

LOOKING CRIMINAL AND THE PRESUMPTION OF DANGEROUSNESS:  
AFROCENTRIC FACIAL FEATURES, SKIN TONE,  
AND CRIMINAL JUSTICE

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*Abstract*

*Social psychologists have established that faces of Black males trigger thoughts of violence, crime, and dangerousness and thoughts of crime trigger thoughts and images of Black males. This presumption of dangerousness increases with darker skin tones (colorism) and greater Afrocentric facial features and affects both men and women. We examine the history of the stereotype of Blacks and crime, violence, and dangerousness arising in the United States from the time of slavery. We focus on the historical development of this stereotype through a lens of history, literature, pseudo-science, emerging neuroscience, media distortion of crime reporting, and the development of the Negro-ape metaphor. We then look beyond the Black-White race dichotomy to explore the evolving social science literature examining the influence of skin tone and Afrocentric facial features on the length of criminal sentences. We further explore the social science supporting the presumption of dangerousness and conclude with recommendations to help ameliorate this problem that permeates the American criminal justice system.*

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“The mere presence of a Black man . . . can trigger thoughts that he is violent and criminal.”<sup>1</sup>

## INTRODUCTION

President Obama understood what few prosecutors, defense lawyers, judges, probation officers, or jurors in our Nation’s criminal justice system do: the historic presumption of dangerousness that Whites routinely apply to Blacks in America. In 2016, addressing a town hall in Washington D.C. on race relations in America, President Obama acknowledged, “I do think that in that sense what is true for me is true for a lot of African-American men is there’s a greater presumption of dangerousness that arises from the social and cultural perceptions that have been fed to folks for a long time.”<sup>2</sup> This presumption of dangerousness is shockingly apparent in a recent incident at a high school cross country meet. During this meet, a fifteen-year-old Black, nonverbal, autistic team member, Chase Coleman, while running, was assaulted by an older White man. The man viewed Chase running down the wrong street, after getting confused about the course, with his number still attached to his jersey. The man got out of his car, approached Chase, and assaulted him by pushing him to the street and yelled: “Get out of here.” The man claimed he thought Chase was going to mug his wife, who was seated on the passenger side, and steal her purse. When asked why he thought this, the man responded that some youths had recently broken into his car.<sup>3</sup> The presumption of Black dangerousness struck again.<sup>4</sup> Black girls and women are not immune to the presumption

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<sup>1</sup> Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004).

<sup>2</sup> ABC News, *President Obama and the People Town Hall: A National Conversation*, YOUTUBE (July 15, 2016), <https://www.youtube.com/watch?v=sNZvIgA0DIc> (containing President Obama’s remarks at 41:58).

<sup>3</sup> Amy B. Wang, *Autistic Black Teen Got Lost Running A 5K - and Was Assaulted by a Man Who Feared Getting Mugged*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/10/31/a-black-autistic-teen-got-lost-running-a-5k-then-assaulted-by-a-man-who-feared-getting-mugged>.

<sup>4</sup> This article examines colorism and Afrocentric facial feature discrimination only in the context of the criminal justice system in the United States. There are important implications for the civil justice system, as well, but they fall beyond the scope of this article. For example, in the federal employment discrimination context, in FY 1997 only 762 charges (0.9% of all charges filed) of “color” discrimination were filed with the federal Equal Employment Opportunity Commission. By FY 2015 that number grew to 2,833 (3.2% of all charges filed). See U.S. EQUAL EMP’T OPPORTUNITY COMM’N,

of dangerousness. Nineteen-year-old Renisha McBride was shot after knocking on a resident's door after crashing her car. The shooter said he thought his home was being broken into.<sup>5</sup>

No one should seriously question that race discrimination, in all aspects of American contemporary life, is still a serious problem.<sup>6</sup> Indeed, with respect to the U.S. criminal justice system virtually every aspect has been scrutinized and criticized for showing racial bias — with the toughest criticism often reserved for sentencing decisions.<sup>7</sup> Michelle Alexander has written, in discussing contemporary mass incarceration in America, that our criminal justice system has “emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”<sup>8</sup> While the focus of this article is on skin tone and Afrocentric features in sentencing, it is important to note that the system of racialized control that Professor Alexander writes about starts much earlier than sentencing. Numerous empirical studies have “confirmed racial disparities in the probability of experiencing arrest.”<sup>9</sup>

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CHARGE STATISTICS FY 1997 THROUGH FY 2016, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 1, 2017). For a thorough discussion of these “color” charge statistics, see Joni Hersch, *Characteristics of Color Discrimination Charges Filed with the EEOC*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 231-46 (Ronald E. Hall ed., 2013). For a thorough discussion of colorism and Afrocentric facial feature discrimination in the federal employment discrimination context, see Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 *DUKE L.J.* 1487 (2000) [hereinafter Jones, *Shades of Brown*]; Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 *BERKELEY J. EMP. & LAB. L.* 435 (2005).

<sup>5</sup> Madison Gray, *Michigan Man to Stand Trial in Fatal Shooting of Woman on Porch*, *TIME* (Dec. 19, 2013), <http://nation.time.com/2013/12/19/michigan-man-to-stand-trial-in-fatal-shooting-of-woman-on-porch>.

<sup>6</sup> See Margaret Hunter, *The Persistent Problem of Colorism: Skin Tone, Status, and Inequality*, 1 *SOC. COMPASS* 237, 237 (2007) [hereinafter Hunter, *Persistent Problem of Colorism*].

<sup>7</sup> Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 *PSYCHOL. SCI.* 674, 674 (2004) [hereinafter Blair et al., *Afrocentric Features in Criminal Sentencing*].

<sup>8</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010).

<sup>9</sup> Jessica Grace Finkeldey, *The Influence of Skin Color on the Likelihood of Experiencing Arrest in Adulthood*, 7 (Aug. 2014) (unpublished Masters of Arts thesis, Bowling Green State University) (citing eight different studies) (on file with the author) (using complex statistical modeling finding that darker skinned individual were more likely to experience

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

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

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an arrest than lighter skinned individuals but finding gender moderated the risk of arrest with some racial/ethnic subgroups). *But see* Amelia R. Branigan et al., *Complicating Colorism: Race, Skin Color, and the Likelihood of Arrest* (Jan. 2016) (unpublished manuscript) (on file with author) (finding that Black male’s probability of arrest remained constant across skin tone variations but that White male’s probability of arrest increased with darker skin tone).

<sup>10</sup> Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 *CRIMINOLOGY* 873, 895 (2003).

<sup>11</sup> *Id.* at 895-99.

<sup>12</sup> The term “colorism” has been attributed to writer Alice Walker in her 1982 essay, *If the Present Looks Like the Past What Does the Future Look Like?* See Jones, *Shades of Brown*, *supra* note 4, at 1489 n.5.

<sup>13</sup> It is interesting to note that some scientists have concluded that biological races do not exist and that “race” is, instead, a social construct. See *id.* at 1493; see also Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 *AM. PSYCHOLOGIST* 16 (2005) (What does “race” mean and are such groups discrete, measurable, and scientifically meaningful? The consensus among most scholars in evolutionary biology, anthropology, and other disciplines is that racial distinctions fail on all three counts — that is, they are not genetically discrete, are not reliably measured, and are not scientifically meaningful.). In *Saint Francis College v. Al-Khazraji*, the Supreme Court, in a section 1981 claim by an Iraqi plaintiff, recognized that:

There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial

overlap.<sup>14</sup> In the nineteenth century, the question of one's race was litigated before juries<sup>15</sup> and was vitally important to issues of personal freedom, property, and social status.<sup>16</sup> The "race" question for individual litigants in these trials had much broader social implications in the South.<sup>17</sup> Neighbors often participated in these trials as witnesses and jurors, and word of the trials spread through newspaper articles and literary narratives.<sup>18</sup> Because the courtroom was such an important part of the culture in the South, such race decisions resounded widely.<sup>19</sup> Even a few cases back then would have a much larger impact than today, because the trials were public, often infamous, and held at the county courthouse — "the central meeting-place of towns and rural areas."<sup>20</sup> The key evidence

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classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the "average" individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature. S. Molnar, *Human Variation* (2d ed. 1983); S. Gould, *The Mismeasure of Man* (1981); M. Banton & J. Harwood, *The Race Concept* (1975); A. Montagu, *Man's Most Dangerous Myth* (1974); A. Montagu, *Statement on Race* (3d ed. 1972); *Science and the Concept of Race* (M. Mead, T. Dobzhansky, E. Tobach, & R. Light eds. 1968); A. Montagu, *The Concept of Race* (1964); R. Benedict, *Race and Racism* (1942); Littlefield, Lieberman, & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 *Current Anthropology* 641 (1982); *Biological Aspects of Race*, 17 *Int'l Soc.Sci.J.* 71 (1965); Washburn, *The Study of Race*, 65 *American Anthropologist* 521 (1963).

*Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609 n.4 (1987).

<sup>14</sup> Jones, *Shades of Brown*, *supra* note 4, at 1493.

<sup>15</sup> Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 *YALE L.J.* 109, 117 (1998).

<sup>16</sup> *Id.* at 119.

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

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

<sup>19</sup> *Id.*

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

in many of these cases was the jurors' very observation of the skin tone and facial features of the parties. Indeed, the Mississippi Supreme Court, in 1876, ruled that racial identity as a "colored person" could be "brought to [the jurors'] attention by ocular demonstration" because "jurors may use their eyes as well as their ears."<sup>21</sup> As the present article reveals, that key evidence, observation of skin tone and facial features, is just as important today, nearly a century and one-half later, or, if you are a defendant in a criminal case, perhaps much more significant.

We think it likely that most people, except for a few specialized social scientists, do not think about the concepts of race, skin tone, and Afrocentric facial features, separately.<sup>22</sup> In fact, research suggests that people are largely unaware of the use of Afrocentric facial features to make judgments about others.<sup>23</sup> This is especially significant for participants in the criminal justice system. Most social science research about criminology and race focuses on the differences between Black and White Americans, not on the heterogeneity within Blacks and Whites.<sup>24</sup> This is likely due, in part, to data limitations on skin tone and facial features, which is seldom included in the sentencing data collected by the states and the federal government.<sup>25</sup> Focusing on race, like Black and White, Hispanic and White, or Asian and White, as most prior research does, misses the new frontier of discrimination in the criminal justice system: harsher treatment within a race (surprisingly including Whites) based on greater Afrocentric facial features and darker skin tone.

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<sup>21</sup> *Garvin v. State*, 52 Miss. 207, 209 (1876); *see also Warlick v. White*, 76 N.C. 175, 179 (1877). The issue was whether Sarah J. Carpenter was a legitimate heir or was of mixed-blood and, thus, could not be the daughter of Joseph. The court noted that the eyes of the jurors were as good as the "medical men." *Id.*

<sup>22</sup> Jones, *Shades of Brown*, *supra* note 4, at 1493; *see also* Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 PERSONALITY & SOC. PSYCHOL. REV. 383, 383 (2004) ("Using the literature as a barometer, most social psychologists seem unfamiliar with incidents of phenotypicality bias distinguishing members of the same racial category.")

<sup>23</sup> *See* Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 7, at 674; Irene V. Blair et al., *The Automaticity of Race and Afrocentric Facial Features in Social Judgments*, 87 J. PERSONALITY & SOC. PSYCHOL. 763, 774, 776 (2004) [hereinafter Blair et al., *Automaticity of Race*]; Irene V. Blair et al., *The Role of Afrocentric Features in Person Perception: Judging by Features and Categories*, 83 J. PERSONALITY & SOC. PSYCHOL. 5, 17, 20, 22 (2002) [hereinafter Blair et al., *Afrocentric Features in Person Perception*].

<sup>24</sup> Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOC. 90, 91 (2016).

<sup>25</sup> *See id.* at 91-92.

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

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

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

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

“Skin tone elicits a cognitive bias such that as skin tone moves from light to dark, negative inferences about ability and competence increase.”<sup>26</sup>

While social scientists have used many terms to describe the phenomenon of colorism (e.g. “racial phenotypicality bias,” “skin tone bias,” “skin color bias,” “skin hue bias,” “perceptual prejudice,” “color bias” “color stratification” and “the bleaching syndrome”),<sup>27</sup> all of them “reflect the differential attitudes, beliefs, and treatment of individuals based on variation in phenotypic characteristics of the face traditionally associated with particular racial categories.”<sup>28</sup> To the extent that some of these terms focus on skin tone rather than other facial features, like nose width, fullness of lips, hair texture, etc., it has been noted that this reflects the researchers’ assumptions “that skin tone (as opposed to variation in other features of the face) is the most salient or important dimension on which distinctions among group members may be made.”<sup>29</sup> In this article, we use “skin tone” and “colorism” interchangeably and “Afrocentric facial features” where appropriate to differentiate between the two.

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<sup>26</sup> Maxine S. Thompson & Steve McDonald, *Race, Skin Tone, and Educational Achievement*, 59 SOC. PERSP. 91, 92-93 (2016).

<sup>27</sup> The terminology used in literature to describe this phenomenon has been wide ranging. See, e.g., G. Edward Codina & Frank F. Montalvo, *Chicano Phenotype and Depression*, 16 HISPANIC J. BEHAV. SCI. 296 (1994) (“phenotyping”); Kwabena Gyimah-Brempong & Gregory N. Price, *Crime and Punishment: And Skin Hue Too?*, 96 AM. ECON. REV. 246 (2006) (“skin hue”); Ronald Hall, *The Bleaching Syndrome: African Americans’ Response to Cultural Domination Vis-à-Vis Skin Color*, 26 J. BLACK STUD. 172 (1995) (“the bleaching syndrome”); Margaret Hunter et al., *The Significance of Skin Color Among African Americans and Mexican Americans*, 7 AFR. AM. RES. PERSP. 173 (2001) (“skin color”) [hereinafter Hunter et al., *Significance of Skin Color*]; King & Johnson, *supra* note 24, at 91, 95 (“color bias” and “color stratification”); Robert W. Livingston & Marilyn B. Brewer, *What Are We Really Priming? Cue-Based Versus Category-Based Processing of Facial Stimuli*, 82 J. PERSONALITY & SOC. PSYCHOL. 5 (2002) (“perceptual prejudice”); Maddox, *supra* note 22 (“racial phenotypicality bias”); Thompson & McDonald, *supra* note 26 (“skin tone bias”); Eric Uhlmann et al., *Subgroup Prejudice Based on Skin Color Among Hispanics in the United States and Latin America*, 20 SOC. COGNITION 198, 198 (2002) (“subgroup prejudice”).

