americans as compared to those with lighter skin coloring. Id. at 1511-21.

<sup>19</sup> There is considerable research showing that African Americans who are lighter skinned are likely to have higher incomes and better occupations than those with darker skin, even controlling for level of education and social background. See, e.g., M. E. Hill, Color differences in the socioeconomic status of African American men: Results of a longitudinal study, 78 SOCIAL FORCES 1437 (2000); E. A. Klonoff & H. Landrine, Is skin color a marker for racial discrimination? Explaining the skin color-hypertension relationship, 23 J. OF BEHAVIORAL MEDICINE 329 (2000); M. Hughes & B.R. Hertel, The significance of color remains: A study of life chances, mate selection, and ethnic consciousness among Black Americans, 68 SOCIAL FORCES 1105 (1990); V. Keith & C. Herring, Skin tone and stratification in the Black community, 97 AMER. J. OF SOCIOLOGY 760 (1991).

The phenomenon of colorism has been traced back to the period of slavery when lighter-skinned African Americans were more likely to be given positions in the slave owner’s household. See, e. g., K.Y. RUSSELL, M. WILSON, & R. E. HALL, THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS (1992).

This is a disturbing result because the extent to which a person is perceived as having Afro-centric features ought not to be a factor in sentencing decisions any more than a person's race should be. It is hoped that illuminating this sort of discrimination will be the first step to eliminating such bias. But this may not be easy: our laboratory research found that even when decision-makers are warned about the possible biasing effect of Afro-centric features on judgment, they seem unable to reduce that influence on their judgment.<sup>20</sup>

## Section I: Laboratory Studies on the Influence of Afro-Centric Features on Judgment

### A. Perceptions of Afro-Centric Features

The starting point for the research on the influence of Afro-centric features on judgment was a study which aimed to demonstrate that African Americans and whites vary in the degree to which they manifest Afro-centric facial features and that people can readily and accurately perceive these differences within both races. We started by creating an initial pool of head and shoulder photographs of eighty-four young males.<sup>21</sup> Forty-six of these were selected because they seemed to us to be obviously African American and thirty-eight were chosen because they seemed obviously to be white.<sup>22</sup>

Subjects were asked to judge the degree to which each face manifested Afro-centric features using a 1 to 9 point rating scale (with 1 meaning not at all and 9 meaning very strongly). They did this in two blocks, either judging the block with all the African American photographs first and then in a second block all the white photographs, or reversing the order of the two blocks.<sup>23</sup>

Not surprisingly, the African American faces were on average given a higher rating than the white faces on the Afro-centric features scale.<sup>24</sup> But what was most important to the later studies was the fact that this study showed that subjects were highly consistent in their ratings of the photographs. The degree of consensus among the subjects in these ratings is indexed by what is known in the social sciences as the "reliability" of the mean judgments.<sup>25</sup> Reliabilities can vary between 0 and 1, with 0 meaning no agreement among subjects and 1 meaning perfect agreement. For the

<sup>20</sup> See text at starting at note 44 *infra*.

<sup>21</sup> See Irene V. Blair, Charles M. Judd, Melody S. Sadler & Christopher Jenkins, *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 JOURNAL OF PERSONALITY AND SOCIAL PSYCH. 5 (2002). [Hereinafter cited as "Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*"]

<sup>22</sup> All of the photographed individuals had neutral facial expressions and no visible accessories (i.e., no hats or eyeglasses). The photographs were digitized and edited to eliminate background features and differences in clothing (i.e., all clothing was replaced with black T-shirts).

<sup>23</sup> Additionally, all faces were judged on their attractiveness as well. This was done as a control in the study because facial attractiveness is known to affect the personality impressions that one forms of another. We wanted to make sure that attractiveness was not confounded with Afro-centric features, which it was not. *Id.* at 9.

<sup>24</sup> The African American faces had an average rating of 6.16, with a range of 3.85 to 7.75; the white faces had an average rating of 3.64, with a range of 2.30 to 4.95. See Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*, *supra* note 21, at 9.

<sup>25</sup> See Charles M. Judd & Gary H. McClelland, *Measurement*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 180, 203 (D. Gilbert, S.T. Fiske, & G., Lindzey, eds. 1998).

African American faces, the reliability was .87. For the white faces, the reliability was .76.<sup>26</sup> These high reliabilities indicate that both African American and white faces vary in the degree to which they manifest Afro-centric features, and people can perceive those differences with a high degree of consensus.<sup>27</sup>

## B. Demonstrating the Influence of Afro-Centric Features on Judgment

Having shown that people can easily and reliably judge faces for the degree to which they manifest Afro-centric features, we undertook studies to demonstrate the influence of such features on judgment. Three different studies were conducted, all using the same research paradigm.<sup>28</sup> In this paradigm, subjects were told that we were interested in their ability to match photos of someone's face with descriptions of what the person is like. They were then given short, two-paragraph descriptions of different individuals. After reading each description, subjects were shown a series of facial photographs and told that one of the individuals in the photographs was the person described. Their job was to attempt to identify the photograph of the person described. To do this, they were asked to judge the probability (on a 0 to 100 scale) that each facial photograph was the person who matched the description.

Each subject repeated this process for four different types of descriptions that varied along two dimensions: how stereotypic they were of whites or African Americans and whether they described someone who was generally sympathetic and likeable or someone who was not.<sup>29</sup> We expected that the probability ratings for the faces in each description would be influenced by the degree to which the faces possessed Afro-centric features, such that faces with more Afro-centric features would be given higher probabilities in the descriptions that were stereotypically African American and lower probabilities in the descriptions that were stereotypic of whites, compared to faces with lower levels of such features.

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<sup>26</sup> See Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*, supra note 21, at 10.

<sup>27</sup> Because we were interested in the influence of Afro-centric features on judgment, over and above any influence due to race itself, i.e., whether a person is African American or White, it was important to establish that the photographed individuals were clearly and consistently identified as being either African American or white, even while they varied in the degree to which (within racial category) they have Afro-centric features. To examine this, the subjects were given all of the photographs and asked to categorize each face as African American or white. Results showed that the faces from each category were classified by subjects in their correct racial category 97% of the time. See Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*, supra note 21, at 10.

<sup>28</sup> Id. at 11-20.

