DISCRIMINATION ON THE BASIS OF AFROCENTRIC FEATURES[†]

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INTRODUCTION: SENTENCING AND RACE

With a huge population of approximately two million prisoners,[1] the United States has a particularly disturbing problem—the disproportional

1.   The Justice Department's Bureau of Justice Statistics reported that as of December 2003, there were 2,085,620 prisoners in prisons and jails in the United States. BUREAU

racial makeup of that population. Although African Americans constitute only 12% of this country's population,[2] approximately 44% of those incarcerated are African American.[3] This composition is discouraging and troubling. Not surprisingly, practically a cottage industry has emerged to examine our prison population from many different angles in an attempt to explain why African Americans are incarcerated at a rate six or seven times greater than Whites.[4] Judicial sentencing discretion, in particular, has come under scrutiny. The discrepancies 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.

However, empirical studies fail to show strong evidence of racial discrimination by judges in sentencing. Probably the most well-known of these studies was conducted by Alfred Blumstein; it examined arrest statistics and prison population statistics both by offense and by race.[5] The Blumstein study concluded that 80% of the racial disparity in incarceration statistics was attributable to disparate racial arrest patterns, meaning that the great bulk of the disparity was not the result of post-arrest discrimination.[6] While the study did not account for all of the disproportionality (Blumstein was careful to point out that his study did not show that sentencing was devoid of racial discrimination),[7] it found the amount of disproportionality left unexplained differed with the seriousness of the crime.[8] For example, the differential arrest rate explained almost all the disproportion in the incarceration rate of African Americans

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OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2003, at 2 tbl.1 (Nov. 2004), *available at* http://www.ojp.usdoj.gov/bjs/prisons.htm.

2.   ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 3 tbl.1 (Mar. 2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf.

3.   *See* BUREAU OF JUSTICE STATISTICS, *supra* note 1, at 9. In our state prisons, the percentage is even higher, with close to 55% of the inmates being African American. *See generally* SAMUEL WALKER ET AL., THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 262 tbl.9.1 (2d ed. 2000).

4.   *See* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 4 (1995). Michael Tonry reported that as of 1991, the incarceration rate for African Americans was 1,895 per 100,000, while the rate for Whites was only 293 per 100,000. *Id.* 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 PRESS BACKGROUNDER, RACE AND INCARCERATION IN THE UNITED STATES (Feb. 27, 2002), *available at* http://www.hrw.org/backgrounder/usa/race/.

5.   Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982).

6.   *See id.* at 1264.

7.   *See 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.").

8.   *See id.* at 1274.

for serious crimes, such as murder and aggravated assault.[9] However, less serious offenses exhibited larger unexplained variations.[10]

The Blumstein study seemed to allow judges to breathe 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 United States 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 [United States] prisons, although discrimination in sentencing may play a more important role in some regions, jurisdictions, crime types, or the decisions of individual participants.[11]

Although the Blumstein study was completed more than two decades ago and is based on data that is not current given the many changes in sentencing laws over the last two decades around the country, more recent studies continue to support Blumstein's general findings.[12] Michael Tonry, a leading criminologist on the subject of sentencing, summed up Blumstein's findings and stated 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."[13]

Despite what the studies seem to show, not everyone is convinced that race is not a factor in sentencing disparities. 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,[14] might trigger racial discrimination in a way that the stud-

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9. *See id.*

10. *Id.*

11. TONRY, *supra* note 4, at 68.

12. 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 SCI. 812 (1990). Furthermore, Professor Blumstein reexamined his earlier study in 1991 and reached conclusions not greatly different from his 1983 study. *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 754 (1993).

13. TONRY, *supra* note 4, at 68. Tonry suggests that the real cause of the heavy racial imbalance in United States prisons is the "malign neglect" of the effect of the war on drugs on African Americans. *See id.* at 115.

14. 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 case challenging the imposition of the death penalty in Georgia on equal protection grounds. The data from the study appears to

ies miss. Others suggest that data might show racial discrimination if stud-
ies examined more discrete aspects of sentencing, such as particular crimes
or particular jurisdictions; these results may be missed when large
amounts of data are analyzed.[15] Finally, some insist that the researchers
used outdated econometric tools in these studies.[16]

  This Article does not challenge the prior research on sentencing dis-
crimination between racial categories that found no significant difference
in sentences given to similarly-situated African Americans and Whites. In
fact, in the jurisdiction we[17] investigated—Florida—we found no dis-
crimination between African Americans and Whites in the sentences
imposed on defendants, looking only at racial category differences.[18]
Rather, our research suggests that in focusing exclusively on discrimina-
tion 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 Afrocentric features. By
Afrocentric features, we mean those features that are perceived as typical
of African Americans, e.g., darker skin, fuller lips, or a broader nose. Our
research found that when one examines sentencing from this perspective,
those defendants who have more pronounced Afrocentric features tend to

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suggest 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. *Id.* at 286. But beneath the surface equality, there
appeared a very troubling inequality when the race of the defendant was taken into ac-
count along with the race of the victim. African American defendants who were convicted
of killing White victims were much more likely to receive a death sentence than African
American defendants who were convicted of killing African American victims or White
defendants who were convicted of killing White or African American victims. *Id.* at 287.
The study concluded that even after accounting for thirty-nine nonracial variables, African
American defendants convicted of killing White victims were 4.3 times more likely to
receive a death sentence than White defendants charged with killing either African Ameri-
can or White victims. *Id.*

  15. *See, e.g.*, Marvin D. Free, Jr., African Americans and the Criminal Justice
System 117-18 (1996); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing
Reforms Reduce Discrimination in Punishment?*, 64 U. Colo. L. Rev. 781, 783-84 (1993); *see
also* Walker et al., *supra* note 3, at 202-04.