<sup>28</sup> Maddox, *supra* note 22, at 384.

<sup>29</sup> *Id.*

Colorism concerns actual skin tone in contrast to race or ethnicity. So, for example, Blacks, Latinos, Asians, and Whites possess various shades of skin tones. Colorism has been defined as “the process of discrimination that privileges light-skinned people of color over their dark-skinned counterparts,”<sup>30</sup> or “the prejudice and discrimination that is directed against African Americans with darker skin and, conversely, the benefits that are granted to African Americans with lighter skin.”<sup>31</sup>

Historical origins of colorism include European colonialism, slavery and plantation life, and early Asian class hierarchies.<sup>32</sup> Colorism exists not only in the United States, but also in Asia, Latin America, and India.<sup>33</sup> Skin tone is a form of “social capital” with lighter skin tone generally being ascribed more value than darker skin tone.<sup>34</sup> In fact the relentless pursuit of lighter skin has been fatal. A Harvard Medical School researcher found outbreaks of mercury poisoning in several countries around the

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<sup>30</sup> Hunter, *Persistent Problem of Colorism*, *supra* note 6, at 237. Professor Hunter has also defined colorism in terms of its effect: “Colorism is a social process that privileges light-skinned people of color over dark-skinned people of color in areas such as income, education, criminal justice sentencing, housing, and the marriage market.” Margaret Hunter, *The Consequences of Colorism*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 247, 247 (Ronald E. Hall ed., 2013) [hereinafter Hunter, *Consequences of Colorism*].

<sup>31</sup> Blair et al., *Afrocentric Features in Person Perception*, *supra* note 23, at 7 (footnote omitted). Others define colorism in a more neutral fashion: “Skin tone bias refers to behavior towards members of a racial category based on the lightness or darkness of their skin.” Travis L. Dixon & Keith B. Maddox, *Skin Tone, Crime News, and Social Reality Judgments: Priming the Stereotype of the Dark and Dangerous Black Criminal*, 35 *J. APPLIED SOC. PSYCHOL.* 1555, 1557 (2005). Thus, a reverse dynamic sometimes occurs in the Black community resulting from resentment from the effects of colorism, where some Blacks may conclude that a Black is not “Black enough.” Jones, *Shades of Brown*, *supra* note 4, at 1495 n.23.

<sup>32</sup> See Hunter, *Persistent Problem of Colorism*, *supra* note 6, at 238. For discussions of colorism among South Asians, see, for example, Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 *UC IRVINE L. REV.* 1105 (2013) (discussing colorism in Asia and among Asian Americans in general with reference to South Asians, and a fascinating discussion of skin tone and beauty noting the sale of skin whitening products is a multi-billion dollar world-wide industry with Asia being a key market); Nance, *supra* note 4.

<sup>33</sup> See Thompson & McDonald, *supra* note 26, at 93 (discussing the historical roots of colorism); see also Shilpi Bhattacharya, *The Desire for Whiteness: Can Law and Economics Explain It?*, 2 *COLUM. J. RACE & L.* 117 (2012) (discussing the origins of colorism in India and arguing for a new theoretical perspective on colorism that focuses on economics rather than race).

<sup>34</sup> Thompson & McDonald, *supra* note 26, at 93.

world, and in the Southwestern United States by thousands of Mexican American women, due to overuse of skin bleaching creams in efforts to achieve lighter and more societally valued skin tone.<sup>35</sup>

While the literature on colorism and Hispanics in America is sparse in comparison to Blacks, it does establish “striking similarity” to the research findings regarding Blacks.<sup>36</sup> Colonial Mexico was developed “around a social hierarchy based largely on a continuum of color” where Spaniards were light skinned and at the top of the hierarchy and Indians with darker skin were at the bottom.<sup>37</sup> Colorism has carried over to Hispanics in the United States, where lighter skinned Hispanics have the same socio-economic advantages over their darker skinned sisters and brothers as lighter skinned Blacks do over darker skinned Blacks.<sup>38</sup>

“Afrocentric features” is not a specific term of art, but generally refers to some combination of facial features such as “dark skin, wide nose, coarse hair, dark eyes, and full lips.”<sup>39</sup> In an early empirical study of facial features and the identification of race, nine facial features were examined for “African,” “Asian,” “Caucasian,” and “Hispanic” faces.<sup>40</sup> The nine facial features were skin color, hair, eyes, nose, mouth, cheeks, eyebrows, forehead, and ears.<sup>41</sup> Within each of the nine facial features, additional factors were considered. For example, regarding the “nose”, study participants rated color, shape, flatness, width, length, and placement.<sup>42</sup>

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<sup>35</sup> See Margaret Hunter, *The Cost of Color: What We Pay for Being Black and Brown*, in RACISM IN THE 21ST CENTURY 74 (Ronald E. Hall ed., 2008).

<sup>36</sup> Walter Allen et al., *Skin Color, Income and Education: A Comparison of African Americans and Mexican Americans*, 12 NAT'L. J. SOC. 129, 141 (2000).

<sup>37</sup> *Id.* at 139.

<sup>38</sup> *Id.* at 139-72. “Institutional norms and patterns use skin color to disadvantage African Americans and Mexican Americans relative to Whites; these same norms and patterns privilege lighter skin among African Americans and Mexican Americans.” *Id.* at 171. For a discussion of the effects of colorism discrimination on Mexican American women in the United States, see Margaret L. Hunter, “*If You’re Light You’re Alright*”: *Light Skin Color as Social Capital for Women of Color*, 16 GENDER & SOC’Y 175 (2002).

<sup>39</sup> Amanda Mae Petersen, *Beyond Black and White: An Examination of Afrocentric Facial Features and Sex in Criminal Sentencing* (June 25, 2014) (unpublished master’s thesis, Portland State University), [http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=2855&context=open\\_access\\_etds](http://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=2855&context=open_access_etds).

<sup>40</sup> Terry D. Brown, Jr. et al., *Perception of Race and Ethnicity*, 13 J. SOC. BEHAV. & PERSONALITY 295, 297-305 (1998).

<sup>41</sup> *Id.* at 297-98.

<sup>42</sup> *Id.* at 300-01.

The four most salient features for identification of “African” faces in descending order were skin color, hair, mouth (including lips), and nose.<sup>43</sup> For “Asians” it was eyes, skin color, hair, and nose.<sup>44</sup> For “Hispanics” it was skin color, hair, eyes, and eyebrows.<sup>45</sup> For “Caucasians” it was skin color, hair, nose, and a tie with eyes and mouth.<sup>46</sup> At bottom, skin color was the most salient facial feature across African, Asian, Caucasian, and Hispanic, in determining race.<sup>47</sup> Table 1 below shows the salience of the

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

facial features by race.<sup>48</sup> A more recent study similarly examined the salience of the most important facial features in determining race, the results of which can be found in Table 2.<sup>49</sup>

Table 1: Mean Importance Ratings for Major Facial Features

<sup>43</sup> *Id.* at 298.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 298, 305.

<sup>48</sup> The participants included twenty-five males, forty-eight females, forty-eight who identified as White, thirteen as Africans, nine as Asians, one Arabian, and one Hispanic. *Id.* at 296. The study conclusions appear to generalize across the racial and gender makeup of these study participants, as there were no significant effects based on their race or gender. *Id.* at 305. Four-fifths of the participants were asked to rate the importance of the facial features in deciding whether someone was African, Asian, Caucasian, Hispanic or an unspecified target. *Id.* at 297.

<sup>49</sup> Jacques-Corey Cormier, *The Influence of Phenotypic Variation on Criminal Judgement* 90 tbl.8 (2012) (unpublished M.S. in Psychology thesis, Georgia Southern University) (on file with author).

Table 2: Ratings of Features' Importance in Assessing Race

	Mean	Std. Deviation
Skin color	7.8833	2.40826
Nose	6.6333	2.16260
Hair	6.3833	2.17140
Mouth	5.6833	1.64153
Eyes	5.4333	2.30230
Ears	3.8136	1.98681
Forehead	3.4500	1.96085
Cheeks	3.1833	2.01260
Eyebrows	2.7333	2.16964

Many scholars have studied the effects of colorism on social, educational and economic stratification for a variety of ethnic and racial groups. For Blacks in the United States there is a strong consensus that this has been a continuing phenomenon since the time of slavery.<sup>50</sup> White slave owners in America used skin tone to determine what tasks would be assigned to enslaved Blacks.<sup>51</sup> Dark skinned Blacks were largely assigned to the most arduous work in the fields while light skinned Blacks were assigned household and other more “privileged” duties.<sup>52</sup>

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<sup>50</sup> See, e.g., Blair et al., *Afrocentric Features in Person Perception*, *supra* note 23, at 7 (“This phenomenon has been primarily documented by historians and sociologists, who have shown during slavery, light-skinned African Americans were given more desirable positions in the household; when slavery ended they were more likely to gain higher education and economic resources than their darker skinned brothers and sisters.”); Hunter et al., *Significance of Skin Color*, *supra* note 27, at 174 (“The connection between skin color and social status in the African-American community dates back to slavery when white male slaveholders frequently gave their illegitimate, mulatto offspring greater opportunities.”); Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 761 (1991) (“The relationship between skin tone and privilege appears to have emerged during slavery.”); Maddox, *supra* note 22, at 384 (“Early historical evidence suggests that both Blacks and Whites in the United States exhibited bias based on skin tone as early as the slavery era. . . . After the abolition of slavery lighter skin provided better social, educational, and economic opportunities.”).

<sup>51</sup> Jones, *Shades of Brown*, *supra* note 4, at 1510 (“Mulatto slaves brought the highest prices on the slave market and were awarded some of the most coveted indoor assignments on plantations, while the more arduous field work was typically left to darker-skinned slaves.”).

<sup>52</sup> *Id.*; see also King & Johnson, *supra* note 24, at 93 (explaining that slaves with light skin tone were more likely household servants than plantation workers); Hunter et al.,

After the Civil War, lighter skinned Blacks sought to maintain their greater social status over darker skinned Blacks by establishing separate communities, social clubs, and “color conscious” churches.<sup>53</sup> For example, congregations concerned with skin tone might base church admission to services on the brown paper bag test, such that potential congregants could only attend services if their skin was lighter than the bag.<sup>54</sup>

Skin tone controversies even affected the decision by the civil rights lawyers in *Plessy v. Ferguson*<sup>55</sup> as to who to use as litigants in the test case challenging Louisiana’s law requiring segregated railroad passenger carriages and related test cases.<sup>56</sup> Lead counsel, Albion W. Tourgée, in the initial strategic planning of the litigation argued for a light skinned litigant and his views eventually won out.<sup>57</sup> Presumably, Tourgée was simply trying to take advantage of prevailing views that were more positive towards light skinned Blacks than dark skinned Blacks.

Both anthropological and sociological research corroborate historical accounts establishing that society confers greater status on Blacks with lighter skin tone than those with darker skin tone.<sup>58</sup> Studies from the 1940’s on establish that the relationship between lighter skin tone and greater socioeconomic achievement for Blacks continues this long-standing phenomenon from slavery to today.<sup>59</sup> Thus, both for both lighter skinned Blacks and Latinos in America, they earn more money, complete more years of education, work in higher-status occupations, live in more racially integrated neighborhoods, receive lighter prison sentences, win

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*Significance of Skin Color*, *supra* note 27, at 174 (“Some light-skinned slaves were assigned the privileged status of house servant or skilled artisan where they received better treatment than darker-skinned field slaves. Still other mulattos were designated free by their affluent white fathers and thus enjoyed access to education as well as property ownership.” (citation omitted)).

<sup>53</sup> Jones, *Shades of Brown*, *supra* note 4, at 1515.

<sup>54</sup> *Id.* at 1515-16.

<sup>55</sup> 163 U.S. 537 (1896). Justice Brown’s majority opinion upholding the “separate but equal” doctrine noted that Plessy “was seven-eighths Caucasian and one-eighth African blood” and that his “mixture of colored blood was not discernable in him.” *Id.* at 541.

<sup>56</sup> WILLIAMJAMES HULL HOFFER, *PLESSY V. FERGUSON: RACE AND INEQUALITY IN JIM CROW AMERICA* 66-68 (2012).

<sup>57</sup> *Id.* at 65-68.

<sup>58</sup> See Maddox, *supra* note 22, at 385.

<sup>59</sup> See Hunter et al., *Significance of Skin Color*, *supra* note 27, at 173.

more political elections, and struggle less with depression, than their darker-skinned counterparts.<sup>60</sup>

Thus, while original and traditional forms of colonialism no longer formally exist in the United States, as the next section illuminates, informal colonialism in the form of skin tone and Afrocentric facial feature bias still is pervasive.