<sup>29</sup> The generally likeable description, stereotypic of African Americans, presented a person who grew up in rural Georgia, was close to an extended family, was attending junior college in Atlanta, and wanted to be an entertainer. The more negative African-American-stereotypic description presented a person who grew up in inner-city Detroit, was attending college on a basketball scholarship, had failed several classes, had been involved in fights on the basketball court, and was accused of dealing drugs. The white-stereotypic likeable description presented a Harvard undergraduate who was a star pre-med student, enjoyed classical music, and wrote music reviews for the school newspaper. And finally, the more negative white-stereotypic description presented a person who was a Princeton undergraduate, was introverted and socially inept, had few friends, and came from a privileged but sheltered background. The complete text of these descriptions can be found in Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*, supra note 21, at 11-12.

The three studies that used this paradigm varied in the sets of photographs used. The goal of the first two studies was to demonstrate the influence of Afro-centric features on judgment when race is not a factor. That is, in the first study, the facial photographs were all of African Americans<sup>30</sup> and in the second study, the photographs were only of whites.<sup>31</sup> In both cases, the faces had been shown in the earlier study to be easily identifiable as members of their respective racial groups, but to vary within each group in the degree to which they manifested Afro-centric features. Because all of the photographed individuals in each study were of the same race, subjects could not use race as a basis for judgment. Indeed, when all of the faces were white, race and racial stereotypes were likely never even considered during the judgment task.

As anticipated, both studies showed that those faces possessing stronger Afro-centric features – be they African American or white – were given significantly higher probability ratings in the descriptions that were stereotypic of African Americans and significantly lower probability ratings in the descriptions that were stereotypic of whites, compared to faces of the same race with less strong manifestations of those features.<sup>32</sup> Thus, even whites were stereotypically judged according to the degree to which they manifested Afro-centric features.<sup>33</sup>

In the third study, subjects were again asked to rate a set of faces for each type of description, but this time half of the faces were African American and half were white.<sup>34</sup> These faces were intermixed and presented in a random order, allowing us to examine whether Afro-centric features influence judgments even when subjects could rely solely on the race of the individuals as a basis for (stereotypic) judgment. The results of this study showed that subjects clearly used the race of the individual to guide their probability judgments, in that African American faces were assigned higher probabilities in the African-American-stereotypic descriptions than white faces, while this was reversed in the white-stereotypic descriptions (what we call race-based stereotyping).<sup>35</sup> However, even though they could have relied exclusively on race, subjects continued to assign higher probabilities to faces with more Afro-centric features in the African-American-stereotypic descriptions and lower probabilities to them in the white-stereotypic descriptions, compared to faces of the same race with less Afro-centric features (what we call feature-based stereotyping).<sup>36</sup> And again, this occurred among both the African American faces and the white faces.

In sum, within both racial categories, Afro-centric features seemed to be guiding the stereotypic inferences that were made about the individuals. Moreover, close

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 14-15.

<sup>32</sup> Although our primary interest is in racial stereotypes, which include both positive and negative traits (e.g., African Americans are stereotypically viewed as both musical and aggressive), our research also consistently shows that individuals with more Afro-centric features are generally evaluated more negatively than other same-race individuals with less of those features. See Blair, Judd, Sadler, and Jenkins, *Afrocentric Features and Judgment*, *supra* note 21, at 13.

<sup>33</sup> *Id.* at 17.

<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.* at 19-20.

<sup>36</sup> *Id.* at 20.

questioning of the subjects at the end of the studies suggested that they were not aware of the influence that Afro-centric features had on their judgments.<sup>37</sup>

The question that we turned to in our next studies was whether the biasing effects of Afro-centric features would continue to be observed under conditions that one might expect would limit such bias.

### C. Exploring Some Limiting Conditions

One subject of obvious interest after the initial studies had demonstrated the biasing influence of Afro-centric features was the question of how pervasive this influence is on judgment. To examine this, we conducted two sorts of additional studies. In the first, we tried to see whether giving subjects what lawyers would call a “cautionary instruction” about the influence of Afro-centric features on judgment might lessen the impact of such features and, if so, by how much.<sup>38</sup> In the second, we examined whether the biasing effect of Afro-centric features would be lessened or eliminated if the subjects were given additional information, obviously relevant to the task at hand, about the individuals in the photos<sup>39</sup>

#### (1) The Effect of Cautionary Instructions

To explore the influence that cautionary instructions might have on the use of Afro-centric features in stereotyping, we used the research paradigm described above in which subjects were asked to make probability judgments about a set of faces, some African American and some white, which varied within each racial category in Afro-centric features.<sup>40</sup> In this study some of the subjects, again mostly undergraduate students, were asked to perform the task exactly as described in the previous studies, i.e. without any cautionary instructions. But other subjects were given one of two different cautionary instructions aimed at decreasing stereotyping. One set of instructions told participants that impressions of other people are often based on racial stereotypes and, because the goal of the study was to measure the accuracy of their impressions, they should avoid using any racial stereotypes they might have in judging the probability that each face presented was the person described. The other set of instructions, given to other subjects, specifically targeting stereotyping based on Afro-centric features, informing subjects that often people are particularly likely to stereotype those with stronger Afro-centric features and asking them to avoid doing so.<sup>41</sup>

<sup>37</sup> *Id.* at 20.

<sup>38</sup> See Irene V. Blair, Charles M. Judd, & Jennifer L. Fallman, The Automaticity of Race and Afrocentric Facial Features in Social Judgments, \_\_\_J. OF PERSONALITY & SOCIAL PSYCH. \_\_\_ (2004)[hereinafter cited as Blair, Judd, & Fallman, *Automaticity*].

<sup>39</sup> See Irene V. Blair, Kristine M. Chapleau & Charles M. Judd, The Use of Afrocentric Features as Cues for Judgment in the Presence of Diagnostic Information, \_\_\_European. J. of Social Psych. \_\_\_(2004)[hereinafter Blair, Chapleau & Judd, *Diagnostic Information*].

<sup>40</sup> See text starting at note 28 *supra*.

<sup>41</sup> The specific wording used for these instructions was: “We sometimes assume that people who have features that are typical of African Americans (i.e., more Negroid or Afro-centric facial features) also have traits or attributes that are associated (by stereotypes) with African Americans. Therefore, just because someone has more Afro-centric facial features, it would be a mistake to assume that he is a good basketball player, doesn’t do well in school, or has a great sense of humor.... In the upcoming task, you

The probability ratings for those subjects not given the cautionary instructions revealed results much like those reported previously.<sup>42</sup> Namely, African American faces were assigned higher probabilities for those descriptions stereotypically associated with African Americans (race-based stereotyping) and, within each racial category, faces with more pronounced Afro-centric features were also rated as more probable with respect to these stereotypic descriptions (feature-based stereotyping).<sup>43</sup> Of greater interest, however, were the ratings made by the subjects given cautionary instructions. Subjects told specifically to avoid racial stereotyping and even those told to avoid stereotyping based on Afro-centric features were much less likely to give ratings that indicated race-based stereotyping. However, neither type of cautionary instruction had any impact on feature-based stereotyping: These subjects continued to use Afro-centric features in making their judgments of individuals of both races.<sup>44</sup> This is an important result because it suggests that even when made aware of the possibility of feature-based stereotyping and told that they should avoid this bias, subjects seem unable to control it.