  16. *See* Myers, *supra* note 15, at 782-83.

  17. Throughout this Article the authors use the term "we" to describe a group of
researchers who conducted a line of empirical research within the Psychology Depart-
ment 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 re-
search.

  18. *See infra* text accompanying note 107.

receive longer sentences than others within their racial category who have less pronounced Afrocentric features.[19]

It may seem puzzling that there may be no discrimination in sentencing between African Americans and Whites, yet there is definite discrimination against those with more pronounced Afrocentric features within each of these racial groups. However, it is our thesis that judges have learned to be more careful to impose similar sentences between racial groups, but they have not been similarly sensitized to the possibility of discrimination based on Afrocentric features within racial categories. This Article intends to begin the process of making the legal community aware of the potency that a person's Afrocentric features may have in biasing judgment within racial categories.

The research that forms the basis of this Article relates to research on an idea referred to as "colorism,"[20] which deals with prejudice and discrimination directed against African Americans with darker skin when, for example, benefits are more likely to be given to those with lighter skin.[21] But important differences separate the research on colorism from our research. For one thing, colorism focuses primarily on skin color, while our research is broader and includes any facial features associated with African Americans, including, for example, hair texture, nose width, and lip fullness. But even more importantly, our research is not limited to examining bias toward African Americans. Our research finds a biasing effect of Afrocentric features among Whites that mirrors the biasing effect of Afrocentric features among African Americans. The bottom line is the

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19.   Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 PSYCHOL. SCI. 674 (2004) [hereinafter Blair et al., *Afrocentric Features in Criminal Sentencing*].

20.   Professor Trina Jones, in an article about discrimination based on shades of skin color among African Americans, attributes the term "colorism" to the writer Alice Walker. 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. *See id.* at 1511-21.

21.   Considerable research shows that lighter-skinned African Americans are likely to have higher incomes and more respected occupations than those with darker skin, even controlling for level of education and social background. *See, e.g.*, Mark E. Hill, *Color Differences in the Socioeconomic Status of African American Men: Results of a Longitudinal Study*, 78 SOC. FORCES 1437 (2000); Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105 (1990); Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760 (1991); Elizabeth A. Klonoff & Hope Landrine, *Is Skin Color a Marker for Racial Discrimination? Explaining the Skin Color-Hypertension Relationship*, 23 J. BEHAV. MED. 329 (2000).

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 generally* KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS (1992).

same for the two racial categories: African American and White defendants who have stronger Afrocentric features within their racial category receive longer sentences than those with less pronounced Afrocentric features.

Part I of this Article describes a series of experiments—classic social science studies using primarily undergraduate students as subjects—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 Afrocentric features, regardless of whether the person was African American or White. Part I is important because it provides the framework for the research described in Part II, in which we studied the influence of Afrocentric features on sentencing in Florida. The consistent results in Part I, showing the strong biasing effect a person's Afrocentric features have on the judgment of others, demonstrates why we were not surprised that a person's Afrocentric features might have a biasing effect when it comes to sentencing decisions.

Part II describes the study we conducted on sentencing patterns 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 in comparing the sentences given to defendants who committed similar crimes and had similar criminal histories, inmates who had stronger Afrocentric features tended to serve longer sentences than others within their racial category who had less pronounced Afrocentric features.

This result is disturbing because the extent to which a person is perceived as having Afrocentric features ought not be a factor in sentencing decisions any more than a person's race should be. We hope that illuminating this sort of discrimination will be the first step to eliminating such bias. But this task may not be easy: our laboratory research found that even when decision-makers are warned about the possible biasing effect of Afrocentric features on judgment, they seem unable to reduce that influence in future judgments.[22]

I. LABORATORY STUDIES ON THE INFLUENCE OF AFROCENTRIC FEATURES ON JUDGMENT

A. *Perceptions of Afrocentric Features*

The starting point for the research on the influence of Afrocentric features on judgment was a study that aimed to demonstrate that African Americans and Whites vary in the degree to which they manifest Afrocentric facial features and that people can readily and accurately perceive these differences within both races. We started by creating an initial pool

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22. *See infra* text accompanying note 50.

of head and shoulder photographs of eighty-four young males.[23] 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.[24]

Subjects were asked to judge the degree to which each face manifested Afrocentric 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 judging a second block with all the White photographs, or reversing the order of the two blocks.[25]

Not surprisingly, the African American faces were on average given a higher rating than the White faces on the Afrocentric features scale.[26] 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.[27] Reliabilities range from zero to one, with zero meaning no agreement among subjects and one meaning perfect agreement. For the African American faces, the reliability was .87; for the White faces, the reliability was .76.[28] These high reliabilities indicate that both African American and White faces vary in the degree to which they manifest Afrocentric features, and people can perceive those differences with a high degree of consensus.[29]

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23.   *See* Irene V. Blair et al., *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSONALITY & SOC. PSYCHOL. 5 (2002) [hereinafter Blair et al., *Afrocentric Features and Judging*].