## II. STEREOTYPING BLACKS AS CRIMINAL, VIOLENT, AND DANGEROUS IS DEEPLY ROOTED IN AMERICA'S HISTORY AND INTRACTABLY ENTRENCHED IN OUR CULTURE AND PSYCHE

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic . . . . This opinion was at that time fixed and universal in the civilized portion of the white race.<sup>61</sup>  
—Chief Justice Roger B. Taney

### The Nation's Historical Perspective

Where does President Obama's notion of a presumption of dangerousness for Blacks in our nation come from? It started with perceptions of Native Americans and their darker skin tone. According to Professor Van Deburg, the earliest English settlers of the new frontier viewed the Native Americans' resistance to western expansion, "in the context of seventeenth-century metaphysics . . . as an allegory for Satan's

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<sup>60</sup> Hunter, *Consequences of Colorism*, *supra* note 30, at 249 (citing to numerous studies); King & Johnson, *supra* note 24, at 90-91 (explaining social scientists have long observed colorism benefits lighter skinned Blacks from the pre-Civil War period, to the early twentieth century, to contemporary times).

<sup>61</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857).

opposition to the divinely approved plans of the righteous.”<sup>62</sup> Professor Van Deburg concludes, “[g]iven the settlers’ cultural heritage, it was understandable that a dark skin tone came to be considered a key indicator of both moral worth and criminal intent.”<sup>63</sup> He argues that claims that Native Americans were “cruel,” “barbarous,” “brutish” and “diabolical creatures” justified expansionism and enabled the white settlers to “conceptualize themselves as virtuous victims engaged in a heroic struggle for God and country.”<sup>64</sup>

Like the conventional thinking toward Native Americans, Thomas Jefferson had suspicion “that the blacks . . . are inferior to the whites in the endowments both of body and mind.”<sup>65</sup> In these colonial times, Whites viewed Blacks as less than human, the prevailing belief was that “black men were not really men but cattle.”<sup>66</sup> A particularly horrific example of the view of Black slaves as chattels comes from the description in 1700 of a New Jersey slave master who had children with each of his Black slave women and sold these offspring “in the same manner as he would have disposed of his hogs.”<sup>67</sup> This fundamental view of Blacks as sub-human, rooted slavery, allowed the narrative of Blacks as violent and dangerous to grow and flourish. The narrative was that Blacks, by their very essence, were “savage brute[s]” who would revert back to their savage nature unless “domesticated” by or “civilized” by the white slave master’s firm control.<sup>68</sup> This core tenet of slavery — that without it “innate racial traits” of slaves as “savage brutes,” prone to violence and criminality, would

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<sup>62</sup> See WILLIAM L. VAN DEBURG, HOODLUMS: BLACK VILLAINS AND SOCIAL BANDITS IN AMERICAN LIFE 22 (2004).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* (citing MARY ROWLANDSON, THE SOVEREIGNTY AND GOODNESS OF GOD, TOGETHER WITH THE FAITHFULNESS OF HIS PROMISES DISPLAYED 67 (Neal Salisbury ed., 1997) (1682)).

<sup>65</sup> THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 150 (Boston, Lilly & Wait 1832).

<sup>66</sup> JAMES BALDWIN, NOTES OF A NATIVE SON 159 (1955).

<sup>67</sup> ARTHUR ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 11 (1967) (quoting SAMUEL SEWALL, THE SELLING OF JOSEPH (Boston, Green & Allen 1700)).

<sup>68</sup> See GEORGE M. FREDRICKSON, THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1874–1914 53-54 (1987); see also Brief for the Nat’l Black Students Ass’n as Amici Curiae Supporting Petitioner at 7-8, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049), 2016 WL 4073688, at \*7-8 (citing full passage from FREDRICKSON, *supra*).

resurface — provided “an unequivocal justification of permanent servitude.”<sup>69</sup>

Even Northern abolitionists promoted the notion that Blacks were prone to dangerousness and criminality. “In 1806, a leading Pennsylvania abolitionist described most Philadelphia Negroes as ‘degraded and vicious.’”<sup>70</sup> In 1808, an abolitionist society in New York, “the New York Manumission Society announced that it viewed ‘with regret the looseness of manners & depravity of conduct in many of the Persons of Colour in this city.’”<sup>71</sup> In 1826, a Boston prison reform group, the Board of Managers of the Boston Prison Discipline Society, wrote in its first annual report “that Negroes constituted a disproportionately large percentage of prison population of the Northeastern states and concluded that ‘the first cause existing in society of the frequency and increase in crime, is the degraded character of the colored population.’”<sup>72</sup>

At the turn of the next century, in 1901, in a text titled *Experimental Sociology*, the author, Frances Kellor, cited statistics about crime and Blacks: “the negro element is . . . the most criminal of our population”; “more criminal as a free man than he was as a slave”; “increasing in criminality with fearful rapidity”; “three times as criminal as the native white and once and a half times as criminal as the foreign white, consisting in many cases of the scum of Europe.”<sup>73</sup> Kellor also noted that Negroes “come from crime-breeding districts”; that their crimes against persons are “impulsive”; and that as evidence of racial inferiority, “[t]here are few or no truly great negro criminals” even though they are “dangerous” but they lack “criminal genius” and organizational skills.<sup>74</sup> In 1914, the first year of the first World War, a book stated that Negroes were instinctive criminals.<sup>75</sup>

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<sup>69</sup> See FREDRICKSON, *supra* note 68, at 53.

<sup>70</sup> *Id.* at 4 (citing ZILVERSMIT, *supra* note 67, at 222-24).

<sup>71</sup> *Id.* (citing ZILVERSMIT, *supra* note 67, at 223-24).

<sup>72</sup> *Id.* at 5.

<sup>73</sup> FRANCES A. KELLOR, *EXPERIMENTAL SOCIOLOGY: DESCRIPTIVE AND ANALYTICAL* 32-33 (1901) (citing “reports by Dr. Winston and Dr. Wilcox”).

<sup>74</sup> *Id.* at 31.

<sup>75</sup> E. FRANKLIN FRAZIER, *BLACK BOURGEOISIE* 145 (1957) (citing CHAS. H. MCCORD, A.M., *THE AMERICAN NEGRO AS A DEPENDENT, DEFECTIVE, AND DELINQUENT* 42 (1914)).

## The Role of Literature and Pseudo Science

Even the White literature of the times promoted the notion of slaves as dangerous and criminal. The White literary vanguard propagated this notion by creating several Black slave character types as “savages” whose presence posed a threat to their nation building.<sup>76</sup> The widely read and well known, Edgar Allen Poe, the master of all things macabre, perhaps more than any other pre-Civil War fiction author, captured the racial fears and views of Black slaves as dangerous criminals. His only full-length novel, *The Narrative of Arthur Gordon Pym*,<sup>77</sup> first published in 1838, was obsessed with blackness and whiteness. It describes a fictional southern island (close to the South Pole) where the all-black natives with an aversion to whiteness, at first friendly to the white explorers, turn out to be “barbarous,” “bloodthirsty” “savages” who brutally slaughter the white interlopers.<sup>78</sup>

The relationship between Blacks and dangerousness and criminality takes on a more covert tone in Poe’s short story, *Murders in the Rue Morgue*, published in Graham’s magazine in 1841, in which two Parisian women are mysteriously and brutally murdered by an escaped orangutan.<sup>79</sup> Literary critics have described this work as “a thinly disguised allegory for the doctrine of black animality.”<sup>80</sup> There has been speculation that Poe may have been influenced by one of several popular primate displays that appeared in Philadelphia, where Poe was then living.<sup>81</sup> The eighteenth and nineteenth centuries saw the rise of proto-evolutionary theory, which “presaged Darwin’s assertion in *The Descent*

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<sup>76</sup> VAN DEBURG, *supra* note 62, at 25.

<sup>77</sup> See EDGAR ALLEN POE, *THE NARRATIVE OF ARTHUR GORDON PYM OF NANTUCKET* (New York: Penguin 1982) (1838).

<sup>78</sup> See *id.* at 143, 151, 165. For a more thorough discussion of the racial underpinnings of Poe’s novel, see Alyssa M. Amaral, *Racial and Cultural Anxieties in Poe’s The Narrative of Arthur Gordon Pym*, 11 BRIDGEWATER ST. U. UNDERGRADUATE REV. 17 (2015).

<sup>79</sup> See EDGAR ALLAN POE, *THE MURDERS IN THE RUE MORGUE AND OTHER TALES* 38, 60-62 (Washington, D.C., Off. Eng. Language Programs 2013) (1841). A prominent Poe historian notes that Poe was familiar with Edward Long’s *History of Jamaica*, where Long makes repeated comparison between Negroes and orangutans. See Joan Dayan, *Amorous Bondage: Poe, Ladies, and Slaves*, 66 AM. LITERATURE 239, 243 (1994).

<sup>80</sup> Christopher Peterson, *The Aping Apes of Poe and Wright: Race, Animality, and Mimicry in “The Murders in the Rue Morgue” and Native Son*, 41 NEW LITERARY HIST. 151, 157 (2010).

<sup>81</sup> See *id.* at 154-55.

of *Man* (1871) that humans are apes.”<sup>82</sup> Thus, it was no surprise “that eighteenth-and-nineteenth-century discourse also frequently equated apes with blacks.”<sup>83</sup> Sterling Brown, in his well-known essay, *Negro Character as Seen by White Authors*, argued that the early stereotype of the Black slave as docile, changed after Reconstruction to the “Brute Negro” which connected the slaves emancipation with Black animality.<sup>84</sup>

Charleston pro-slavery lawyer, William Drayton circulated pamphlets that Black slaves were prone to vice and that slavery was a “natural consequence of [Black] inferiority of [] character.”<sup>85</sup> He also wrote that emancipation of Black slaves would release a “wild frenzy of revenge and the savage lust for blood” uniting to give liberated Black slaves “traits of cruelty and crime that nothing earthly can equal.”<sup>86</sup>

When Richard Wright’s protest novel, *Native Son*, was published in 1940, the Black protagonist, Bigger Thomas, a vicious murderer of a White woman in Chicago, was depicted in the Chicago newspapers as an “ape,” and a “jungle beast,” and a “missing link in the human species.”<sup>87</sup> A recent book reviewer, in discussing James Baldwin’s reaction to *Native Son*, described Bigger Thomas as “a rapist and a murderer motivated only by fear, hate and a slew of animal impulses. He is the black ape gone berserk that reigned supreme in the white racial imagination.”<sup>88</sup>

In 1900, *The Negro a Beast*, by Charles Carroll, was published by a religious publishing company.<sup>89</sup> Carroll described Blacks (“Negros”) as apelike and reserved his harshest criticism for the mulattoes who lacked “the right to live” and were “the rapists and criminals of the present

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<sup>82</sup> *Id.* at 154.

<sup>83</sup> *Id.* at 157.

<sup>84</sup> Sterling A. Brown, *Negro Character as Seen by White Authors*, 2 J. NEGRO EDUC. 179, 191-92 (1933).

<sup>85</sup> FREDRICKSON, *supra* note 68, at 47 (citing WILLIAM DRAYTON, THE SOUTH VINDICATED FROM THE TREASON AND FANATICISM OF THE NORTHERN ABOLITIONISTS 232-33 (Philadelphia, H. Manley 1836)).

<sup>86</sup> *See id.* at 54 (citing DRAYTON, *supra* note 85, at 246).

<sup>87</sup> *See* Peterson, *supra* note 80, at 161.

<sup>88</sup> Ayana Mathis & Pankaj Mishra, *James Baldwin Denounced Richard Wright’s “Native Son” As a “Protest Novel.” Was He Right?*, N.Y. TIMES (Feb. 24, 2015), [http://www.nytimes.com/2015/03/01/books/review/james-baldwin-denounced-richard-wrights-native-son-as-a-protest-novel-was-he-right.html?\\_r=0](http://www.nytimes.com/2015/03/01/books/review/james-baldwin-denounced-richard-wrights-native-son-as-a-protest-novel-was-he-right.html?_r=0).

<sup>89</sup> FREDRICKSON, *supra* note 68, at 277 (citing CHARLES CARROLL, THE NEGRO A BEAST (1900)).

time.”<sup>90</sup> Thomas Dixon, a prominent Baptist minister turned fear mongering novelist, wrote bestselling novels exploiting the fear of the “black brute.”<sup>91</sup> His most popular one, *The Clansman*, published in 1905, was the basis for the film *The Birth of a Nation* and features a description of the “negro” as a “half-child, half-animal . . . whose passions, once aroused, are as the fury of the tiger.”<sup>92</sup> In the story, a former slave and Black militia captain, described as bestial, rapes a white woman, resulting in her and her mother’s death by suicide and in his lynching by the Ku Klux Klan.<sup>93</sup>

So, too did the “science” of the times promote the notion that Blacks were inferior, fueling the connection to violence and dangerousness. Dr. Samuel George Morton, a leading physician and scientist in the nineteenth century and a proponent of “scientific racism” who believed that races had different origins (polygenesis), collected more than one thousand skulls to argue that the larger White skulls proved Black intellectual inferiority.<sup>94</sup> The scientific community, who wanted “scientific explanations for the racial problems of that day” lauded Morton’s work.<sup>95</sup>

Dr. Josiah C. Nott, an American surgeon and slave owner, and also a polygenist, concluded that in the animal kingdom there is a “regular gradation in the form of the brain, from the Caucasian down to the lowest order of animals, and [] the intellectual faculties and instincts are commensurate with the size and form.”<sup>96</sup> Dr. Nott claimed that the Negro brain was not only smaller than the Caucasian brain, but also that the forehead was “narrower and more receding” causing “the anterior or intellectual portion of the brain” to be “defective.”<sup>97</sup> He also opined that Negroes could not adapt to cold climates and that their brains freeze so “as to make them insane or idiotical.”<sup>98</sup> He suggested that early cave drawings prior to 1500 B.C. established that Negroes differed from Caucasians as

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<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at 280.

<sup>92</sup> *Id.* at 280-81 (citing THOMAS DIXON, *THE CLANSMAN* 292-93 (1907)).

<sup>93</sup> *See id.* at 281; *see also* DIXON, *supra* note 92, at 289, 313, 321.