We worried that the inability of the subjects to control feature-based stereotyping might derive from the fact that the subjects were unfamiliar with such features and how they might be used. Accordingly, we conducted a final study, involving these same cautionary instructions, in which subjects first demonstrated that they could reliably judge faces on the basis of their Afro-centric features, exactly as subjects had done in the first study reported above. These subjects, just like those in that study, manifested both reliable and consensual judgments of Afro-centric facial features. However, when they subsequently were given cautionary instructions to avoid feature-based stereotyping in the probability judgment task, they were unable to do so. In other words, even though they knew what such features are, subjects seemed to be unable to control their influence.<sup>45</sup>

## (2) Feature-Based Stereotyping in the Presence of Additional Relevant Information

The studies described thus far demonstrate the effect that Afro-centric features may have on judgment, but they do so in a relatively impoverished situation where the only information that is available are the features conveyed in the facial photographs. It is important to ask whether Afro-centric features bias judgment even when obviously relevant factual information about the individuals who are being judged is available. To explore this question, we conducted a study in which subjects were shown photographs of sixty-four African Americans who varied in their Afro-centric features. In addition to the photograph, for each individual, subjects were told whether or not the person pictured had acted aggressively in four prior situations.<sup>46</sup> Some individuals were portrayed as acting aggressively in all four situations, others in three of the four, others in two of the

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will see faces with features that vary in how typical they are of African Americans. Because you are being asked to make judgments that are as accurate as possible, you should actively try to avoid using those particular features as a basis for judgment.” See Blair, Judd, & Fallman, *Automaticity*, supra note 38, at \_.

<sup>42</sup> See text starting at note 21 supra.

<sup>43</sup> See Blair, Judd, & Fallman, *Automaticity*, supra note 38, at \_\_\_\_.

<sup>44</sup> Id. at \_\_\_\_.

<sup>45</sup> Id. at \_\_\_\_.

<sup>46</sup> Id. at \_\_\_\_.

four, others in only one of the four, and still others in none of the four. The subjects' task was to judge the probability that each individual would act aggressively in a fifth situation based on the information they were given.<sup>47</sup>

Unsurprisingly, subjects' judgments about the probability of aggression in the fifth situation were heavily influenced by the individuals' previous level of aggression in the four prior situations.<sup>48</sup> However, the Afro-centric facial features of the individuals continued to impact the probability judgments: over and above the very large impact of information about prior levels of aggression engaged in by the individuals, those individuals with more pronounced Afro-centric facial features were judged as more likely to engage in aggression in the fifth situation than those with less strong Afro-centric features.<sup>49</sup>

To put this last result together with the earlier studies, the series of laboratory studies show that a person's Afro-centric facial features have a powerful effect on judgment, for both African Americans and whites. Subjects seem unable to control the use of such features even when explicitly asked to do so and even after Afro-centric features have been described to them and they demonstrate their ability to identify the relevant features within each racial category. Additionally, even when diagnostic and obviously relevant information is abundantly available, subjects continue to be influenced by a person's Afro-centric features in making stereotypic judgments.

## Section II: The Influence of Afro-centric Features on Sentencing Decisions

Stereotypes are commonly defined as widely shared beliefs about the attributes of particular social groups.<sup>50</sup> Stereotypes influence judgments through categorization, meaning that people are judged to have stereotypic attributes if they are categorized as members of the relevant social group.<sup>51</sup> Thus, stereotypes associated with African Americans or Asian Americans will be applied to a person once that person is determined to be a member of the particular racial category. What makes the laboratory research in Section I important is that it shows that individuating facial features have the power to affect judgment by triggering the application of racial stereotypes within as well as between racial groups.

The research showed that attributes stereotypically associated with African Americans (e.g., criminal, athletic) were judged to be more true of individuals who

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<sup>47</sup> For the judgment, subjects were told that the individual was involved in a rough basketball game and a fight with another player loomed as a result. The question was whether the individual would in fact initiate a fight on the court or would turn and walk away. The four prior situations in which the individual acted either aggressively or non-aggressively involved aggression on the highway, aggression against a rude person in a nightclub, getting angry at his girlfriend for flirting at a party, and getting angry when some personal property was damaged at a party that roommates gave. *Id.* at \_\_\_\_.

<sup>48</sup> *Id.* at \_\_\_\_.

<sup>49</sup> *Id.* at \_\_\_\_.

<sup>50</sup> See generally S.T. Fiske, Stereotyping, prejudice and discrimination, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY (D. Gilbert, S. T. Fiske, & G. Lindzey, eds. 1998); Charles M. Judd & Bernadette Park, Definition and assessment of accuracy in social stereotypes, 100 PSYCH. REV. 109 (1993).

<sup>51</sup> G. V. Bodenhausen & C. N. Macrae, Stereotype activation and inhibition, 11 ADVANCES IN SOCIAL COGNITION (J. R. Wyer ed. 1998); S.T. Fiske & S. L. Neuberg, A continuum of impression formation, from category-based to individuating processes: Influences of information and motivation on attention and interpretation, 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCH. 1-74 (1990).

possessed stronger Afro-centric features, and this occurred independently of any stereotyping due to racial category. That is, feature-based stereotyping was found when all of the individuals were clearly members of the same racial category, African American or white. Additionally, when judgments were made of both African American and white individuals, racial category and (within race) Afro-centric features were shown to have independent effects on judgment.

Having demonstrated in laboratory research the way that Afro-centric features can affect judgment, we wanted to see if the influence of Afro-centric features on judgment within racial categories could be observed outside of structured experiments. One area that suggested possible research was that of sentencing in criminal cases. This was a natural follow-up to the lab research for two reasons.

The first reason is the sheer importance of criminal sentencing to our country and our society. At a time when our country has so many citizens in our prisons, we need to make sure at a minimum that those in prison have been treated fairly, at least as fairly as others similarly situated.