24.   All of the photographed individuals had neutral facial expressions and no visible accessories (e.g., no hats or eyeglasses). The photographs were digitized and edited to eliminate background features and differences in clothing (all clothing was replaced with black tee-shirts). *Id*. at 9.

25.   Additionally, all faces were judged on their attractiveness. *Id*. This measure was included as a control in the study, because facial attractiveness is known to affect the personality impressions that one forms of another. *Id*. at 8. We wanted to ensure that attractiveness was not confounded with Afrocentric features; it was not. *Id*. at 11.

26.   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. Blair et al., *Afrocentric Features and Judging*, *supra* note 23, at 10.

27.   The reliability of mean judgments shows the extent to which the subjects in a study agreed with each other in their judgments. *See* Charles M. Judd & Gary H. McClelland, *Measurement*, *in* 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 180, 203 (1998). It can be thought of as the proportion of variation in the mean scores that represents true or accurate variation among the subjects, as opposed to errors of measurement. As explained in the text, as a proportion, it can vary between zero (all error) and one (no errors of measurement). *Id*.

28.   Blair et al., *Afrocentric Features and Judging*, *supra* note 23, at 10.

29.   Because we were interested in the influence of Afrocentric features on judgment, over and above any influence due to race itself (e.g., whether a person is African

B. *Demonstrating the Influence of Afrocentric Features on Judgment*

Having shown that people can easily and reliably judge faces for the degree to which they manifest Afrocentric features, we undertook studies to demonstrate the influence of such features on judgment. Three different studies were conducted, all using the same research paradigm.[30] 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.[31] 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.[32] They were asked to attempt to identify the photograph of the person described by judging the probability (on a 0 to 100 scale) that each facial photograph was the person who matched the description.[33]

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.[34] We expected that the probability ratings for the faces in each description would be influenced by the degree to which the faces possessed Afrocentric features, such that faces with more Afrocentric features would be given higher probabilities in the descriptions that were stereotypic of African Americans and lower probabilities in the descriptions that were

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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 their respective racial categories) they had Afrocentric features. To examine this, the subjects were given all of the photographs and asked to categorize each face as African American or White. Blair et al., *Afrocentric Features and Judging*, *supra* note 23, at 11. Results showed that the faces from each category were classified by subjects in their correct racial category 97% of the time. *Id.*

    30.   *Id.* at 11–20.
    31.   *Id.* at 11.
    32.   *Id.*
    33.   *Id.* at 12.
    34.   *Id.* 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. *Id.* at 11-12. 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. *Id.* at 12. 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. *Id.* 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. *Id.*

stereotypic of Whites, compared to faces with lower levels of such features.

The three studies that used this paradigm varied in the sets of photographs used.[35] The goal of the first two studies was to demonstrate the influence of Afrocentric features on judgment when race is not a factor. That is, the first study used only facial photographs of African Americans,[36] and the second study used only photographs of Whites.[37] The earlier study had shown that all of the faces in these photographs were easily identifiable as members of their respective racial groups, but they varied within each group in the degree to which they manifested Afrocentric features. Because all of the photographs shown in each study were the faces of individuals 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 consciously considered during the judgment task.

As anticipated, both studies showed that those faces possessing stronger Afrocentric features—be they African American or White faces—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.[38] Thus, even Whites were judged as more stereotypically African American if they manifested Afrocentric features.[39]

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.[40] These faces were intermixed and presented in a random order, allowing us to examine whether Afrocentric 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: 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 (race-based stereotyping).[41] However, even though they could have relied

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35.   All of these photographs, however, were subsets of those used in the first study.

36.   Blair et al., *Afrocentric Features and Judging*, *supra* note 23, at 9.

37.   *Id*. at 14–15.

38.   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 strong Afrocentric features are generally evaluated more negatively than other same-race individuals with less strong Afrocentric features. *See id*. at 13.

39.   *Id*. at 17.

40.   *Id*. at 18.

41.   *Id*. at 19–20.

exclusively on race, subjects continued to assign higher probabilities to faces with more Afrocentric 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 Afrocentric features (feature-based stereotyping).[42] Again, this occurred among both the African American faces and the White faces.

In sum, within both racial categories, Afrocentric features seemed to be guiding the stereotypic inferences that were made about the individuals. Moreover, close questioning of the subjects at the end of the studies suggested that they were not aware of the influence that Afrocentric features had on their judgments.[43] The question we wanted to answer with our next studies was whether the biasing effects of Afrocentric 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 sterotypic bias based on Afrocentric features was the question of how pervasive this bias is on social judgments. To examine this, we conducted two types of additional studies. In the first, we tried to see whether giving subjects what lawyers would call a "cautionary instruction" about the influence of Afrocentric features on social judgment might lessen the impact of such features, and if so, by how much.[44] In the second, we examined whether the biasing effect of Afrocentric features would be lessened or eliminated if the subjects were given additional information that was obviously relevant to the task at hand about the individuals in the photos.[45]

1. The Effect of Cautionary Instructions

To explore the influence that cautionary instructions might have on the use of Afrocentric 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

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42.   *Id*. at 20.

43.   *Id*.