<sup>94</sup> *See* Jennifer L. Eberhardt, *Imaging Race*, 60 *AM. PSYCHOL.* 181, 186 (2005); *see also* MATTHEW F. JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 35 (1998).

<sup>95</sup> Eberhardt, *supra* note 94.

<sup>96</sup> JOSIAH C. NOTT, *TWO LECTURES ON THE NATURAL HISTORY OF THE CAUCASIAN AND NEGRO RACES* 23 (Mobile, Dade & Thompson 1884).

<sup>97</sup> *Id.* at 23, 35.

<sup>98</sup> *Id.* at 19.

much then as in the present day, and that even in those remote times drawings and sculptures established that Negroes were “barbarian” and their race “perverse.”<sup>99</sup> Finally, Nott concluded that there were strong anatomical resemblances between Negroes and apes.<sup>100</sup> Nott was not alone. For example, an article in *Popular Science Monthly* claimed the anatomical structure of the Negro was inferior and “approximates the African apes.”<sup>101</sup>

Professor John S. Haller, Jr., an historian, wrote a comprehensive book about how science from 1859–1900, through anthropology, medicine, psychology, and sociology “verified” theories of Black racial inferiority.<sup>102</sup> From Carl von Linnaeus’ taxonomic system based on skin color;<sup>103</sup> to Peter Browne, a Philadelphia lawyer and self-proclaimed scientist’s hair pile theory that Blacks were a separate species;<sup>104</sup> to Petrus Camper’s face angle theory that suggested Blacks had more in common with Orangutans and dogs than other human species.<sup>105</sup> This book also discusses the many scientific fads that were used to justify various “scientific” theories of Black inferiority, and hence their subordination: phrenology (of which there were many converts); craniometrics, brain-weight analysis, and brain suture study in children.<sup>106</sup> The brain suture “science” postulated that both the coronal and central frontal sutures of the brains of Black children close faster than in other races, and thus Blacks, like orangutans, “became incapable of further progress.”<sup>107</sup>

Haller’s book is especially important for his detailed discussion of the study of racial types in the Union army in the form of the U.S. Sanitary Commission.<sup>108</sup> This proven “science” of anthropometric investigation

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<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.* at 24.

<sup>101</sup> Commentary, 13 *POPULAR SCI. MONTHLY* 500 (1878) (containing excerpt from the pamphlet ALEXANDER WINCHELL, ADAMITES AND PREADAMITES; OR, A POPULAR DISCUSSION CONCERNING THE REMOTE REPRESENTATIVES OF THE HUMAN SPECIES AND THEIR RELATION TO THE BIBLICAL ADAM (Syracuse, J.T. Roberts 1878)).

<sup>102</sup> JOHN S. HALLER, JR., *OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859–1900* (1971).

<sup>103</sup> *Id.* at 4.

<sup>104</sup> *Id.* at 7-8.

<sup>105</sup> *See id.* at 9.

<sup>106</sup> *See generally id.* at 4-38.

<sup>107</sup> *See id.* at 35-36.

<sup>108</sup> *See generally id.* at 19-34.

was perhaps the “greatest irony of the Civil War” because it was “used in the late nineteenth century to support institutional racism.”<sup>109</sup>

Scientific racism is still alive and well. A recent article, *Physiognomy's New Clothes*, sharply criticizes a new non-peer reviewed paper that claims artificial intelligence and machine learning software can predict, with close to ninety percent accuracy, the likelihood that an individual has a criminal conviction using only an identification-style face photo.<sup>110</sup> Physiognomy is the practice of using one’s physical appearance to determine character traits, a practice which historically has had deeply prejudiced applications.<sup>111</sup> Rather than being an objective predictor of criminality, the alleged “criminality detector” in the current study simply reinforces the notion that social perception of facial images leads to judgments about criminal behavior.<sup>112</sup>

The Emerging Neuroscience of Facial Race Bias – Psychological Development and the Role of the Amygdala

Psychological research in a variety of cultures shows that norms and biases involving race develop in childhood and adolescence and that the social environment plays a significant role in shaping these processes.<sup>113</sup> Learned racial preferences start as early as three months and appear to vary with exposure to members of different racial groups.<sup>114</sup> Psychologists have theorized that children also learn biases when groups are labeled, sorted, or treated differently (e.g., segregated).<sup>115</sup> Although implicit biases appear

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<sup>109</sup> *Id.* at 34.

<sup>110</sup> Blaise Agüera y Arcas, Margaret Mitchell & Alexander Todorov, *Physiognomy's New Clothes*, MEDIUM (May 6, 2017), <https://medium.com/@blaisea/physiognomys-new-clothes-f2d4b59fdd6a>.

<sup>111</sup> *See id.* paras. 49-58 (providing multiple examples, including Nazi “race scientists”).

<sup>112</sup> *See id.* paras. 92-93.

<sup>113</sup> *See generally* Yair Bar-Haim et al., *Nature and Nurture in Own-Race Face Processing*, 17 PSYCHOL. SCI. 159 (2006); Eva H. Telzer et al., *Amygdala Sensitivity to Race is Not Present in Childhood but Emerges Over Adolescence*, 25 J. COGNITIVE NEUROSCIENCE 234, 234 (2013).

<sup>114</sup> *See* Bar-Haim et al., *supra* note 113, at 162; David J. Kelly et al., *Three-Month-Olds, but Not Newborns, Prefer Own-Race Faces*, 8 DEVELOPMENTAL SCI. F31, F31-F36 (2005).

<sup>115</sup> *See* Rebecca S. Bigler & Lynn S. Liben, *Developmental Intergroup Theory: Explaining and Reducing Children's Social Stereotyping and Prejudice*, 16 CURRENT DIRECTIONS IN PSYCHOL. SCI. 162, 162-66 (2007).

at least by age six,<sup>116</sup> there is some evidence that children — at least White American children — adopt cultural race-related norms (e.g., avoiding race) at about age ten or eleven.<sup>117</sup> Consistent with this finding, research suggests that implicit and explicit attitudes begin to diverge at age ten.<sup>118</sup> According to one study, the heightened amygdala activity to Black faces found in adults is not present in early childhood and doesn't emerge until around age fourteen.<sup>119</sup> Explicit and implicit stereotypes about Blacks likely explain the heightened amygdala activity.<sup>120</sup>

The emerging trend in psychology, addressed here, is the ability to use non-invasive neuroimaging, primarily functional magnetic resonance imaging (fMRI), to understand how cognition is linked to brain functioning.<sup>121</sup> Research has focused on the amygdala as a brain area of particular relevance to racial prejudice, though it is, of course, not the only brain area associated with prejudice.<sup>122</sup> As researchers explain, “[t]he term “amygdala” (Latin for almond) was first used in 1819 by the anatomist Burdach, to describe an almond-shaped cell mass located deep in the human temporal cortex.”<sup>123</sup> Among other functions, the amygdala is involved in processing stimuli that based on one's prior experience have attained emotional significance.<sup>124</sup> It plays a role in fear learning and

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<sup>116</sup> See Andrew Scott Baron & Mahzarin R. Banaji, *The Development of Implicit Attitudes: Evidence of Race Evaluations From Ages 6 and 10 and Adulthood*, 17 PSYCHOL. SCI. 53, 55 (2006).

<sup>117</sup> See Evan P. Apfelbaum et al., *Learning (Not) to Talk About Race: When Older Children Underperform in Social Categorization*, 44 DEVELOPMENTAL PSYCHOL. 1513, 1516-17 (2008).

<sup>118</sup> Baron & Banaji, *supra* note 116, at 56.

<sup>119</sup> Telzer et al., *supra* note 113, at 241.

<sup>120</sup> *Id.*

<sup>121</sup> Adam M. Chekroud et al., *A Review of Neuroimaging Studies of Race-Related Prejudice: Does Amygdala Response Reflect Threat?*, FRONTIERS HUM. NEUROSCIENCE, Mar. 2014, at 1 (2014).

<sup>122</sup> *Id.* See David M. Amodio, *The Neuroscience of Prejudice and Stereotyping*, 15 NATURE REVIEWS NEUROSCIENCE 670 (2014) (discussing at least seven other areas of the brain associated with prejudice).

<sup>123</sup> M. Davis & P.J. Whalen, *The Amygdala: Vigilance and Emotion*, 6 MOLECULAR PSYCHIATRY 13, 13 (2001) (“As originally described, the amygdala is composed of several distinct groups of cells, usually termed the lateral, basal and accessory basal nuclei, and now collectively termed the basolateral amygdala. Several structures surrounding the basolateral amygdala, including the central, medial and cortical nuclei, are traditionally included in the ‘amygdaloid complex’. These surrounding structures, together with the basolateral amygdala, have come to be called ‘the amygdala’.”).

<sup>124</sup> Telzer et al., *supra* note 113, at 234.

contributes to threat detection; it “reflects arousal triggered by fast unconscious assessment of potential threat elicited by sensory, social and emotional stimuli.”<sup>125</sup>

In 2000, the first fMRI study was published investigating race-related amygdala activity.<sup>126</sup> Looking at Black and White participants observing Black and White male and female faces, the study found greater amygdala activation to outgroup faces (but not ingroup faces) during later stimulus presentations.<sup>127</sup> Thus the study concluded that “the rate of response habituation within the amygdala to face stimuli is dependent upon an interaction between the race of the subjects and the perceived race of the face stimuli.”<sup>128</sup>

In a series of two experiments also in 2000, researchers established that the magnitude of amygdala activation in White participants to Black (versus White) male faces was correlated with measures of racial bias on the Implicit Association Test and an eyeblink startle test that in prior studies has been linked to negative or fear stimuli and to amygdala function in response to such stimuli.<sup>129</sup> Interestingly, there was no correlation between amygdala activation and a measure of self-reported explicit racial bias.<sup>130</sup> As in prior research, a study published in 2007 found greater amygdala activity when Whites viewed male Black faces than when they viewed White male faces.<sup>131</sup> The study also found greater amygdala activation for darker-skinned faces than for lighter-skinned faces, but this skin tone difference was found only for their White stimuli.<sup>132</sup>

One article reviewing neuroimaging studies of race-related prejudice interprets amygdala activation in response to Black faces as a response to

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<sup>125</sup> Jaclyn Ronquillo et al., *The Effects of Skin Tone on Race-Related Amygdala Activity: An fMRI Investigation*, 2 SOC. COGNITIVE AFFECTIVE NEUROSCIENCE 39, 39 (2007) (citation omitted); see also Ralph Adolphs et al., *Fear and the Human Amygdala*, 15 J. NEUROSCIENCE 5879, 5879 (1995) (discussing that the amygdala processes stimuli related to fear).

<sup>126</sup> See Allen J. Hart et al., *Differential Response in the Human Amygdala to Racial Outgroup vs Ingroup Face Stimuli*, 11 NEUROREPORT 2351 (2000).

<sup>127</sup> *Id.* at 2352-53. Participants were asked to classify the faces by gender. *Id.*

<sup>128</sup> *Id.* at 2353.

<sup>129</sup> Elizabeth A. Phelps et al., *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 729-33 (2000).

<sup>130</sup> *Id.* at 732. Explicit bias was assessed with the Modern Racism Scale. *Id.*

<sup>131</sup> Ronquillo et al., *supra* note 125, at 41.

<sup>132</sup> *Id.*

potential threat.<sup>133</sup> The article notes that young Black men are often both implicitly and explicitly “stereotyped violent, criminal, and dangerous.”<sup>134</sup> The authors suggest that race-related amygdala activity, rather than being due to the widely-held interpretation of out-group bias *per se*, is better explained through the negative culturally learned stereotype associations between Black males and threat.<sup>135</sup>

Television Crime News as Priming Black Crime Stereotypes and the Presumption of Dangerousness

“[S]tereotypes associating members of certain minority groups — in particular, African-Americans — with crime are pervasive and well-known by all Americans.”<sup>136</sup>

Numerous studies have concluded that television news stories about crime systematically overrepresent Blacks as perpetrators of crime and Whites as victims of crime.<sup>137</sup> For example, two studies of television crime reporting in the Los Angeles area, found that Blacks were overrepresented as crime perpetrators (37%) compared to arrest reports (21%) and that Whites were underrepresented as crime perpetrators (21%) compared to arrest reports (28%) and were overrepresented as victims in crime news reports (43%) compared to crime reports (13%).<sup>138</sup> These and other studies establish that Blacks are much more frequently linked with criminality and dangerousness than Whites on television news.<sup>139</sup>

Does television crime news activate and help perpetuate stereotypes of Black criminality and the presumption of dangerousness? The activation of Black stereotypes via television crime news potentially biases the

<sup>133</sup> See Chekroud et al., *supra* note 121, at 1.

<sup>134</sup> *Id.* at 4 (citations omitted).

<sup>135</sup> *Id.* at 9.

<sup>136</sup> Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 721 (2001) (citing P.G. Devine & A.J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139 (1995)).

<sup>137</sup> Dixon & Maddox, *supra* note 31, at 1555-56 (citing numerous studies).

<sup>138</sup> Travis L. Dixon & Daniel Linz, *Overrepresentation and Underrepresentation of African Americans and Latinos as Lawbreakers on Television News*, 50 J. COMM. 131, 144 (2000); Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM. RES. 547, 561 (2000).