Another reason for looking at the possible influence of Afro-centric features on sentencing decisions has to do with the worries over racism in our criminal justice system, and especially in sentencing decisions. Obviously, racism can influence the criminal justice system in many ways, but sentencing has been a particular worry for many years because judges typically have considerable sentencing discretion when the crime is serious. As the Introduction explains, there have been many studies of sentencing that have focused on the race of the offender. But the effect of a person's Afro-centric features on sentencing has never been studied. The laboratory research suggested that a judge's assessment of a defendant might be susceptible to the same sort of biasing effect from a defendant's Afro-centric features as was found in the laboratory. If such a biasing effect were found, it might help explain at least to some extent the feeling many have that something seems "not right" about sentencing, even though studies seem to show no significant racial discrimination when looking at racial categories.

#### A. The Decision to Study Sentencing in Florida

Florida was chosen for the study for one major reason: it has a wealth of information about inmates in the Florida prison system on the Internet,<sup>52</sup> which meant that sentencing decisions could be studied efficiently and inexpensively. For each inmate in the Florida prison system – and it is a large prison system with approximately 80,000 inmates<sup>53</sup> – there is available on the Internet: identification information about the offender (including aliases, tattoos or scars, height, weight, age, and racial category), information about the conviction offense or offenses, information about the sentence imposed, and information on the prior criminal record of the inmate.<sup>54</sup> Importantly, for this research, the information about each inmate also includes a picture of the inmate.

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<sup>52</sup> The Florida Department of Corrections home page is: <http://www.dc.state.fl.us/index.html>.

<sup>53</sup> The Florida Corrections web site reports that as of the end of June 2004 there were 81,974 inmates in the system. See <http://www.dc.state.fl.us/pub/pop/facility/index.html>.

<sup>54</sup> Id.

These pictures are typical “mug shot” pictures showing the full face of the inmate from the shoulders up.

While the decision to look at sentencing in Florida was driven by the fact that the study could be done efficiently, Florida turns out to be an excellent state to study if one has to choose a single state jurisdiction. In the first place, it is an important jurisdiction because it is the country’s fourth most populous state containing slightly less than 6 percent of the U.S. population. Secondly, it is a very diverse state with a large African American population. As to its diversity, among those in the U.S. who are foreign-born, almost 10 percent live in Florida.<sup>55</sup> Almost 16 percent of Florida’s population is African American (compared to about 13 percent of the U.S. population) and Hispanics are more than 18 percent of Florida’s population (but only 13 percent of the U.S. population).<sup>56</sup> Thus, the impact of discrimination, whether based on race or Afro-centric features, will affect a significant number of inmates.

## B. The Ebb and Flow of Sentencing Policies in Florida

A third reason why Florida turned out to be good state in which to study sentencing is the fact that sentencing in Florida has gone through the same general evolution that one finds in many states over the last few decades.

To speak first about national trends in sentencing, the starting point would be forty or fifty years ago when states placed very broad sentencing discretion in the hands of trial judges, with very little structure to guide judges in their decision and with no appellate review possible. Typically, state statutes set only a maximum penalty for particular crimes and within the range from probation through the maximum penalty, judges had complete discretion to impose any sentence they felt appropriate.<sup>57</sup> It was not unusual for judges to have the discretion to sentence defendants to prison within ranges zero years in prison up to thirty, forty, or fifty years in prison. This wide discretion was thought necessary to allow judges to tailor each individual sentence to fit the rehabilitative needs of the offender.

But rather than foster rehabilitation, this sort of discretion allowed judges to sentence offenders for many different reasons and purposes, some of them often idiosyncratic to the particular judge.<sup>58</sup> Beginning in the 1970s, there was general disenchantment with sentencing in the United States. Studies showed that judges swung wildly in their sentencing predilections, sometimes seeming to be clearly biased by the offender’s race,<sup>59</sup> but sometimes simply making very different assessments about the appropriate punishment for different crimes and different offenders.<sup>60</sup> One of the most

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<sup>55</sup> The web site for Enterprise Florida, <http://www.eflorida.com/fp/population.asp>, contains detailed information on the present population of Florida as well as projections for the future.

<sup>56</sup> *Id.*

<sup>57</sup> See Andrew von Hirsch, *Chapter 1: The Sentencing Commission’s Function* in *THE SENTENCING COMMISSION’S FUNCTION AND ITS GUIDELINES* (Andrew von Hirsch, Kay A. Knapp, and Michael Tonry, eds. 1987) at 3-4.

<sup>58</sup> *Id.*

<sup>59</sup> See *TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 5* (1976).

<sup>60</sup> A study of federal judges in which the judges were given twenty identical files and asked to sentence the offender found that there were “glaring disparities” in the sentences the judges thought

influential books in that period was Judge Marvin Frankel's *CRIMINAL SENTENCES: LAW WITHOUT ORDER*.<sup>61</sup> Frankel, a federal judge at the time, attacked what he saw happening around him in courtrooms and called for fundamental reforms in sentencing. Among his proposals for reform was the creation of a sentencing commission that would be composed of judges, prosecutors, defense attorneys, scholars, and citizens that would have a professional staff to help it write detailed guidelines for sentencing which judges would have to follow.<sup>62</sup>

There was a great deal of interest in the idea of sentencing guidelines in the late 1970s. Some jurisdictions (including Florida) experimented with voluntary guidelines which judges were not bound to follow.<sup>63</sup> But voluntary guidelines did not have much impact on sentencing and so states continued to pursue stronger guidelines systems. The first state to adopt the sentencing commission model was Minnesota in 1980 and that commission enacted guidelines designed to promote a more uniform and proportional sentencing system.<sup>64</sup> Under that system, which based sentences only on the offender's conviction offense and prior record, a judge was expected in most cases to sentence within the guideline range. However, a judge could depart from the sentencing range if the circumstances were substantial and compelling, but both the prosecution and the defense could appeal any such departure.<sup>65</sup> A number of states, today about fifteen or sixteen, have followed Minnesota's lead and have adopted systems of presumptive guidelines, which required a judge to sentence within a guideline range based on the offense and the record of the offender, unless there are strong reasons for departing from that range.<sup>66</sup> But even in states that do not have guideline systems, there continues to be efforts to make sentencing more uniform and less subject to the whim (or biases) of individual judges.

While Florida has a sentencing system that does not mirror that of any other state, the history of sentencing in Florida parallels what has been going on nationally. Like many other jurisdictions, in the 1970s and early 1980s, Florida became increasingly worried about its sentencing system and the broad discretion vested in judges. In 1979, the Florida Sentencing Study Committee studied their system and found that, after holding relevant factors constant, "non-white offenders were significantly more likely to

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appropriate for the offenses described in the files. See Alan M. Dershowitz, Background Paper, in *TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT*, supra note 52, at 103. For example, one judge would have sentenced a union official convicted of extortionate credit transactions to twenty years in prison, while another judge would have sentenced the same offender to only three years. *Id.*

<sup>61</sup> MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

<sup>62</sup> *Id.* at 57-62.