44.   *See* Irene V. Blair et al., *The Automaticity of Race and Afrocentric Facial Features in Social Judgments*, 87 J. Personality & Soc. Psychol. 763 (2004) [hereinafter Blair et al., *Automaticity*].

45.   *See* Irene V. Blair et al., *The Use of Afrocentric Features as Cues for Judgment in the Presence of Diagnostic Information*, 35 Eur. J. Soc. Psychol. 59 (2004) [hereinafter Blair et al., *Diagnostic Information*].

that varied within each racial category in Afrocentric features.[46] Some of the subjects in this study, again mostly undergraduate students, were asked to perform the task exactly as described in the previous studies, e.g., without any cautionary instructions. 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 set of instructions given to the other subjects specifically targeted stereotyping based on Afrocentric features and informed the subjects that people are particularly likely to stereotype those with stronger Afrocentric features and asked them to avoid doing so.[47]

The probability ratings for those subjects not given the cautionary instructions revealed results much like those reported previously.[48] 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 Afrocentric features were also rated with higher probabilities with respect to these stereotypic descriptions (feature-based stereotyping).[49] 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 Afrocentric 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 Afrocentric features in judging individuals of both races.[50] This result is important because it suggests that even when made aware of the possibil-

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46.   *See supra* notes 30–37 and accompanying text.

47.   The specific wording used for these instructions was:

> [W]e sometimes assume that people who have features that are typical of African Americans (i.e., more Negroid or Afrocentric facial features) also have traits or attributes that are associated (by stereotypes) with African Americans. Therefore, just because someone has more Afrocentric 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 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 et al., *Automaticity*, *supra* note 44, at 770.

48.   *See supra* notes 38–39 and accompanying text.

49.   Blair et al., *Automaticity*, *supra* note 44, at 771.

50.   *Id.*

ity 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 Afrocentric features, exactly as subjects had done in the first study reported above. These subjects, just like those in the first study, manifested both reliable and consensual judgments of Afrocentric 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.[51]

2. Feature-Based Stereotyping in the Presence of Additional Relevant Information

The studies described thus far demonstrate the effect that Afrocentric features may have on judgment, but they do so in a relatively impoverished situation where the only information available are the features conveyed in the facial photographs. It is important to ask whether Afrocentric 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 Afrocentric features. In addition to seeing the photographs, subjects were told whether or not each individual person pictured had acted aggressively in four prior situations.[52] Some individuals were portrayed as acting aggressively in all four situations, others in three of the four, others in two of the four, others in only one of the four, and still others in none of the four. The subjects' task was to judge the probabilities of each individual acting aggressively in a fifth situation based on the information they were given.[53]

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51.   *Id.* at 773-74.

52.   *See* Blair et al., *Diagnostic Information*, *supra* note 45, at 62.

53.   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. *Id.* at 67-68. The question was whether the individual would in fact initiate a fight on the court or would instead turn and walk away. *Id.* 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, anger at his girlfriend for flirting at a party, and anger when some personal property was damaged at a party hosted by his roommates. *Id.*

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.[54] However, the Afrocentric 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 Afrocentric facial features were judged as more likely to engage in aggression in the fifth situation than those with less strong Afrocentric features.[55]

To put this last result together with the earlier studies, the series of laboratory studies show that a person's Afrocentric facial features have a powerful effect on judgment of both African Americans and Whites. Subjects seem unable to control the use of such features even when explicitly asked to do so—even after Afrocentric 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 Afrocentric features in making stereotypic judgments.

II. THE INFLUENCE OF AFROCENTRIC FEATURES ON SENTENCING DECISIONS

Stereotypes are commonly defined as widely shared beliefs about the attributes of particular social groups.[56] 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.[57] 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 Part 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

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54.   *Id*. at 63-64.

55.   *Id*. at 64.

56.   *See generally* Susan T. Fiske, *Stereotyping, Prejudice and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (1998); Charles M. Judd & Bernadette Park, *Definition and Assessment of Accuracy in Social Stereotypes*, 100 PSYCHOL. REV. 109 (1993).

57.   *See* Galen V. Bodenhausen & C. Neil Macrae, *Stereotype Activation and Inhibition*, 11 ADVANCES SOC. COGNITION 1 (Robert S. Wyer Jr. ed., 1998); Susan T. Fiske & Steven L. Neuberg, *A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation*, 23 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 1 (1990).

of individuals who possessed stronger Afrocentric 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) Afrocentric features were shown to have independent effects on judgment.

Having demonstrated in laboratory research the way that Afrocentric features can affect judgment, we wanted to see if the influence of Afrocentric 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 study 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, those in prison must, at a minimum, be treated fairly, at least as fairly as others similarly situated.

The second reason for looking at the possible influence of Afrocentric features on sentencing decisions has to do with the worries about 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, many studies of sentencing have focused on the race of the offender. But the effect of a person's Afrocentric features on sentencing has never been studied. We expected that a judge's assessment of a defendant might be susceptible to the same sort of biasing effect from a defendant's Afrocentric 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: a wealth of information about inmates in the Florida prison system is on the Internet,[58] which meant that sentencing decisions could be studied efficiently and inexpensively. For each inmate in the Florida prison system—a large prison system with approximately 82,000 inmates[59]—there is available on

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58.   Florida Department of Corrections, *Homepage*, *at* http://www.dc.state.fl.us/index.html (last visited Mar. 20, 2005).