<sup>139</sup> Dixon & Maddox, *supra* note 31, at 1556.

processing of incoming information, usually in a stereotype-consistent manner.<sup>140</sup> Thus, over time it is likely that repeated exposure in the media to these inaccurate portrayals of Blacks and crime contribute to the stereotype of Black criminality and the presumption of dangerousness.<sup>141</sup> Furthermore, the more exposure one has to these Black stereotypes the greater likelihood they will affect judgments.<sup>142</sup>

In an important study on exposure to crime news and skin tone, researchers found that, among heavy viewers of news, stories with darker-skinned perpetrators elicited more worry about the crime than stories with White perpetrators; dark-skinned perpetrators were also more memorable than White perpetrators regardless of viewership; finally, victims of all Black perpetrators (light, medium and dark-skinned) were viewed more positively by individuals defined as heavy news watchers, compared to victims of White perpetrators.<sup>143</sup>

Thus, news crime reporting as well as television and film entertainment reinforce the stereotype of Blacks, criminality, dangerousness and guilt.<sup>144</sup> There is considerable evidence that media stereotypes in the context of crime coverage consist of recurring messages that Blacks and Latinos are criminal, violent and dangerous.<sup>145</sup>

#### Historical Dehumanization of Blacks and the Negro-Ape Metaphor

“The brutal lust of these half-civilized gorillas seems to be inflamed to madness.” – Rebecca Felton (1894)<sup>146</sup>

Renowned historian and expert on slavery and racism in the United States, Winthrop D. Jordan, traced the history of the Negro-ape metaphor to the English exploring Western Africa and the slave-trade at the turn of

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<sup>140</sup> *See id.*

<sup>141</sup> *See id.* (citing studies).

<sup>142</sup> *Id.* at 1557.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1562-64.

<sup>145</sup> Robert M. Entman & Kimberly A. Gross, *Race to Judgment: Stereotyping Media and Criminal Defendants*, 71 *LAW & CONTEMP. PROBS.* 93, 102 (2008).

<sup>146</sup> *Id.* at 97-103 (citing numerous studies).

<sup>146</sup> LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 213 (1998). Ms. Felton was responding to a newspaper editorial as part of her personal crusade to arouse the public about the dangers Blacks posed to White women. *See id.* at 526 n.80.

the seventeenth century.<sup>147</sup> Jordan wrote: “If Negroes were likened to beasts, there was in Africa a beast which was likened to men. It was a strange and eventually tragic happenstance of nature that the Negro’s homeland was the habitat of the animal which in appearance most resembles man.”<sup>148</sup> In describing visual representation of Negroes in pictures at the turn of the twentieth century, Professor of Sociology, Dr. Franklin Frazier, wrote: “in every representation of the Negro, he was pictured as a gorilla dressed like a man.”<sup>149</sup> In newspapers in the South, Negro pictures were not used “unless he had committed a crime.”<sup>150</sup> In the newspapers, Negroes were described as ape-like and even very light skinned Negroes were represented in cartoons as “black with gorilla features.”<sup>151</sup> This fit the stereotype of the time “which represented the Negro as subhuman or a beast, without any human qualities.”<sup>152</sup> A so-called authoritative doctoral dissertation published by Columbia University in 1910 accepted as scientific evidence that the Negro was “as destitute of morals as any of the lower animals.”<sup>153</sup>

However, dehumanizing representations of Blacks date back almost to Europeans’ first encounters with Blacks in West Africa.<sup>154</sup> Maritime writings of early European explorers described primitive people as more ape-like than the white explorers.<sup>155</sup> As late as 1906 the New York Zoological Society, now the Bronx Zoo, had a monkey exhibit that included a chimpanzee and a young man from Africa.<sup>156</sup> Several years

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<sup>147</sup> WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* 28-32 (1968).

<sup>148</sup> *Id.* at 28-29. “Almost certainly that fortuitous proximity played a crucial role in shaping the eighteenth century’s consensus that on the Great Scale of Beings the place just above the ape was occupied by the Negro.” *Id.* at 229.

<sup>149</sup> FRAZIER, *supra* note 75, at 144.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 144-45.

<sup>153</sup> *Id.* at 145.

<sup>154</sup> Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 *J. PERSONALITY & SOC. PSYCHOL.* 292, 292 (2008).

<sup>155</sup> *Id.*

<sup>156</sup> S. Plous & Tyrone Williams, *Racial Stereotypes from the Days of American Slavery: A Continuing Legacy*, 25 *J. APPLIED SOC. PSYCHOL.* 795, 811 (1995).

later the famed Ringling Brothers circus had a similar display “The Monkey Man” featuring a female chimpanzee and a caged Black man.<sup>157</sup>

In a series of six studies, researchers found a cognitive association between Blacks and apes that was bidirectional, that is, exposure to Black faces facilitated the perception of apes, and exposure to apes facilitated visual attention to Black faces.<sup>158</sup> Neither explicit bias nor ingroup status affected the association between Blacks and apes.<sup>159</sup> Also, Whites and apes were negatively associated with each other.<sup>160</sup> This comported with prior research led by one of the researchers (Dr. Jennifer L. Eberhardt) that found a positive association between Blacks and crime and a negative association between Whites and crime.<sup>161</sup> The researchers in the *Not Yet Human* studies also found that the association between Blacks and apes was strong and unrelated to conscious knowledge of the stereotype that Blacks are apelike, indeed only nine percent of the participants in the studies were aware of this historical stereotype.<sup>162</sup> This was in sharp contrast to ninety-four percent of the respondents who were aware of the stereotype that Blacks are violent.<sup>163</sup> The study also found that there was no correlation between the participants’ anti-black implicit bias on the IAT and the Black-ape association.<sup>164</sup> In the final portion of the study, the researchers found that Black defendants in death penalty cases in Philadelphia from 1979–1999 were much more likely to be associated with ape-like qualities than White defendants in newspaper articles that mention a defendant with words associated with animals or subhuman qualities.<sup>165</sup> Disturbingly, this portrayal was associated with a greater likelihood of receiving the death penalty.<sup>166</sup>

The comparison of Blacks to apes continues. When former NBA All-Star Patrick Ewing, a Black seven-footer, was playing college basketball at Georgetown University, fans at rival Villanova University held up a

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<sup>157</sup> *Id.*

<sup>158</sup> See Goff et al., *supra* note 154, at 296-304.

<sup>159</sup> *Id.* at 304.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (citing Eberhardt et al., *supra* note 1).

<sup>162</sup> See *id.* at 301.

<sup>163</sup> See *id.*

<sup>164</sup> See *id.*

<sup>165</sup> See *id.* at 304.

<sup>166</sup> *Id.*

bedsheet that read “Ewing Is An Ape” and threw a banana peel on the court.<sup>167</sup>

One does not have to look very far on the internet to find websites hosting disgusting and abhorrent Photoshopped images of President Obama and the First Lady as apelike, one of them under the heading Primate-In-Chief.<sup>168</sup> Many of these images are on T-shirts presumably for sale.<sup>169</sup> Author and blogger, Earl Ofari Hutchinson recently blogged:

The long, sordid and savage history of racist stereotyping of African-Americans has been the stock in trade of race baiting and racial ridicule for more than century. A few grotesque book titles from a century ago, such as *The Negro, a Beast*; *The Negro, a Menace to American Civilization*; and *The Clansman* depicted blacks as apes, monkeys, bestial, and animal-like. The image stuck in books, magazines, journals, and deeply colored the thinking of many Americans of that day... that day?<sup>170</sup>

In November of 2016, two local West Virginia officials in Clay County faced mounting pressure to resign after a racist post about Michelle Obama: “It will be refreshing to have a classy, beautiful, dignified First Lady in the White House. I’m tired of seeing [an] Ape in heels.”<sup>171</sup>

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<sup>167</sup> Gary Pomerantz, *Ewing Under Siege*, WASH. POST (Feb. 9, 1983), <https://www.washingtonpost.com/archive/sports/1983/02/09/ewing-under-siege/a17fe474-6ec8-42a9-8ad6-19880d4d9990>.

<sup>168</sup> See, e.g., Abe Sauer, *Primate in Chief: A Guide to Racist Obama Monkey Photoshops*, AWL (Apr. 19, 2011), <https://www.theawl.com/2011/04/primate-in-chief-a-guide-to-racist-obama-monkey-photoshops>.

<sup>169</sup> See *id.*

<sup>170</sup> Earl Ofari Hutchinson, *Nothing New in the Ape Crack About Michelle Obama*, HUFFPOST (May 15, 2015), [http://www.huffingtonpost.com/earl-ofari-hutchinson/nothing-new-in-the-ape-crack-about-michelle-obama\\_b\\_6869650.html](http://www.huffingtonpost.com/earl-ofari-hutchinson/nothing-new-in-the-ape-crack-about-michelle-obama_b_6869650.html).

<sup>171</sup> See Hannah Parry, *West Virginia Officials Under Fire for Racist Facebook Post Which Described Michelle Obama as an ‘Ape in Heels’ Compared to ‘Classy, Beautiful’ Melania Trump*, DAILYMAIL (Nov. 15, 2016, 2:23 PM), <http://www.dailymail.co.uk/news/article-3935342/West-Virginia-officials-fire-racist-Facebook-post-described-Michelle-Obama-Ape-heels-compared-classy-beautiful-Melania-Trump.html#ixzz4RvWUmEPL>.

### Summary

“That African-Americans are more likely to have violent and criminal dispositions is one of the most readily invoked contemporary stereotypes about blacks.”<sup>172</sup>

The stereotyping of Blacks’ predisposition to crime and dangerousness is rooted in the beliefs formed during slavery by Whites that Blacks were more animalistic than human. To the White European settlers of our nation, the darker skin of the Native Americans, and Black slaves abducted from Africa, were signs of a lack of moral worth and criminal intent.

From the colonial times viewing Blacks as chattel, through slavery viewing Blacks as savages and brutes, the themes of Blacks’ criminality and dangerousness pervaded the contemporary thinking by Whites at the times. This stereotype pervades historical, sociological, anthropological, theological, and pseudo-science writings of the times. Through these writings and the evolving literature Blacks were dehumanized in many ways, including the enduring Black-ape metaphor that persists today. The presumption of dangerousness and criminality of Blacks is not only widely accepted but “deeply embedded in the collective consciousness of Americans.”<sup>173</sup> This remains irrespective of ones’ “level of prejudice or personal beliefs.”<sup>174</sup> Emerging technology in neuroscience has established that this stereotype of the presumption of dangerousness for Blacks is now hard-wired in many Whites’ brains “fear center” — the amygdala.

This historical perspective helps elucidate why darker skin tones and greater Afrocentric facial features impact offenders in our criminal justice system, as further analyzed in the following section.

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<sup>172</sup> Quillian & Pager, *supra* note 136, at 721.

<sup>173</sup> *Id.* at 722.

<sup>174</sup> *Id.* (“A combination of negative media depictions of African-Americans, historical stereotypes, and ethnocentric biases are likely combined to form distorted perceptions in which the association of blackness and criminality is systematically overestimated.”).

### III. BEYOND RACE, AFROCENTRIC FACIAL FEATURES, COLORISM, AND SENTENCING

“[T]he association between criminality and Afrocentric features is universal, regardless of gender or race.”<sup>175</sup>

Does race play a role in the length of sentences? That is, all other sentencing factors being equal, do Blacks, on average, serve longer sentences than Whites? A brief review of studies on race and sentencing seems to suggest that Blacks receive harsher sentences, more lenient sentences, or similar sentences to Whites.<sup>176</sup> One study looked at forty published studies that had statistically examined the association of race and sentencing severity using data on non-capital sentences imposed at the State (thirty-two) or Federal (eight) level in the 1980s and 1990s and had controlled for criminal history and seriousness of the crime.<sup>177</sup> This review concluded that young, male, and unemployed Blacks and Hispanics had both a greater likelihood of incarceration and longer sentences than comparable White offenders, and that these effects appeared at the state and federal level and were not limited to a particular region of the country.<sup>178</sup> It also stressed the importance of examining other interacting variables such as the type of crime (e.g., drug offense) and process-related factors (pretrial release).<sup>179</sup> Other studies have looked more closely at mechanisms of racial disparities in sentence length, finding, for example, that disparities in federal courts stemmed primarily from departures from sentencing guidelines.<sup>180</sup> Others have suggested the importance of looking at a host of discretionary points in case processing.<sup>181</sup> Yet other social scientists claim that “empirical studies fail to show strong evidence of

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<sup>175</sup> Heather M. Kleider et al., *Looking Like a Criminal: Stereotypical Black Facial Features Promote Face Source Memory Error*, 40 *MEMORY & COGNITION* 1200, 1212 (2012).

<sup>176</sup> See Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 *CRIM. JUST.* 427, 429 (2000) (citing studies).

<sup>177</sup> *Id.* at 443, 453.

<sup>178</sup> *Id.* at 465, 474.

<sup>179</sup> *Id.* at 481.

<sup>180</sup> David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 *J.L. & ECON.* 285, 285 (2001).

<sup>181</sup> Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 *CRIMINOLOGY* 514, 514-51 (2014).

racial discrimination by judges in sentencing.”<sup>182</sup> Fortunately, we need not and do not decide this controversy. We are looking beyond race to the next frontier of sentencing. The first seven of the studies analyzed below used actual sentencing data, each from a different state, and are discussed from earliest to most recent.

A. The Florida Study

In 2004, *The Influence of Afrocentric Facial Features in Criminal Sentencing* was the first published study to examine the relationship between the degree of Afrocentric facial features and the length of a criminal sentence.<sup>183</sup> The researchers used a public database of photographs of incarcerated inmates in the State of Florida, maintained by the Florida Department of Corrections, to create a random sample of eighteen to twenty-four-year old Black and White male inmates.<sup>184</sup> The researchers then coded the sample for a number of sentencing factors Florida trial court judges were allowed to consider.<sup>185</sup> The sample was then coded for Afrocentric facial features using a scale of 1 (not at all) to 9 (very much).<sup>186</sup> Prior research has established that evaluating faces for the presence of Afrocentric facial features is not difficult and results are reliable.<sup>187</sup> Obviously, Black inmates, on average, had stronger Afrocentric facial features than White inmates, but “there was considerable variance within each group.”<sup>188</sup>

The race of the inmates (Black or White), when controlled for legitimate statutory sentencing factors, did not “account for a significant amount of variance in sentence length.”<sup>189</sup> However, Afrocentric facial features “were a significant predictor of sentence length.”<sup>190</sup> The first result of the study, that sentencing length was roughly equivalent for Black and White offenders with similar criminal histories confirmed “earlier

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<sup>182</sup> William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 328 (2005).