<sup>63</sup> See Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 *COLO. L. REV.* 713 (1993); W. Clinton Terry, III, *The U.S. Sentencing Guidelines and Police Officer Discretion in THE U.S. SENTENCING GUIDELINES* 21, 22 (Dean J. Champion, ed. 1989).

<sup>64</sup> See Debra L. Dailey, *Prison and Race in Minnesota*, 64 *COLO. L. REV.* 761, 761-62 note 7 (1993).

<sup>65</sup> *Id.*

<sup>66</sup> See Kevin Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 *COLO. L. REV.* 645, 647-48 (1993).

receive a jail or prison sentences than white offenders.”<sup>67</sup> The Sentencing Study Committee recommended that sentencing guidelines be implemented to decrease racial bias in sentencing decisions and cut back on the broad discretion judges typically were permitted in sentencing.

In response to these concerns, Florida moved to a guidelines system that went through a number of drafts and was eventually adopted by the Florida Supreme Court under its rulemaking authority.<sup>68</sup> Parole was eliminated for all offenses, except for capital crimes, and a guideline system was put into place in which one of nine worksheets, depending on the crime, had to be completed.<sup>69</sup> On the worksheet, a calculation was made using factors such as the number of offenses, the prior record of the defendant, and injury to the victim to arrive at a score which would determine the sentencing range for the offense. Judges could depart from the range, but appellate review was available if a judge departed from the sentencing range.<sup>70</sup>

In 1994, the legislature supplanted the guidelines system that had been adopted by the court with a system of its own. This version of the guidelines ranked felonies into one of ten severity levels depending on the nature of the offense and points were added, as under the old system, for factors such as a prior record. Judges could still depart from the guideline sentence, but now judges were given a list of acceptable reasons for departing from the guideline range.<sup>71</sup>

Because of continued concern over possible racial discrimination in sentencing and to make sure sentencing was complying with the state statute requiring that sentencing be “neutral with respect to race, gender, and social and economic status”<sup>72</sup> the Florida Department of Corrections conducted a study of all felony offenders sentenced between July 1, 1994, and December 31, 1996.<sup>73</sup> The study examined the possible influence of race on the sentencing decisions and, for offenders sentenced to prison, on the length of the prison sentence. For both types of outcomes, it was determined that race had no “meaningful effect” on decisions once other relevant and legitimate sentencing factors were taken into account.<sup>74</sup> This led the Department of Corrections to conclude that “the goal of racial equity explicit in the sentencing guidelines law has been met...”<sup>75</sup>

But the legislature changed direction once again in 1998 by passing a new sentencing law, referred to as the Criminal Punishment Code, that had the effect of

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<sup>67</sup> The Impact of the 1994 and 1995 Structured Sentencing Policies in Florida, in SENTENCING GUIDELINES, 1996-97 ANNUAL REPORT, at 2, available at <[http://www.dc.state.fl.us/pub/sg\\_annual/9697/index.html](http://www.dc.state.fl.us/pub/sg_annual/9697/index.html)>.

<sup>68</sup> See Robert Batey & Stephen M. Everhart, The Appeal Provision of Florida’s Criminal Punishment Code: Unwise and Unconstitutional, 11 FLA. J.L. & PUB. POL’Y 5, 11-12 (1999)

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id. at 16-17.

<sup>72</sup> FLA. STAT. §921.001(a)(4)(1). This provision has also been adopted as a goal under Florida’s Criminal Punishment Code, which is the sentencing system to be applied to offenses committed after October, 1 1998. See FLA. STAT. §921.0001(1)(a).

<sup>73</sup> W. D. Bales, Part II: Impact, Section 2: Sentencing Neutrality in SENTENCING GUIDELINES 1996 – 1997 ANNUAL REPORT (1997), Florida Department of Corrections, Bureau of Research and Data Analysis, Tallahassee, FL. (Available on the Internet at: <[http://www.dc.state.fl.us/pub/sg\\_annual/9596/ii\\_2.html](http://www.dc.state.fl.us/pub/sg_annual/9596/ii_2.html)>).

<sup>74</sup> Id.

<sup>75</sup> Id.

broadening the sentencing discretion of judges. The new law, which went into effect on October 1, 1998, still requires the completion of the guidelines' "scoresheet" that was required under the guidelines system, but judges are now free to depart upward without appellate review, up to the maximum sentence permitted for the offense.<sup>76</sup> The result today is that Florida might best be viewed as having a "loose" guidelines system in that there are guidelines that judges should follow but judges have more discretion to depart and impose a longer sentence if they see fit.

Florida is similar to the great majority of state systems in that judges continue to have considerable sentencing discretion – not the sort of unbridled discretion that judges possessed thirty or forty years ago – but fairly broad discretion nonetheless. For this reason, it seems very likely that the results we found in Florida, showing discrimination among inmates within racial categories based on the strength of their Afro-centric features, would be replicated if similar studies were done in many other states.

### C. The Methodology of the Study

#### (1) The Inmates in the Study, Their Background, and the Assessment of Their Facial Features

Individual inmates were randomly selected from the Florida Department of Corrections database.<sup>77</sup> Within the population of all young (18 to 24 years of age) male inmates, a sample of 216 was randomly selected, stratified by race, as designated on their court records.<sup>78</sup> There were 100 African American inmates and 116 white inmates. To lessen the possible impact of changes in sentencing laws, only inmates who were serving time for offenses committed between October 1, 1998 and October 1, 2002 were chosen for the study, 1998 being the date of the last major change in the guidelines system.<sup>79</sup>

We researched the Florida criminal statutes to help code each case for a number of different variables: the amount of time the inmate had been sentenced to serve in prison, the seriousness of the primary offense, the number of any additional offenses and their average seriousness, and the number of prior offenses and their average seriousness.<sup>80</sup> In this sample inmate population, a total of 138 different types of offenses had been committed. The seriousness of each was determined by consulting the Florida state statutes using the 10-point Florida system in which lower numbers indicate less serious felonies and higher numbers more serious felonies.<sup>81</sup> For example, supplying an

<sup>76</sup> See Robert Batey & Stephen M. Everhart, *supra* note 68, at 17-18.

<sup>77</sup> The Florida Department of Corrections Web site from which data on offenders can be accessed is located at <<http://www.dc.state.fl.us/index.html>>.