59.   The Florida Corrections web site reports the number of inmates each month, and that number fluctuates slightly as inmates are released from the system and others

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.[60] Importantly for this research, the information about each inmate also includes a picture of the inmate.[61] These pictures are typical "mug shots," 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. First, it is an important jurisdiction because it is the country's fourth most populous state, containing slightly less than 6% of the United States population.[62] Second, it is a very diverse state with a large African American population. As to its diversity, among those in the United States who are foreign-born, almost 10% live in Florida.[63] Almost 16% of Florida's population is African American (compared to about 13% of the United States population) and Hispanics are more than 18% of Florida's population (but only 13% of the United States population).[64] Thus, the impact of discrimination, whether based on race or Afrocentric features, will affect a significant number of criminal defendants.

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

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

When discussing national trends in sentencing, the starting point would be forty or fifty years ago. At that time, states placed very broad sentencing discretion in the hands of trial judges, with very little structure to guide judges in their decisions and without the possibility of appellate review. 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

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enter. In July 2004, there were 82,205 inmates in the system, and that number increased to 83,131 as of January 2005. *See* Florida Department of Corrections, *Inmate Population by Facility FY 2004-0505* (Mar. 15, 2005), *at* http://www.dc.state.fl.us/pub/pop/facility.

60. *See* Florida Department of Corrections, *Inmate Population Information Search*, *at* http://www.dc.state.fl.us/ActiveInmates (last visited Mar. 20, 2005).

61. *See id.*

62. For detailed information on the present population of Florida, as well as projections for the future, *see* Enterprise Florida, *Florida's Population*, *at* http://www.eflorida.com/fp/population.asp (last visited Mar. 20, 2005).

63. *Id.*

64. *Id.*

appropriate.[65] It was not unusual for judges to have the discretion to sentence defendants within ranges from zero years in prison 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 disparately sentence offenders for many different reasons and purposes, some of them idiosyncratic to the particular judge.[66] 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 clearly biased by the offender's race,[67] but other times simply making very different assessments about the appropriate punishment for different crimes and different offenders.[68] One of the most influential books in that period was Marvin Frankel's *Criminal Sentences: Law Without Order.*[69] 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 composed of judges, penologists, and criminologists, as well as ordinary citizens and even former inmates.[70] One of the functions of this commission would be to develop tables of agreed-upon factors as well as procedures for weighing such factors that judges would have to use in making their sentencing decisions.[71]

In an effort to provide more structure for sentencing decisions, in the late 1970s states began to develop sentencing guideline systems to provide a structure within which judges would determine sentences. Some jurisdictions (including Florida) experimented with voluntary guidelines that judges were not bound to follow.[72] Voluntary guidelines did not have much impact on sentencing, so states continued to pursue

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65. *See* Andrew von Hirsch, *Chapter 1: The Sentencing Commission's Function*, *in* THE SENTENCING COMMISSION'S FUNCTION AND ITS GUIDELINES 3-4 (1987).

66. *Id.*

67. *See* TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 5 (1976).

68. 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 appropriate for the offenses described in the files. *See* Alan M. Dershowitz, *Background Paper*, *in* FAIR AND CERTAIN PUNISHMENT, *supra* note 66, 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.*

69. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

70. *Id.* at 118-20.

71. *Id.* at 121.

72. *See* 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); Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713 (1993).

stronger guideline 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.[73] 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.[74] 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.[75] More recently, a number of states, about fifteen or sixteen, have followed Minnesota's lead and have adopted systems of presumptive guidelines, which require 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.[76] Even in states that do not have guideline systems, efforts continue toward making sentencing more uniform and less subject to the whim (or biases) of individual judges.

The history of sentencing in Florida parallels national trends, even though Florida's sentencing system does not mirror any of the other states' systems. 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 examined Florida's system and found that, after holding relevant factors constant, "non-[W]hite offenders were significantly more likely to receive a jail or prison sentence than [W]hite offenders."[77] The Sentencing Study Committee recommended that sentencing guidelines be implemented to decrease racial bias in sentencing decisions and cut back on the broad discretion typically permitted to judges in sentencing.[78]

In response to these concerns, Florida moved to a guideline system that went through a number of drafts and was eventually adopted by the Florida Supreme Court under its rulemaking authority.[79] Parole was eliminated for all offenses except capital crimes, and a guideline system was put into place in which one of nine worksheets, depending on the crime, had to be completed.[80] On the worksheet, a calculation was made

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73.   *See* Debra L. Dailey, *Prison and Race in Minnesota*, 64 U. COLO. L. REV. 761, 761–62 n.7 (1993).

74.   *Id.* at 765.

75.   *Id.* at 761 n.7.

76.   *See* Kevin Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law Review Symposium*, 64 U. COLO. L. REV. 645, 647–48 (1993).

77.   *Part II: Impact, Section 2: Sentencing Neutrality*, *in* FLORIDA DEPARTMENT OF CORRECTIONS, SENTENCING GUIDELINES, 1996–97 ANNUAL REPORT: THE IMPACT OF THE 1994 AND 1995 STRUCTURED SENTENCING POLICIES IN FLORIDA 7 (July 1998), *available at* http://www.dc.state.fl.us/pub/sg_annual/9697/impact2.html.