<sup>183</sup> Blair et al., *Afrocentric Features in Criminal Sentencing*, *supra* note 7, at 674.

<sup>184</sup> *Id.* at 675.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 676.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 676-77.

research on the role of race in sentencing.”<sup>191</sup> The researchers suggest that Florida’s twenty-year effort to achieve race neutrality in sentencing has “largely been successful.”<sup>192</sup> They argued that it appeared that Florida judges had learned to give similar sentences to Blacks and Whites with similar criminal histories and the same seriousness of the crime.<sup>193</sup> This was not true for Afrocentric facial features. The stronger the Afrocentric facial features, the longer the sentence.<sup>194</sup>

Not surprisingly, far fewer Whites than Blacks have Afrocentric facial features.<sup>195</sup> One surprising result was that White offenders with strong Afrocentric facial features received longer sentences than White offenders with less Afrocentric facial features.<sup>196</sup> Unexpectedly, White offenders compared with similarly situated Black offenders were given longer sentences than Black offenders when both were rated with strong Afrocentric facial features.<sup>197</sup> Within each racial group, Black and White offenders with high Afrocentric facial features received longer sentences than those with less Afrocentric facial features.<sup>198</sup>

The study concluded that racial stereotyping in sentencing by judges was still happening but that it was no longer based on just race.<sup>199</sup> Instead, it was now based on the strength of Afrocentric facial features in both Black and White offenders.<sup>200</sup>

#### The Philadelphia Study

The study *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital Sentencing Outcomes* examined the influence of a stereotypically Black physical appearance on juror death-

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<sup>191</sup> *Id.* at 677.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* The researchers computed average sentencing length (for the mean levels of criminal history variables) for offenders 1 standard deviation above and below the mean for Afrocentric facial features. *Id.* at 677-78. This resulted in sentences of seven to eight months longer for individuals 1 standard deviation above the group mean. *Id.*

<sup>195</sup> *Id.* at 678.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

sentence decisions in cases with Black versus White victims.<sup>201</sup> The study used a database of death-eligible cases from Philadelphia, Pennsylvania that, between 1979 and 1999, had advanced to the sentencing phase. The researchers acquired photographs from the forty-four cases in which Black male defendants had been convicted of murdering Whites and a subset (118 out of 308) of those convicted of murdering Blacks.<sup>202</sup> They asked raters to rate the stereotypicality of the faces on a scale of 1 (not at all stereotypical) to 11 (extremely stereotypical), with the instruction that “they could use any number of features (e.g., lips, nose, hair texture, skin tone) to arrive at their judgments.”<sup>203</sup> When the victim was White, more stereotypically-Black looking defendants were significantly more likely to receive the death penalty, even after controlling for a number of factors known to affect sentencing.<sup>204</sup> When the victim was Black, stereotypical appearance was not related to death-sentencing outcome.<sup>205</sup>

#### The Mississippi Study

A study by Kwabena Gyimah-Brempong and Gregory Price looked at 403 incarcerated Black offenders in the State of Mississippi whose last name started with the letter “A” and who were incarcerated as of August 20, 2005.<sup>206</sup> The offenders were classified into seven skin hue groups (from fair to dark).<sup>207</sup> Controlling for type of crime conviction (drug, violent, property) and two socioeconomic measures, the researchers found that the darker the offender’s skin tone, the longer the prison sentence.<sup>208</sup> The study did not attempt to analyze Afrocentric facial features.<sup>209</sup> It appears that the authors only looked at similar crimes for their data and no other relevant sentencing factors (e.g., prior criminal history, prior

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<sup>201</sup> Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383, 383 (2006).

<sup>202</sup> *Id.* at 383-84.

<sup>203</sup> *Id.* at 384.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 385.

<sup>206</sup> Gyimah-Brempong & Price, *supra* note 27, at 246-47.

<sup>207</sup> *Id.* at 248 n.7. The authors did not specify how skin hue was recorded, just that it “was reported in the convict data.” *Id.*

<sup>208</sup> *Id.* at 247-49.

<sup>209</sup> *Id. passim.*

incarceration), which may skew these results.<sup>210</sup> The study has been mildly criticized for lacking “separate analyses for men and women (which skews the results toward the male experience, given that about 90 percent of all offenders are men).”<sup>211</sup>

#### The North Carolina Study

In 2010, *The Impact of Light Skin on Prison Time for Black Female Offenders* became the first study to examine colorism as it relates to sentencing of female offenders.<sup>212</sup> The sample included over 12,000 records of Black females taken from inmate records in the state of North Carolina from 1995–2009.<sup>213</sup> No photographs, independent evaluation of skin tones, scales of continuous skin tones, or measures of Afrocentric facial features were used.<sup>214</sup> Instead, offenders were assessed by correctional officers on admission with a binary code, 0 for non-light skin and 1 for light skin.<sup>215</sup> Only four percent of Black female offenders were scored with “light skin,” suggesting to the researchers that the “average baseline for determining skin lightness was individuals of European descent.”<sup>216</sup> Due to the overall large sample size, this still left several hundred “light skinned” Black female offenders.<sup>217</sup>

The study found that the offenders designated “light skinned” received approximately twelve percent less time than darker skinned counterparts, controlling for other relevant sentencing factors.<sup>218</sup> This study extends previous research that had focused on Black men, and, as the researchers conclude, it “adds to a growing body of colorism research that underscores the complexity of racism in our society.”<sup>219</sup>

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<sup>210</sup> *Id.*

<sup>211</sup> Jill Viglione et al., *The Impact of Light Skin on Prison Time for Black Female Offenders*, 48 SOC. SCI. J. 250, 252 (2011).

<sup>212</sup> *Id.* at 252.

<sup>213</sup> *Id.* at 251.

<sup>214</sup> *Id.* at 253-54, 257.

<sup>215</sup> *Id.* at 253.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 255.

<sup>219</sup> *Id.* at 257.

### The Oregon Study

In 2014, *Beyond Black and White: an Examination of Afrocentric Facial Features and Sex in Criminal Sentencing* became the latest empirical study in this area.<sup>220</sup> The purpose of the study was to “utilize[] multivariate regression analyses to examine the influence of Afrocentric facial features and sex on sentence length in Oregon.”<sup>221</sup> One of Petersen’s hypotheses was that, because prior research has established Afrocentric facial features are connected to stereotyping and skin tone is related to different stereotypes for men and women, sentencing outcomes may differ based on the combination of facial features and sex.<sup>222</sup>

Petersen’s study analyzed data on sentencing outcomes for White and Black offenders incarcerated in Oregon as of January 2014.<sup>223</sup> The dependent variable was the length of the sentence, expressed in months.<sup>224</sup> Twenty-eight undergraduate students were recruited as participants for the Afrocentric facial features portion of the study. They rated the photographs of the Black offenders on a scale of 1-9, with 1 being not stereotypical of a Black person and 9 being the most stereotypical. They were instructed that: “Some of the individuals would have features that are more typical of Black individuals than others in terms of skin color, hair, eyes, nose, cheeks, and lips, and that some of the individuals would have features that were less typical of Black individuals.”<sup>225</sup> Each face was given “an Afrocentric facial feature rating” composed of an average of that photo’s ratings.<sup>226</sup>

Petersen’s study findings are summarized as follows. First, broad race categories (White and Black) did not predict sentencing length, when keeping constant a host of legally relevant factors (e.g. crime seriousness,

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<sup>220</sup> Petersen, *supra* note 39.

<sup>221</sup> *Id.* at 2.

<sup>222</sup> *Id.* at 2-3.

<sup>223</sup> *Id.* at 20. Data on offenders was collected from and with the cooperation of the Oregon Department of Corrections, through the public and online Oregon Offender search database, and from participants used to rate photographs (obtained from the Oregon Offender search database) of offenders for strength of Afrocentric features. *Id.*

<sup>224</sup> *Id.* at 21. In Oregon, this date is defined as the “earliest possible release” date, not the actual one which may be the result of loss of good time or failure to complete programming. *Id.*

<sup>225</sup> *Id.* at 27-28.

<sup>226</sup> *Id.* at 28.

offense history, parole and probation violations).<sup>227</sup> This was consistent with one of Petersen's initial hypotheses.<sup>228</sup> Second, Afrocentric facial features increased the length of sentences for Black males, when those rated lowest in Afrocentric facial features were omitted from the analysis.<sup>229</sup> Table 3, below, indicates the effect of Afrocentric features on the length of the sentence, for Black men with Afrocentric facial feature ratings of 3 and above. The table shows the percentage change in sentence length when moving from one rating to another (e.g., a Black man with a rating of 8 would receive a 38.51% longer sentence than one with a rating of 3). Third, the study found that Afrocentric facial features did not affect the length of sentences for Black females, even when those rated lowest in Afrocentric facial features were omitted from the analysis.<sup>230</sup>

Table 3 -Afrocentric facial feature rating on sentence length

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

#### The Georgia Study

The 2015 study, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, analyzed sentencing data of first-time felony offenders incarcerated offenders in Georgia collected by the

<sup>227</sup> *Id.* at 30.

<sup>228</sup> *Id.* at 19.

<sup>229</sup> *Id.* at 39.

<sup>230</sup> *Id.* at 39-40.

Georgia Department of Corrections (GDC).<sup>231</sup> Blacks are 31% of the state of Georgia's population but comprise nearly 62% of persons serving prison time in Georgia.<sup>232</sup> The GDC data came "from two files" "in the fall of 2003"<sup>233</sup> The data used was from first-time felony convictions from 1995-2002, totally 67,379 inmates, 23,840 Whites and 43,539 Blacks.<sup>234</sup> For Blacks, skin color was recoded from thirteen original categories into three: light-, medium-, and dark-skinned.<sup>235</sup>

The study found that dark-skinned Blacks received sentences that were 4.83% longer than Whites, medium-skinned Blacks received sentences that were 4.80% longer than Whites, and light-skinned Blacks did not receive statistically significantly different sentences than Whites.<sup>236</sup> The study used multivariate analysis to attempt to control for many factors that judges would consider in Georgia for sentencing (including crime type).<sup>237</sup> However, because Georgia did not have sentencing guidelines during the period of this study, it was impossible to control for all factors a sentencing judge might consider.<sup>238</sup> The sentencing disparity between White and medium- and dark-skinned blacks held even when socioeconomic status was included in the model.<sup>239</sup>

The study concludes "this research shows that a skin color disparity in criminal sentencing also exists and helps make salient within-group phenotype differences."<sup>240</sup> Finally, the skin tone bias established by this study "seems to follow the age-old pattern of disfavoring African-ness, however measured."<sup>241</sup>

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<sup>231</sup> Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395 (2015).

<sup>232</sup> *Id.* at 404.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 405. The author excluded inmates with a common Hispanic surname.

<sup>235</sup> *Id.* at 405, 417-419

<sup>236</sup> *Id.* at 409-410.

<sup>237</sup> *Id.* at 408.

<sup>238</sup> *Id.* at 406, 407, 411-412.

<sup>239</sup> *Id.* at 409.

<sup>240</sup> *Id.* at 413.

<sup>241</sup> *Id.*

### The Minnesota Study

In 2016, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice* became the latest and most far reaching of the empirical studies on this subject.<sup>242</sup> This study used a sampling frame of all adult felony cases in two counties that include St. Paul and Minneapolis, which account for more than one-third of felony convictions in Minnesota and more than seventy percent of the state's Black population.<sup>243</sup> This large sample included twenty-six different criminal offenses spanning drug, property, and violent crimes.<sup>244</sup> Unlike two of the prior studies, this study included both Black and White (and Hispanic) offenders and is the first study to analyze race, skin tone, and Afrocentric facial features with Black, White, and Hispanic offenders.<sup>245</sup> Another unique feature of this study is that, in addition to length of the sentence, it analyzes the association of race, skin tone and Afrocentric facial features with the likelihood of different types of sentences (prison and two forms of probation);<sup>246</sup> further, it analyzed the role of race of the sentencing judge in sentencing outcomes.<sup>247</sup>

The first critical finding of this study was that race alone (Black and White) did not affect the length of sentencing.<sup>248</sup> The second critical finding, and apparently the first time this has been researched in an empirical study, is that there are important associations between skin tone and Afrocentric facial features on the decision of whether to impose and/or execute or to not impose a prison sentence.<sup>249</sup> Minnesota law provides for three sentencing scenarios: imposition of imprisonment (a sentence is imposed and executed), a "stay of execution" (a prison sentence is imposed but is served only if a violation of probation occurs), and a "stay

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<sup>242</sup> King & Johnson, *supra* note 24.

<sup>243</sup> *Id.* at 97.

<sup>244</sup> *Id.* at 97-98.

<sup>245</sup> *Id.* at 97, 110-11. The study coded offenders for perceived skin tone on a scale of 1 (very light skin) to 7 (very dark skin) and for Afrocentric facial features on a scale of 1 to 7. *Id.* at 99-100.

<sup>246</sup> *Id.* at 98.

<sup>247</sup> *Id.* at 112.

<sup>248</sup> *Id.* at 104, 108. The study controlled for key variables that could be considered possible confounds in this and subsequent analyses, such as criminal history and crime. *Id.* at 101-02.