<sup>78</sup> See Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, *supra* note 17, at \_\_\_\_

<sup>79</sup> Because the database did not allow us to select cases by offense date, we initially drew a total of 350 cases, stratified by race. We then excluded those cases with offense dates outside our parameters ( $n = 113$ ). Twenty-one additional cases were excluded, either because they had committed crimes that we could not code or the photographs were severely degraded. *Id.* at \_\_\_\_.

<sup>80</sup> For this research on the Florida criminal statutes, we are grateful to Sandy Schneider, who was at the time a law student at the University of Colorado at Boulder.

<sup>81</sup> See Fla. Stat. § 921.0022. A few additional notes on the coding of offenses: multiple sentences were served concurrently and thus total sentence length was determined by the length of the longest sentence; life sentences were coded as 99 years; for multiple current offenses, the offense given the longest sentence was defined as the primary offense; and only felony crimes were included in this analysis because

unauthorized driver's license is a Level 1 offense, possessing child pornography or selling cocaine is a Level 5 offense, and murder is a Level 10 offense.

We then assessed the degree to which the facial photograph of each inmate manifested Afro-centric facial features. To accomplish this, the 216 photographs were randomly divided into two sets, with approximately equal numbers of African American and white inmates in each set. Each set was given to a group of undergraduate students to rate in terms of the strength of the Afro-centric features, using the same procedure followed in the first study described above.<sup>82</sup>

As anticipated, the subjects were very consistent in their ratings of the photographs for Afro-centric features,<sup>83</sup> and while the African American inmates were found to possess significantly more pronounced Afro-centric features than the white inmates,<sup>84</sup> there was considerable variability within each group.<sup>85</sup>

## (2) Legitimate Influences on the Length of Sentences in Florida?

Before examining the degree to which race and, within race, the strength of inmates' Afro-centric features predicted length of prison sentence, we first conducted an analysis in which sentence length was regressed<sup>86</sup> on only those factors that should lawfully influence sentencing under the Florida sentencing system<sup>87</sup>: the seriousness of the primary crime committed, the number and average seriousness of additional concurrent crimes, and the number and average seriousness of the offender's prior offenses (what we will henceforth refer to as the criminal record).<sup>88</sup> The results of the

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there was no system to code the seriousness of the relatively infrequent misdemeanors. See Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, supra note 17, at \_\_\_\_.

<sup>82</sup> See text starting at note 21 *supra*. As was true of the preliminary studies, these participants were also asked to rate the faces on attractiveness. This variable was unrelated to Afro-centric features and was subsequently found not to be predictive of sentence length. Accordingly, we do not discuss it further.

<sup>83</sup> Put in more technical terms, obtained reliabilities of mean ratings of Afro-centric features were high and varied between .88 and .95. See Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, supra note 17, at \_\_\_\_.

<sup>84</sup> The African American inmates were given an average rating of 5.92, whereas the white inmates were given an average rating of 3.33,  $t[214] = 16.06$ ,  $p < .0001$ . *Id.* at \_\_\_\_.

<sup>85</sup> Among the African American inmates, the standard deviation in ratings was 1.11, and among the white inmates it was 1.27. *Id.* at \_\_\_\_.

<sup>86</sup> The statistical procedure used here, multiple regression, derives a weighted additive linear combination of the predictor variables to predict the outcome or dependent variable (in this case sentence length), minimizing squared errors of prediction. The resulting partial regression coefficients, one for each predictor variable, can be interpreted as the extent to which the dependent variable is predicted to increase or decrease as a function of the particular predictor, statistically holding constant or "controlling for" all other predictors. See generally CHARLES M. JUDD & GARY H. MCCLELLAND, *DATA ANALYSIS: A MODEL COMPARISON APPROACH* (1989).

<sup>87</sup> The factors that should influence sentences in Florida are set out in the statutory provision that provides the worksheet that must be completed for each felony offender. See FLA. STAT. §921.0024.

<sup>88</sup> We also included quadratic predictor terms for the seriousness of primary offense, the seriousness of additional offenses, and the seriousness of prior offenses, because the guidelines specify that the length of a sentence should increase dramatically with offense seriousness for more serious offenses. In other words, the 10-Level system of crime seriousness is not strictly linear. The sentencing implications of going from a Level 1 crime to a Level 2 crime are less severe than going from a Level 9 crime to a Level 10 crime. Because sentence length was positively skewed, a log-transformation was performed on this

analysis showed, as expected, that criminal record accounted for a substantial amount of the variance (57%) in sentence length.<sup>89</sup>

Unsurprisingly, the seriousness of the primary offense (linear and quadratic effects), and both the seriousness (quadratic effect) and number of additional offenses were significant predictors of sentence length.<sup>90</sup>

### (3) Sentences as Influenced by Racial Category and Afro-Centric Features

We then turned to the issue of whether the racial category of the inmates was related to the sentences they received. To determine any influence played by racial category, we estimated a second regression model (Model 2) in which inmate race, as indicated by the court, was entered as a predictor along with the predictors from the previous regression model (i.e., the inmates' criminal record). Consistent with the findings of the Florida Race Neutrality in Sentencing report, this analysis showed that the race of the offender did not account for a significant amount of variance in sentence length over and above the inmates' criminal record.<sup>91</sup> This is consistent with the studies of the influence of race on sentencing that have been done for many years which show that discrimination by racial category is not a significant factor in sentencing outcomes.

But when we ran a third regression model (Model 3) and added as an additional predictor of sentence length the degree to which the inmates manifested Afro-centric features (as judged from their photographs), controlling for the race of the inmates and criminal record (i.e., all prior predictors), the results were quite different. This analysis showed that an inmate's Afro-centric features significantly predicted sentence length over and above the other factors.<sup>92</sup> Additionally, with Afro-centric features now in the model, race was found to be a significant predictor of sentence length,<sup>93</sup> but surprisingly in the direction opposite to what one might expect, with white inmates serving longer sentences than African American inmates, all else being equal.

To help understand the results of these analyses, we have placed a chart in the Appendix which we have labeled "Figure 1." Figure 1 presents a residual plot of all data points and the prediction functions from Model 2 and Model 3. The vertical axis is the

variable prior to analysis. Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, supra note 17, at \_\_\_\_.

<sup>89</sup> This is comparable to the 42.2% of variance accounted for in the analysis conducted by the Florida Department of Corrections, see W. D. Bales, supra note 73.