78.   *Id.*

79.   *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).

80.   *Id.*

using factors such as the number of offenses, the prior record of the de-
fendant, and the injury to the victim to arrive at a score that 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.[81]

In 1994, the legislature supplanted the guideline system that had
been adopted by the court with a system of its own.[82] 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.[83] Judges could depart from the guide-
lines sentence range if a judge found a mitigating or aggravating reason
for such a departure, and the statute gave judges lists, not meant to be ex-
haustive, of mitigating and aggravating circumstances that would
reasonably justify such departures.[84]

Because of continued concern over possible racial discrimination in
sentencing and to ensure judges were complying with the state statute
requiring that sentencing be "neutral with respect to race, gender, and
social and economic status,"[85] the Florida Department of Corrections
conducted a study of all felony offenders sentenced between July 1, 1994,
and December 31, 1996.[86] The study examined the possible influence of
race on sentencing decisions and, for offenders sentenced to prison, on
the length of the prison sentence. For both types of outcomes, it was de-
termined that race had no "meaningful effect" on decisions once other
relevant and legitimate sentencing factors were taken into account.[87] This
led the Department of Corrections to conclude that "the goal of racial
equity explicit in the sentencing guidelines law has been met."[88]

But the legislature changed direction once again in 1998 by passing
a new sentencing law, referred to as the Criminal Punishment Code,[89] that
had the effect of broadening the sentencing discretion of judges by allow-
ing them to sentence above the guideline range more easily. The new law,
which went into effect on October 1, 1998, still requires the completion
of the guidelines' "scoresheet" that was required under the prior guideline

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81.   *Id*.

82.   *See* Fla. Stat. § 921.001 (2004).

83.   *See* FLA. STAT. § 921.0014 (2004).

84.   *See* FLA. STAT. § 921.0016 (2004).

85.   FLA. STAT. § 921.001(4)(a)(1) (2004). 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)
(2004).

86.   W.D. Bales, *Part II: Impact, Section 2: Sentencing Neutrality*, *in* FLORIDA DEPARTMENT
OF CORRECTIONS, SENTENCING GUIDELINES 1995–1996 ANNUAL REPORT (Mar. 1997), *avail-
able at* http://www.dc.state.fl.us/pub/sg_annual/9596/ii_2.html.

87.   *Id*.

88.   *Id*. (emphasis omitted).

89.   FLA. STAT. § 921.0024 (2004).

system, but judges are now free to depart upward to the maximum sentence permitted for the offense without appellate review.[90] Downward departures from below the shortest sentence in the sentencing range are still subject to appellate review.[91] The result today is that Florida might best be viewed as having a loose guideline system in that there are guidelines that judges should follow, but judges have discretion to depart, especially to impose a longer sentence beyond the guideline range.

Florida is similar to the great majority of states in that judges continue to have considerable sentencing discretion, though not the sort of unbridled discretion that judges possessed thirty or forty years ago. For this reason, it seems very likely that the results we found in Florida—discrimination among inmates within racial categories based on the strength of their Afrocentric 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 Backgrounds, and
the Assessment of Their Facial Features

Individual inmates were randomly selected from the Florida Department of Corrections database.[92] Within the population of all young (18 to 24 years of age) male inmates, a sample of 216 was randomly selected and stratified by the race designated on court records.[93] The sample included 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.[94]

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.[95] In this sam-

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90.   *See* Batey & Everhart, *supra* note 78, at 17-18.

91.   Fla. Stat. § 921.0026 (2004).

92.   Florida Department of Corrections, *Homepage*, *supra* note 58.

93.   *See* Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 675.

94.   We selected this period because 1998 was when the last major change in the guideline system took place. 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 (a total of 113 cases). Twenty-one additional cases were excluded, either because the inmates had committed crimes that we could not code or the photographs were severely degraded. *See id.* at 675 n.3.

95.   For this research on the Florida criminal statutes, we are grateful to Sandy Schmeider, who was at the time a law student at the University of Colorado at Boulder.

ple 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 ten-point Florida system in which lower numbers indicate less serious felonies and higher numbers indicate more serious felonies.[96] For example, supplying an 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.[97]

We then assessed the degree to which the facial photograph of each inmate manifested Afrocentric 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 Afrocentric features, using the same procedure followed in the first study described above.[98]

As anticipated, the subjects were very consistent in their ratings of the photographs for Afrocentric features,[99] and while the African American inmates were found to possess significantly more pronounced Afrocentric features than the White inmates,[100] there was considerable variability within each group.[101]

2. Legitimate Influences on the Length of Sentences in Florida

Before examining the degree to which race and the (within race) strength of inmates' Afrocentric features predicted length of prison sentence, we first conducted an analysis in which sentence length was

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96.   *See* FLA. STAT. § 921.0022 (2004). 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 there was no system to code the seriousness of the relatively infrequent misdemeanors. *See* Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 675 n.4.

97.   FLA. STAT. § 921.0022 (2004).

98.   *See supra* notes 23-29 and accompanying text. As was true of the preliminary studies, these participants were also asked to rate the faces on attractiveness. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676. This variable was unrelated to Afrocentric features and was subsequently found not to be predictive of sentence length. *Id.* at 677. Accordingly, we do not discuss it further.

99.   Put in more technical terms, obtained reliabilities of mean ratings of Afrocentric features were high and varied between .88 and .95. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676.