<sup>249</sup> *Id.* at 113-14.

of imposition” (a term of imprisonment is not imposed and a felony is converted to a misdemeanor upon successful completion of probation).<sup>250</sup> Compared to the lightest skinned offenders, “the odds of dark-skinned Blacks receiving a stay of execution relative to a stay of imposition are nearly twice as high, and the odds of a prison sentence increase by more than 3.5 times.”<sup>251</sup> Comparing the difference between light, medium, and dark skin tones is also instructive. The raw regression coefficient comparing prison with a stay of imposition increases by sixty-three percent moving from the light to medium skin tone category (a difference that is not statistically significant); however, the coefficient increases by a whopping 139% when moving from medium to dark skin tone (a statistically significant difference).<sup>252</sup> The study also found Afrocentric facial features to be “a powerful predictor of imprisonment,” with each unit increase in the scale of Afrocentric facial features increasing the odds of a stay of execution relative to a stay of imposition by thirteen percent and the odds of imprisonment by thirty percent.<sup>253</sup> The study was able to determine that “both skin tone and Afrocentric facial features independently influence incarceration decisions.”<sup>254</sup>

The third critical finding is that unlike the prior studies of incarcerated offenders in Florida, Mississippi, North Carolina and Oregon this study did not find that either skin tone or Afrocentric facial features affected the *length* of criminal sentences.<sup>255</sup> Fourth, for the small percentage of White defendants with Afrocentric facial features, while it did not affect the length of their sentences, it did double their chances of being incarcerated in prison.<sup>256</sup> Thus, the chances of a White offender with Afrocentric facial features receiving a prison sentence is closer to that of Blacks than that of Whites.<sup>257</sup> Finally, the race of the sentencing judge was not correlated with any of the findings.<sup>258</sup>

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<sup>250</sup> *See id.* at 98.

<sup>251</sup> *Id.* at 107.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 108.

<sup>255</sup> *Id.* at 108, 115.

<sup>256</sup> *Id.* at 111, 115. It appears that the stronger Afrocentric facial features in Whites rather than darker skin tone results in greater likelihood of prison. *Id.* at 111.

<sup>257</sup> *Id.* at 111-12.

<sup>258</sup> *Id.* at 112.

### The Florida Laboratory Study

Unlike the above studies which used actual sentencing data of incarcerated state offenders from Florida, Mississippi, North Carolina, Oregon, and Minnesota, a laboratory participant study provided evidence consistent with many of the findings concerning skin tone and Afrocentric facial features discussed in the seven studies above.<sup>259</sup>

In the Florida Laboratory study, first a set of laboratory participants rated headshot photographs of Black men from the Florida Department of Corrections for their Afrocentricity, among other characteristics (e.g., kindness, aggression), and rated nine features for their importance in judging a person's race.<sup>260</sup> Then a second set of participants were asked to imagine themselves as a juror and read a criminal charge and vignette of a burglary with a headshot photograph that was either the most, least or average in Afrocentric facial features (as gauged by the earlier set of participants); complete a word-completion task measuring the accessibility of the concept of aggressiveness; make criminal judgments about the defendant's guilt and punishment; complete a measure of their explicit attitudes towards Blacks; and take a race IAT.<sup>261</sup>

Skin color was deemed the most important feature when deciding on someone's race and the photo rated highest in Afrocentric facial features was also the darkest skin tone.<sup>262</sup> It was also rated the highest for criminality (highly aggressive and less likely to be kind).<sup>263</sup> Participants who rated a defendant with greater Afrocentric facial features also imposed substantially longer sentences.<sup>264</sup> Interestingly, the greater the explicit and implicit bias, the greater the likelihood the defendant was perceived with darker skin and greater Afrocentric facial features, and the greater the perception of Black criminality.<sup>265</sup> Thus, of all the colorism and Afrocentric facial features studies, this was the first to measure and find an association of the physical perception of a Black defendant and the participants' negative attitudes towards Blacks.<sup>266</sup>

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<sup>259</sup> Cormier, *supra* note 49, at 45 (discussing Phase 2 results).

<sup>260</sup> *Id.* at 32. The photographs were selected from Black males between the ages of eighteen and twenty-five convicted of theft and property crimes. *Id.*

<sup>261</sup> *Id.* at 32-33.

<sup>262</sup> *Id.* at 38.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 43-44.

<sup>265</sup> *Id.* at 45-46.

<sup>266</sup> *Id.* at 46.

### Summary

The Florida study found that the stronger the Afrocentric facial features, the longer the sentence for male offenders. Remarkably, this was also true for the small percentage of White offenders who have Afrocentric facial features despite their lighter skin tone. While most of the available studies focus on judicial decision-making, the Philadelphia study examined juror decisions in the death penalty context. It found that Black defendants' stereotypicality (defined as a combination of skin tone and Afrocentric features) influenced sentencing when the victim was White, but not when the victim was Black. The Mississippi study only looked at skin tone, not Afrocentric facial features, and found the Blacks with darker skin tones received longer sentences. The North Carolina study only looked at female offenders and found darker skin tone offenders received longer sentences. The Oregon study found that race (Black and White) did not account for longer sentences. However, Afrocentric facial features increased the length of sentences for Black male offenders, but only when the Black offenders rated lowest in Afrocentric facial features were omitted from the analysis. Afrocentric facial features did not affect the length of sentences for Black female offenders in Oregon. The Georgia study examined Black and White male first-time felony offenders and found that both race and skin tone were related to sentencing, with medium- and dark-skinned Blacks receiving significantly longer sentences than Whites.

The Minnesota study stands *alone* in not finding an impact on the length of sentences based on either skin tone, Afrocentric facial features, or both. It does, however, make an important contribution to the literature by examining for the first time and finding that both skin tone and Afrocentric facial features negatively impact Blacks on the grave threshold judicial decision to send an offender to prison or give two types of probation. It also adds two additional important contributions: the race of the judge has no impact on the decision to send an offender to prison; and, while the study contradicts both the Oregon and Florida findings that Whites with strong Afrocentric facial features received longer sentences, it did find that Whites with strong Afrocentric facial features were much more likely to be sent to prison than to have no sentence imposed. The Florida Laboratory study added important measures of both explicit and implicit bias. The greater the perception of darker skin tone and Afrocentric facial features, the longer the hypothetical prison sentence.

## IV. THE PRESUMPTION OF DANGEROUSNESS

“[B]lack defendants in criminal cases are especially likely to be presumed guilty because they are subject to the stereotypes or heuristics that most whites apply to the category ‘black person.’”<sup>267</sup>

Completely at odds with the way the presumption of innocence operates in the criminal justice system, the presumption of dangerousness is unknowingly inscribed in the consciousness of most of White America.<sup>268</sup> Repeated studies indicate Blacks with darker skin tones and stronger Afrocentric facial features “activate automatic associations with negative behavioral stereotypes of Black men, such as aggression, violence, and criminality.”<sup>269</sup> Hence, this is what we describe as the presumption of dangerousness.

## The Early Studies

Social psychologists have studied the racial stereotype of Blacks as aggressive, violent, and criminal for nearly six decades.<sup>270</sup> This presumption of dangerousness has often been corroborated in the social science domain, even at such a low level as in an “ambiguous shove.” In a study over four decades ago about the perception of intergroup violence, White subjects viewing an “ambiguous shove” (one that was less than blatant) labeled the same shove as more violent when a Black rather than a White engaged in giving another the “ambiguous shove.”<sup>271</sup> The shove

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<sup>267</sup> Entman & Gross, *supra* note 144, at 97.

<sup>268</sup> See Nao Hagiwara et al., *The Independent Effects of Skin Tone and Facial Features on Whites’ Affective Reactions to Blacks*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 892, 897 (2012) (“Because Whites reacted more negatively to Blacks with darker skin and more prototypical facial features, as compared to Blacks with lighter skin and less prototypical facial features, even on the explicit measure, they are likely to be unaware of the negative effects that Black phenotypes can have on their racial attitudes.”).

<sup>269</sup> Kleider et al., *supra* note 175, at 1200-01.

<sup>270</sup> Eberhardt et al., *supra* note 1, at 876 (citing to several studies).

<sup>271</sup> Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 590 (1976). The race of the person giving (Black and White) and receiving (Black and White) the shove were systematically varied. *Id.* at 596-97.

was perceived as even more “violent” when the “victim” was White rather than Black.<sup>272</sup> The study confirmed the author’s hypothesis that the stereotype of Blacks as more prone to crime and violence than Whites would result in a lower threshold for considering an act violent for Blacks than Whites.<sup>273</sup>

In a follow-up study, the researchers measured how Black and White sixth-graders at a desegregated urban Northeastern middle school viewed four ambiguously aggressive behaviors: bumping in the hallway, requesting food from another student, poking a student in the classroom, and using another’s pencil without asking.<sup>274</sup> The researchers concluded that the prior study and theirs together provide “clear evidence that even relatively innocuous acts by black males are likely to be considered more threatening than the same behaviors by white males.”<sup>275</sup> As the authors note, this was true even though the four scenarios presented to the sixth-graders in this study did not explicitly indicate anger and two of the four scenarios involved no physical contact.<sup>276</sup> Most interestingly, the Black students demonstrated the same anti-black bias as the White students.<sup>277</sup> Thus, the researchers concluded the “tendency to perceive threat in black’s behavior” is “generalizable to a number of situations and populations in this country.”<sup>278</sup>

#### The Studies on Stereotypicality and Crime/Threat Associations

In an important four-part study, researchers looked at the relationship between stereotypical Black facial features (darker skin tones and greater Afrocentric facial features) and the stereotype of Blacks associated with

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<sup>272</sup> *Id.* at 596.

<sup>273</sup> *Id.* at 591.

<sup>274</sup> H. Andrew Sagar & Janet Ward Schofield, *Racial and Behavioral Cues in Black and White Children’s Perceptions of Ambiguously Aggressive Acts*, 39 J. PERSONALITY & SOC. PSYCHOL. 590, 593 (1980). Indeed, this study expressly intended to constitute “a conceptual replication of the Duncan study” albeit with a different population and going “beyond that study, not only in varying the behavior of both white and black stimulus persons but also in comparing responses of white and black observers.” *Id.* at 592-93.

<sup>275</sup> *Id.* at 596.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

crime and violence.<sup>279</sup> Study 1 tested the implicit association between stereotypical Black facial features and perceptions of criminality.<sup>280</sup> Interestingly, there were more than twice as many Black participants as White participants in Study 1.<sup>281</sup> The participants were asked to quickly sort male stereotypical Black faces and male atypical Black faces (lighter skin tones and less strong Afrocentric facial features) into three categories purportedly for a movie role: artist, teacher/professor, or drug dealer.<sup>282</sup> They also took an established self-reported test of explicit bias against Blacks, the Social Distance Scale.<sup>283</sup> The results confirmed that the stereotypical Black faces were associated with crime (that is, the drug dealer, not the artist or teacher/professor).<sup>284</sup> The quickness of the judgments on this task suggested that the “stereotypical associations to criminality are automatic and culturally entrenched.”<sup>285</sup> These findings were unrelated to the participants’ race or prejudicial attitudes against Blacks.<sup>286</sup>

The next three studies examined the possibility that stereotypical facial features would guide memory in a way that was consistent with stereotypes.<sup>287</sup> Study 2 found that stereotypical features acted as memory cues for Black men, and Study 3 critically established that the Black man stereotypical facial feature stereotype extends to Black women as well.<sup>288</sup> Studies 3 and 4 combined established even more surprising results. Both Black women and White men with stereotypical Black facial features trigger the stereotype of Black male criminality, violence and dangerousness.<sup>289</sup> This is consistent with the Blair studies in 2002, which found that Black Afrocentric facial features trigger the stereotype of criminality, violence and dangerousness even when the target is male and

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<sup>279</sup> Kleider et al., *supra* note 175, at 1200-01.

<sup>280</sup> *Id.* at 1203.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 1204.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* Studies 2-4 confirmed that stereotypical Black facial features, rather than demographics, drive the association with crime, violence and dangerousness. *Id.* at 1212.

<sup>287</sup> *Id.* at 1204-05.

<sup>288</sup> *Id.* at 1205-06, 1208.

<sup>289</sup> *Id.* at 1210.

White so long as the White face has Afrocentric facial features.<sup>290</sup> In sum, Studies 1-4 consistently found that Afrocentric facial features drive the presumption of dangerousness across society as a whole rather than just among subgroups who hold certain racial beliefs.<sup>291</sup>

In another set of studies, researchers examined the relationship of racial phenotypic stereotypicality to perceptions of “physical formidability,” including not only size and strength, but also perceptions of capacity to do harm, and to justification of use of force.<sup>292</sup> First, the researchers found that Black men were perceived as being taller and heavier than White men (even controlling for actual height and weight), more muscular, stronger (even controlling for actual strength), and at least among non-Black participants, as more capable of doing physical harm (even when matched for actual size).<sup>293</sup> The researchers also found racial bias in participants’ ratings of the appropriateness of use of force by police against a hypothetical unarmed suspect, an effect attributable at least in part to racial differences in perceived size and harm capacity.<sup>294</sup> They then recruited a separate set of participants to rate Black and White male faces for global Afrocentricity, specific Afrocentric features, or skin tone.<sup>295</sup> For the specific features ratings, line drawings were used in order to eliminate skin tone, and for the skin tone ratings, the features were obscured.<sup>296</sup> The researchers then correlated these ratings with previous participants’ ratings of perceived formidability (weight, muscularity, strength, and harm capacity) and appropriateness of police use of force.<sup>297</sup> Across all three measures of Afrocentricity, the more prototypically Black the faces looked, the more those individuals were seen as being physically formidable and the more force was seen as justified.<sup>298</sup> In other words, Black phenotypic stereotypicality predicted perceptions of physical threat.

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<sup>290</sup> *Id.*; see also Blair et al., *Afrocentric Features in Person Perception*, *supra* note 23, at 5.

<sup>291</sup> Kleider et al., *supra* note 175, at 1212.

<sup>292</sup> John Paul Wilson et al., *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCHOL. 59, 59 (2017).