<sup>90</sup> Somewhat surprisingly, neither the seriousness nor number of prior offenses predicted sentence length over and above the other predictor variables. We believe that these null effects are attributable to the relative youthfulness of the inmates chosen for the study, among whom there were relatively few who had a record of prior felony convictions. The average number of prior felonies was 0.95. See Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, supra note 17, at \_\_\_\_.

<sup>91</sup> In this analysis, race accounted for 0.4% of the variance in sentence length,  $t(206) = 0.90$ ,  $p = .37$ . *Id.* at \_\_\_\_.

<sup>92</sup> Afrocentric features accounted for 2% of the variance in sentence length,  $t(205) = 2.29$ ,  $p < .025$ . . *Id.* at \_\_\_\_ . Although the size of the effect may seem small, it is comparable to the influence that the seriousness of additional concurrent offenses had on sentence length (quadratic effect, 3%). Thus, having very Afrocentric features would result in a longer prison sentence to about the same extent as having committed a very serious offense concurrent with the primary offense.

<sup>93</sup> In this analysis, race accounted for 2% of the variance in sentence length,  $t(205) = 2.28$ ,  $p < .025$ . . *Id.* at \_\_\_\_.

residual sentence length for each case, partialling out effects of criminal record. The horizontal axis represents the residual Afro-centric features variable, again partialling out the effects of criminal record. This plot thus permits one to examine the partial relationships between sentence length, on the one hand, and race and Afro-centric features on the other, over and above any influence of criminal record. The data for the white inmates are plotted with squares, while the data for the African American inmates are represented by circles.

In Model 2, where race is included as a predictor along with criminal record, but Afro-centric features are not included as a predictor, the predicted sentence lengths are given by the two gray, horizontal lines in the plot, representing the mean residual sentence length for each racial group. These, as we have reported, are not significantly different from each other.

But the lines change considerably when Afro-centric features and race are both predictors. The result is the two darker, sloped lines representing the predicted functions from Model 3. The positive (and significant) slopes for these lines indicate that within each race, stronger Afro-centric features are associated with longer sentences, given equivalent criminal records. Additionally, as can be seen by the vertical distance between the two partial prediction lines, there is a significant difference between the two races: given equivalent criminal records and equivalent Afro-centric facial features, white inmates receive longer sentences than African American inmates.<sup>94</sup>

This last finding may seem surprising given that race was not significantly related to sentence length in Model 2. The difference in results for race in Model 2 and Model 3 is understandable in view of the strong relation between race and Afro-centric features.<sup>95</sup> Although there is some overlap, one can see that most of the white inmates appear on the left half of Figure 1 and most of the African American inmates appear on the right half. Clearly the two groups have, on average, very different levels of Afro-centric facial features. In Model 2, the relation between race and sentence length is examined without regard to Afro-centric features (i.e., the fact that whites have less Afro-centric features than African Americans has no relevance for the analysis), and here we find that race has no impact on sentence length. In Model 3, the relation between race and sentence length is examined, controlling for Afro-centric features. What that means is that we are looking at the effect of race on sentence length among people who have the same level of Afro-centric features. Because whites naturally have less Afro-centric features than African Americans, the comparison being made in Model 3 is between whites who are high in Afro-centric features (relative to other whites) and African Americans who are low in Afro-centric features (relative to other African Americans). And because whites with relatively high Afro-centric features receive harsher sentences than other whites and African Americans with relatively low Afro-centric features receive more lenient sentences than other African Americans, the result of this comparison is that whites

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<sup>94</sup> A final regression model was estimated to examine whether the impact of Afro-centric features was the same for the African American and the white inmates. To do this we created a variable that was the product of race and Afro-centric features and added this as an additional predictor to capture the interaction. This interaction did not approach significance ( $p > .70$ ), thus suggesting that the plotted lines in Figure 1 really are parallel: the effects of Afro-centric features on residual sentence length within the two racial groups are equivalent. See Blair, Judd & Chapleau, *Afrocentric Features in Criminal Sentencing*, *supra* note 17, at \_\_\_\_.

<sup>95</sup> The correlation between these two variables is .74,  $p < .001$ . *Id.* at \_\_\_\_.

appear to be receiving longer sentences than African Americans. Thus the race difference emerges only when Afro-centric features are statistically controlled.

## (4) Evaluating the Results

The results when we compared the sentences of African American and white inmates by racial category were consistent with the earlier findings reached by the state of Florida. We observed no adverse effect on sentencing when we looked only at the race of the inmate: African American and white offenders in the state of Florida, given equivalent criminal records, are given roughly equivalent sentences. This result seems to suggest that Florida has been able to meet the objective in its statute that sentences be “neutral with respect to race.”<sup>96</sup>

But when one looks more closely at features associated with race, the sentencing inmates receive is not unbiased - offenders with equivalent criminal records within the same racial category (African American or white) receive longer sentences if they have stronger Afro-centric features.

That Afro-centric features might distort criminal sentences, when judges have the most relevant information about offenders at their disposal, may seem surprising as well as disheartening. Before accusations of unbridled bias begin to fly, we remind readers that this result is consistent with our laboratory studies that show the difficulty of eliminating the influence of Afro-centric features on judgment. Even when subjects were given very clear and diagnostic information upon which to base their judgments, and even when they were told explicitly about the influence of Afro-centric features and told to avoid it, such features continued to influence their judgments. Although one might argue that judges have the most pertinent information, they must still rely on their subjective perceptions to some extent, with the consequence that stereotypes may lead to the conclusion that some individuals (i.e., those with more Afro-centric features) are more threatening, more dangerous, less remorseful and more culpable, and thus more deserving of longer sentences.

We must acknowledge of course that the effects we have shown may be attributable to a series of stages or decisions taken during the criminal sentencing process. For instance, the inmate records to which we had access contained no indication of whether plea-bargaining had taken place, either to determine the primary offense or the resulting sentence length. It may well be the case that the biases due to Afro-centric facial features that we have shown are not only attributable to judges, but also to district attorneys and many others involved in the plea bargaining and sentencing process. Thus, throughout our discussion we have referred to *judges* being influenced by Afro-centric features, but the more appropriate characterization is that there may be biases in the whole process of which sentencing is the final outcome.

Taking the results as a whole, some might be tempted to say that the picture is fairly positive. Race is not being used in sentencing decisions and if anything, the minority race group is coming out ahead (i.e., when Afro-centric features are equated). But such a conclusion is a serious misinterpretation of the study’s results. Racial stereotyping in sentencing decisions is still going on. But it is not a function of the racial category of the individual. Instead, there seems to be an equally pernicious and less controllable process at work. Racial stereotyping in sentencing is still occurring based on the facial appearance of the offender. Be they white or African American, those

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<sup>96</sup> FLA. STAT. § 921.001[a][4].

offenders who possess stronger Afro-centric features are receiving harsher sentences for the same crimes.