100.   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.*

101.   Among the African American inmates, the standard deviation in ratings was 1.11, and among the White inmates it was 1.27. *Id.*

regressed[102] on only those factors that should lawfully influence sentencing under the Florida sentencing system:[103] 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 (which we will henceforth refer to as the criminal record).[104] The results of the analysis showed, as expected, that criminal record accounted for a substantial amount of the variance (57%) in sentence length.[105] 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.[106]

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102.   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. *See generally* Charles M. Judd & Gary H. McClelland, Data Analysis: A Model Comparison Approach (1989). 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 id.*

103.   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 (2004).

104.   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. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676. 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. This can be seen by examining the sentencing worksheet that judges must use in Florida, which shows that going from a Level 9 offense to a Level 10 offense would add 14 sentence points to the score used to determine a defendant's sentence, but going from a Level 1 offense to a Level 2 offense would add only 6 points to that score. *See* Fla. Stat. § 921.0024(1)(a) (2004). Because sentence length was positively skewed, a log-transformation was performed on this variable prior to analysis. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676.

105.   This is comparable to the 42.2% of variance accounted for in the analysis conducted by the Florida Department of Corrections. *See* Bales, *supra* note 85.

106.   Somewhat surprisingly, neither the seriousness nor number of prior offenses predicted sentence length over and above the other predictor variables. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676. We believe that these null effects are attributable to the relative youthfulness of the inmates chosen for the study, few of whom had a record of prior felony convictions. *Id.* The average number of prior felonies was 0.95. *Id.*

3. Sentences as Influenced by Racial Category
and Afrocentric 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 from racial category, we estimated a second regression model (Model 2) in which the inmate's race, as indicated by the court, was entered as a predictor along with the predictors from the previous regression model (e.g., the inmate's criminal record). Consistent with the findings of the Florida Race Neutrality in Sentencing report,[107] 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 inmate's criminal record.[108] This finding is consistent with the studies of the influence of race on sentencing that have been done for many years that show discrimination by racial category is not a significant factor in sentencing outcomes.[109]

But when we ran a third regression model (Model 3), the results were quite different. In this model, we added as an additional predictor of sentence length the degree to which the inmates manifested Afrocentric features (as judged from their photographs), and we controlled for the race and criminal records (e.g., all prior predictors) of the inmates. This analysis showed that an inmate's Afrocentric features significantly predicted sentence length over and above the other factors.[110] Additionally, with Afrocentric features now in the model, race was found to be a significant predictor of sentence length, but surprisingly in the direction opposite to what one might expect—White inmates serve longer sentences than African American inmates, all else being equal.[111]

To help understand the results of these analyses, we have placed a chart labeled "Figure 1" in the Appendix. 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 residual sentence length for each case, partialling out effects of criminal record. The horizontal axis represents the residual Afrocentric features variable, again partialling out the effects of criminal record. This plot thus permits one to examine the partial relationships

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107.   *See Sentencing Neutrality*, *supra* note 77.

108.   In this analysis, race accounted for 0.4% of the variance in sentence length, $t(206) = 0.90$, $p = .37$. *Id*.

109.   *See supra* notes 5-13 and accompanying text.

110.   Afrocentric features accounted for 2% of the variance in sentence length, $t(205) = 2.29$, $p < .025$. Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 676-77. 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%). *Id*. at 676. Thus, having strong Afrocentric features would result in a longer prison sentence equivalent to having committed a very serious offense concurrent with the primary offense.

111.   In this analysis, race accounted for 2% of the variance in sentence length, $t(205) = 2.28$, $p < .025$. *Id*. at 677.

between sentence length on the one hand, and race and Afrocentric 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 Afrocentric 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 Afrocentric 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 Afrocentric 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 Afrocentric facial features, White inmates receive longer sentences than African American inmates.[112]

It is important to emphasize that this last finding—that given equivalent criminal records and the same strength of one's Afrocentric features, White inmates receive significantly longer sentences than African American inmates—does not indicate that Whites receive significantly longer sentences than African American inmates. As Model 2 shows, that is not the case when the two racial groups are compared solely on the basis of race. In Model 3, however, the relation between race and sentence length is examined, *controlling for Afrocentric features*. That means Model 3 looks at the effect of race on sentence length among people who have the *same* level of Afrocentric features. Because Whites naturally have less strong Afrocentric features than African Americans,[113] the comparison being made in Model 3 is between Whites who are high in Afrocentric features (relative to other Whites) and African Americans who are low in Afrocentric features (relative to other African Americans). Since Whites with relatively high Afrocentric features receive harsher sentences than other Whites and African Americans with relatively low Afrocentric features receive more lenient sentences than other African Americans, this

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112.   A final regression model was estimated to examine whether the impact of Afrocentric features was the same for African American and White inmates. To do this, we created a variable that was the product of race and Afrocentric features and added this as an additional predictor to capture the interaction. *See* Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 677. This interaction did not approach significance ($p > .70$), thus suggesting that the plotted lines in Figure 1 really are parallel: the effects of Afrocentric features on residual sentence length within the two racial groups are equivalent. *Id.*

113.   The correlation between these two variables is .74, $p < .001$. *Id.* at 678.

explains why there is a significant difference between the two racial groups in Model 3 when those with the same level of Afrocentric features are being compared.

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, receive 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."[114]

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 Afrocentric features.

That Afrocentric 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 Afrocentric 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 Afrocentric 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. As a consequence, stereotypes may lead to the conclusion that some individuals (e.g., those with stronger Afrocentric 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 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 Afrocentric facial features that we have shown are attributable not only 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 Afrocentric features, but the more appropriate characteriza-

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114.   Fla. Stat. § 921.001(4)(a)(1) (2004).

tion 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, African Americans are coming out ahead of Whites when Afrocentric features are equated. But such a conclusion is a serious misinterpretation of the study's results. Racial stereotyping in sentencing decisions still persists. 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 still occurs based on the facial appearance of the offender. Be they White or African American, those offenders who possess stronger Afrocentric features receive harsher sentences for the same crimes.

How large are the impacts of Afrocentric 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 Afrocentric features for their racial group.[115] When we did this and compared the length of sentences, we found that individuals one standard deviation above their group mean on Afrocentric features are receiving sentences about 7-8 months longer than individuals one standard deviation below their group mean with the same criminal record.[116] This difference is clearly meaningful.

CONCLUSION

Our laboratory research described in Part I of this Article shows that people use Afrocentric 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 that we found similar results, as described in Part II, when we looked at the influence of Afrocentric 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 Afrocentric features were influencing their decisions.

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115.   Examining predicted sentence length with Afrocentric features set at one standard deviation above and below the mean for each racial group is a standard social science method of conducting comparisons when one needs to control for other variables, in this case multiple criminal history variables. *See* LEONA S. AIKEN & STEPHEN G. WEST, MULTIPLE REGRESSION: TESTING AND INTERPRETING INTERACTIONS 13 (1991). This methodology allowed us to make specific predictions about the differences in sentencing between individuals with "high" versus "low" Afrocentric features (with equally "average" criminal histories), while ensuring that other influences on sentencing do not bias our interpretation of the data.

116.   *See* Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 19, at 677-78.

What causes this bias based on Afrocentric features is unclear, but we theorize that a person's facial features lead to stereotyping in two ways. Of course, 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 Afrocentric features can trigger stereotypic inferences about that person even within a racial category. In short, Afrocentric features 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 Afrocentric 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 Afrocentric 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.
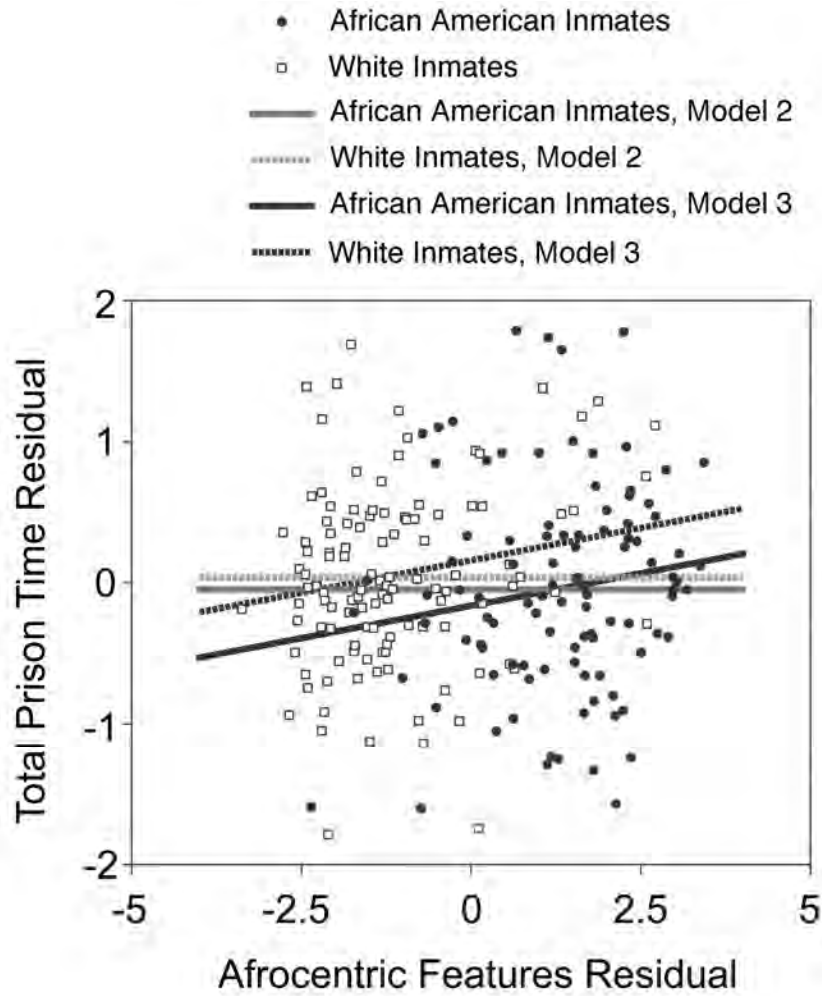
APPENDIX
FIGURE 1

FIGURE 1. Residualized sentence length as a function of residualized Afrocentric features, for African American and White inmates. One set of regression lines depicts the effect of race on sentence length, controlling only for criminal record (Model 2). Another set of regression lines depicts the effects of race and Afrocentric features, each controlling for the other variable as well as criminal record (Model 3).