How large are the impacts of Afro-centric features on sentences? One way to calibrate them is to derive predicted sentence lengths (for the mean levels of the criminal history variables) for individuals within each race who are one standard deviation above and below the mean level of Afro-centric features for their racial group. When this is done, it appears that individuals one standard deviation above their group mean on Afro-centric features are receiving sentences about 7-8 months longer than individuals one standard deviation below their group mean (assuming also the same criminal record). This is clearly a meaningful difference.

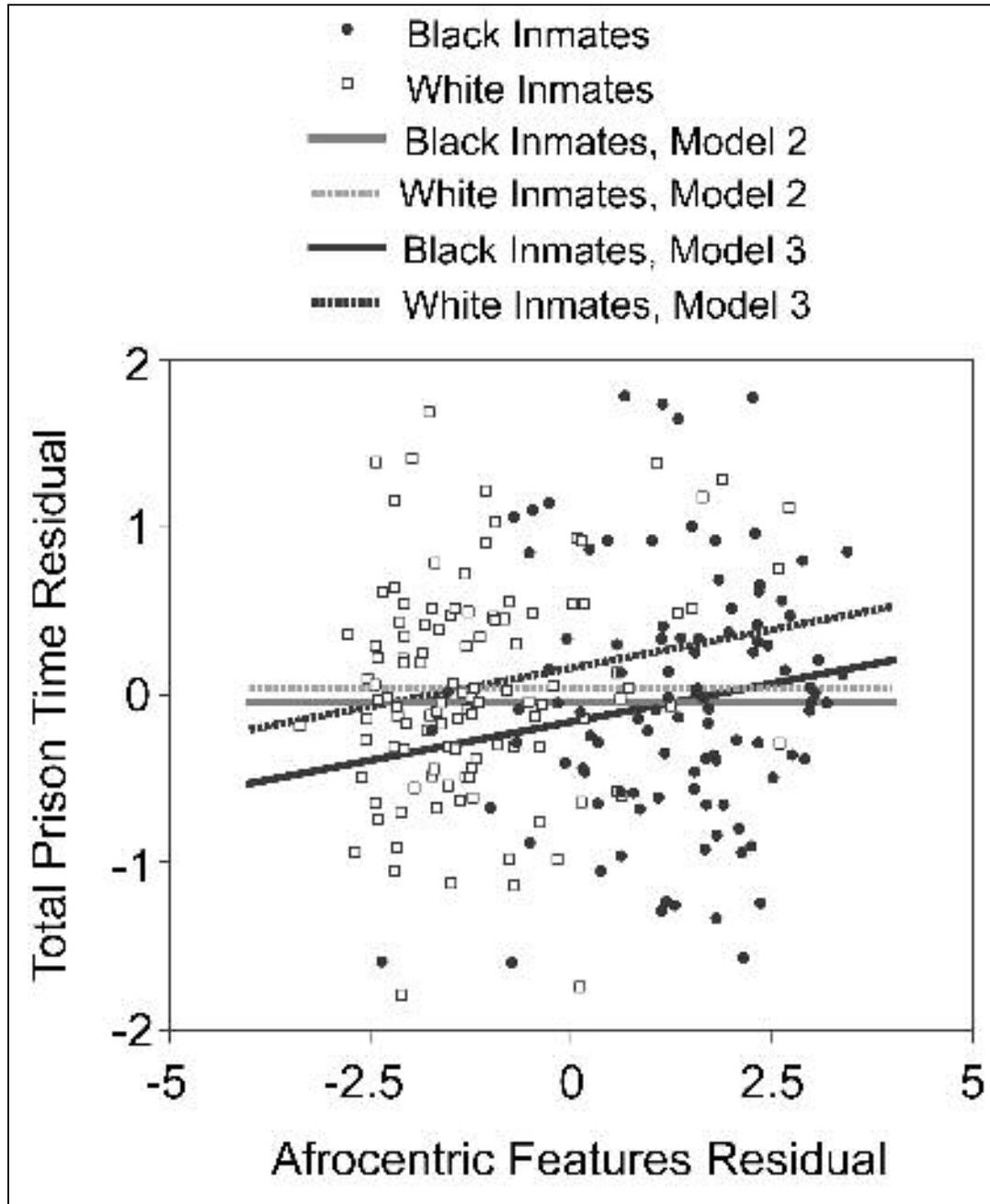
### Conclusion

Our laboratory research described in Section I of this Article shows that people use Afro-centric features to infer traits that are stereotypic of African Americans and, importantly, this form of stereotyping appears to occur without people's awareness and outside of their immediate control. Given the laboratory findings, it is not surprising to have found similar results, as described in Section II, when we looked at the influence of Afro-centric features on sentencing decisions. Judges appear to behave like the laboratory participants in the studies and this suggests that they were unaware of the fact that Afro-centric features were influencing their decisions.

What is causing this bias based on Afro-centric features is unclear, but we theorize that a person's facial features lead to stereotyping in two ways. First, one can use a person's facial features to infer that a person is a member of a racial category and racial stereotyping can then ensue on that basis. But we believe that something else is going on at this point in time and that a person's Afro-centric features can trigger stereotypic inferences about that person even within a racial category. In short, Afro-centric features have come to have potency on their own to influence judgment and trigger stereotypic inferences.

Obviously, race-based stereotypes have the potential to lead judges to perceive African American offenders more negatively than white offenders and for that reason our criminal justice system continues to monitor sentencing from that perspective. But judges have been well sensitized to this form of possible bias and it seems that they are able to avoid it for that reason. But judges have not been sensitized to the discrimination that has been described in this article, namely, discrimination on the basis of a person's Afro-centric features. The perception that a particular offender appears more dangerous or culpable than other offenders within the same racial group is unlikely to raise the red flag of racial bias, as it is customarily understood, and thus no steps are taken to ensure that sentencing is not biased by the mere fact that the offender has more pronounced Afro-centric features. It is the purpose of this article to call attention to this form of bias and to start sensitizing those in the criminal justice system to the unfairness, irrationality, and injustice that can result from this form of bias.

Appendix



**Figure 1.** Residualized sentence length as a function of residualized Afro-centric features, for Black and White inmates. The regression lines displayed are from Model 2, which examined sentence length as a function of race, controlling only for criminal record, and from Model 3, which examined sentence length as a function of race and Afro-centric features, each controlling for the other variable as well as criminal record.