<sup>293</sup> *Id.* at 63-66.

<sup>294</sup> *Id.* at 71.

<sup>295</sup> *Id.* at 72.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 72-73.

<sup>298</sup> *Id.*

## The “Shooter Bias” Studies

Further evidence of the existence of the presumption of dangerousness can be found in the well-known “shooter-bias” studies by psychologist Joshua Correll and his colleagues. These studies use a video simulation where the participant is instructed to “shoot” anyone holding a gun but not to shoot targets carrying anything else (e.g. a silver aluminum can, a black cell phone).<sup>299</sup> The “correct” response is irrelevant to race and dependent only on the object the target is holding.<sup>300</sup> However, participants shot armed targets more frequently and more quickly when they were Black rather than White and decided not to shoot unarmed targets more frequently and more quickly when they were White rather than Black.<sup>301</sup> They also used a lower threshold for deciding to shoot at a Black versus White target.<sup>302</sup> In his initial article, Correll argued that this “shooter bias” resulted from the racial stereotype linking Blacks to violence and dangerousness.<sup>303</sup> Correll’s second article also provided support for that hypothesis.<sup>304</sup> Additionally, the second article measured the participants’ event-related brain potentials (ERPs), that is “electrical activity of the brain that occurs in response to specific stimuli.”<sup>305</sup> It also included measures of the participants’ personal and cultural stereotypes of both Blacks and Whites as aggressive, violent and dangerous.<sup>306</sup> The ERP data suggested that unarmed White targets were processed differently than armed White and both unarmed and armed Black targets.<sup>307</sup> Thus,

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<sup>299</sup> See Joshua Correll et al., *Event-Related Potentials and the Decision to Shoot: The Role of Threat Perception and Cognitive Control*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 120, 122 (2006) [hereinafter Correll et al., *Event-Related Potentials*]; Joshua Correll et al., *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1315-16 (2002) [hereinafter Correll et al., *Police Officer’s Dilemma*]. For similar tasks, see also Anthony G. Greenwald et al., *Targets of Discrimination: Effects of Race on Responses to Weapons Holders*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 399, 399 (2003); E. Ashby Plant et al., *Eliminating Automatic Racial Bias: Making Race Non-Diagnostic for Responses to Criminal Suspects*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 141, 141 (2005).

<sup>300</sup> *Id.*; Correll et al., *Police Officer’s Dilemma*, *supra* note 299, at 1317.

<sup>301</sup> *Id.* at 1325.

<sup>302</sup> *Id.* at 1319.

<sup>303</sup> *Id.* at 1325.

<sup>304</sup> Correll et al., *Event-Related Potentials*, *supra* note 299, at 126.

<sup>305</sup> *Id.* at 121.

<sup>306</sup> *Id.* at 122.

<sup>307</sup> *Id.* at 127.

individuals with stronger personal and cultural stereotypes about Blacks as more violent and dangerous than Whites responded to Blacks as more threatening regardless of the presence or absence of a weapon.<sup>308</sup>

In a follow-up study, Correll found that priming “shooter bias” study participants by having them read newspaper stories of armed robberies by either Black or White criminals biased the decision to shoot.<sup>309</sup> The Black criminal newspaper prime (in contrast to the White criminal prime) dramatically magnified the racial bias in the decision to shoot.<sup>310</sup> This was attributed to the accessibility of racial stereotypes linking Blacks to crime and dangerousness.<sup>311</sup> In a second study, participants were either overexposed to armed Black targets (the stereotype congruent condition linking Blacks and criminality), overexposed to armed White targets (the stereotype inconsistent condition), or shown an equal number (the control condition).<sup>312</sup> Just as participants who read about the Black armed robbers in the first study showed a greater racially motivated bias in the decision to shoot or not shoot, participants who were exposed more to stereotype congruent targets (Blacks with guns) shot armed Blacks faster than armed Whites.<sup>313</sup> They also were more quick to not to shoot unarmed Whites than unarmed Blacks.<sup>314</sup> In conclusion, this article noted that the pervasive “associations between Blacks and violence in American culture” was “striking and disconcerting” and that the race-danger stereotype drives the “shooter Bias.”<sup>315</sup>

Importantly, subsequent research suggests that racial phenotypic stereotypicality — not just the Black-White binary — also affects the decision to shoot. Kahn and Davies created a videogame task similar to Correll’s but varied the stereotypicality of the Black target by changing his facial features and skin tone (the stereotypicality of the White target

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<sup>308</sup> *Id.* This study is valuable, in part, because it made use of three vastly different types of data: personal and longstanding cultural stereotypes of Blacks as more criminal and dangerous than Whites; nearly instantaneous neural activity related to threat perception and control; and subsequent behavioral responses on the stimulation about shoot/don’t shoot. *Id.* at 126.

<sup>309</sup> Joshua Correll et al., *The Influence of Stereotypes on Decisions to Shoot*, 27 EUROPEAN J. SOC. PSYCHOL. 1102, 1102 (2007).

<sup>310</sup> *Id.* at 1107.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.* at 1108-11.

<sup>313</sup> *Id.* at 1111.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 1115.

was not varied).<sup>316</sup> In their first study, they found that non-Black participants mistakenly shot unarmed highly stereotypical Black targets more often than less stereotypical Black targets or White targets and decided not to shoot armed less stereotypical Black targets and White targets more often than highly stereotypical Black targets.<sup>317</sup> They also set a lower threshold for shooting at highly stereotypical Black targets compared with the other targets.<sup>318</sup> A second study with Black participants largely replicated these results, though these effects were slightly weaker.<sup>319</sup> The authors suggest that racial phenotypic stereotypicality increases the application of the Black-danger stereotype.<sup>320</sup>

#### The Race and Crime Visual Processing Studies

In a series of five studies on visual processing and the stereotype of Blacks and crime, including crime-relevant objects and Black and White male faces, Eberhardt and colleagues determined that the stereotypes of Blacks and crime are bidirectional.<sup>321</sup> That is, Black faces elicit thoughts of crime and thinking about crime elicits thoughts of Blacks.<sup>322</sup> In one of

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<sup>316</sup> Kimberly B. Kahn & Paul G. Davies, *Differentially Dangerous? Phenotypic Racial Stereotypicality Increases Implicit Bias Among Ingroup and Outgroup Members*, 14 GROUP PROCESSES & INTERGROUP REL. 569, 571-72 (2010).

<sup>317</sup> *Id.* at 573. *But see* Debbie S. Ma & Joshua Correll, *Target Prototypicality Moderates Racial Bias in the Decision to Shoot*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 391, 391-96 (2011) (finding prototypicality effects that seemed largely driven by variation among White targets). The authors do not compare their study to Kahn and Davies', including possible differences in the prototypicality ratings of their Black targets.

<sup>318</sup> Kahn & Davies, *supra* note 316, at 574.

<sup>319</sup> *Id.* at 575-77.

<sup>320</sup> *Id.* at 578.

<sup>321</sup> *See* Eberhardt et al., *supra* note 1, at 876-93 (building on prior work finding that people identify guns more quickly when primed with Black versus White male faces); *see also* B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181, 181-92 (2001) (finding “[p]articipants misidentified tools as guns more often when primed with a Black face than with a White face”).

<sup>322</sup> Eberhardt et al., *supra* note 1, at 876 (“The paradigmatic understanding of the automatic stereotyping process — indeed, the one pursued in all of the research highlighted above — is that the mere presence of a person can lead one to think about the concepts with which that person’s social group has become associated. The mere presence of a Black man, for instance, can trigger thoughts that he is violent and criminal.”).

the studies, participants were subliminally primed with pictures of either White or Black male faces for thirty milliseconds or with no prime before they engaged in the degraded object identity task.<sup>323</sup> In the object identity task they were shown both crime relevant (e.g., knife, gun) and crime irrelevant (e.g., pocket watch, penny, key) objects.<sup>324</sup> The objects were displayed in a series of short “movielike segments” starting off as fuzzy and frame by frame, becoming increasingly clear.<sup>325</sup> The participants then were asked to hit the space bar on the computer keyboard when they could first identify the object.<sup>326</sup> The participants were then given two tests to determine their explicit racial prejudices.<sup>327</sup> Priming with Black faces “dramatically reduced the number of frames needed to accurately detect crime-relevant objects” compared to crime irrelevant objects and compared to the participants with the White face prime.<sup>328</sup> In contrast, subliminal exposure to White faces required more frames for participants “to detect crime-relevant objects in comparison with crime-irrelevant objects.”<sup>329</sup> In three subsequent studies, the researchers showed the bidirectional effect: priming participants with crime-relevant as opposed to crime-irrelevant objects facilitated visual attention to Black versus White male faces.<sup>330</sup> Notably, they found this pattern regardless of individuals’ levels of explicit racial prejudice.<sup>331</sup>

One of these studies tested visual attention and memory among police officers from an urban city in the United States. Priming police officers with crime-relevant objects caused them to remember Black faces as more racially stereotypical than the face to which they were actually exposed during the visual attention task.<sup>332</sup> In a final study, another set of police officers were shown a series of either Black or White faces.<sup>333</sup> A portion

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<sup>323</sup> *Id.* at 879-80.

<sup>324</sup> *Id.* at 879.

<sup>325</sup> *Id.* at 880.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* (using two tests: the Modern Racism Scale and the Motivation to Control Prejudice Scale).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* (finding no relationship between the participants’ explicit racial attitudes and the frame in which they identified objects).

<sup>330</sup> *Id.* at 881-88.

<sup>331</sup> *Id.* at 887, 884-85.

<sup>332</sup> *Id.* at 887-88.

<sup>333</sup> *Id.* at 888. The faces were screened for attractiveness so that the officers saw Black and White faces that were perceived as equal in attractiveness. *Id.* A portion of the officers also rated the faces for stereotypicality. *Id.*

of the officers were then asked if the faces they were looking at, which they were told might include some criminals, “looked criminal.”<sup>334</sup> These officers judged the Black faces to look criminal more so than the White faces, and the more stereotypically Black the face, the more likely it was to be judged criminal.<sup>335</sup>

In another set of studies, researchers examined the perceived racial phenotypicality of offenders in the context of eyewitness identification and memory.<sup>336</sup> A pretest first identified crimes that were stereotypically associated with Blacks (e.g., drive-by-shooting, pimp) or Whites (internet hacker, serial killer).<sup>337</sup> Study 1 then found that people associated more phenotypically stereotypical Black faces with stereotypically Black crimes.<sup>338</sup> In Study 2, the researchers had participants watch a video purportedly showing a perpetrator who had committed a stereotypically Black or White crime (or no crime) and then identify the perpetrator from a set of pictures of Black men that varied in phenotypic stereotypicality.<sup>339</sup> Participants showed memory biases such that they recalled the suspect as being more phenotypically stereotypical in the stereotypically Black crime condition than did participants in the stereotypically White crime or no crime conditions.<sup>340</sup> Study 3 obtained similar results using a different pair of crimes.<sup>341</sup> The researchers speculate that this phenotypic stereotypicality bias may have implications for sentencing, as other research has found that having an appearance that is consistent with crime stereotypes is associated with greater perceived culpability and harsher punishment.<sup>342</sup>

#### The Biased Evidence Hypothesis and Guilty/Not Guilty Implicit Bias Studies

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<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 889.

<sup>336</sup> Danny Osborne & Paul G. Davies, *Eyewitness Identifications are Affected by Stereotypes About a Suspect's Level of Perceived Stereotypicality*, 16 GROUP PROCESSES & INTERGROUP REL., 488-504 (2012).

<sup>337</sup> *Id.* at 491.

<sup>338</sup> *Id.* at 493.

<sup>339</sup> *Id.* at 494-6.

<sup>340</sup> *Id.* at 496-7.

<sup>341</sup> *Id.* at 499.

<sup>342</sup> *Id.* at 490, 500.

Based on an empirical study with mock jurors, Levinson and Young found support for the Biased Evidence Hypothesis, a new hypothesis that had never been tested.<sup>343</sup> That is, mock jurors who saw a photo revealing dark skin on the forearm of an armed robbery perpetrator judged subsequent ambiguous evidence as significantly more probative of guilt than did mock jurors who saw the identical photo except the forearm was light skinned.<sup>344</sup> Thus, simply showing the photo of the darker skinned forearm of the perpetrator injected racial bias of the mock jurors into the most important function of a jury — their evaluation of trial evidence.<sup>345</sup> Their evaluation of the evidence mattered because it predicted guilty and not guilty verdicts.<sup>346</sup>

The researchers recognized that “priming” research establishes that racial “stereotypes are activated easily, automatically and often unconsciously” and that once people are primed, the racial stereotype “affects the way they make decisions in racially stereotyped ways.”<sup>347</sup> They found that the established Biased Evidence Hypothesis was unrelated to explicit racial bias in the mock jurors.<sup>348</sup> They also concluded that the evidence judgments of the mock jurors were implicit rather than explicit, based on the fact that mock jurors, for the most part, could not recall whether they had seen the picture of the perpetrator with light or dark skin, that their responses did not depend on their accurate recollection, and that Implicit Association Test (IAT) scores in a subsequent study predicted evidence judgments.<sup>349</sup>

In a companion study, Levinson and colleagues designed a Guilty/Not Guilty IAT to examine whether the study participants had implicit associations between Blacks and criminal guilt.<sup>350</sup> Participants displayed

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<sup>343</sup> Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 334-35 (2010). *But see* Francis X. Shen, *Minority Mens Rea: Racial Bias and Criminal Mental States*, 68 HASTINGS L.J. 1007, 1046 (2017) (empirical study of jury eligible subjects finding no bias in culpable mental states with fictional protagonists named Jamal and Lakisha compared to John and Emily).

<sup>344</sup> Levinson & Young, *supra* note 343, at 332, 336-37.

<sup>345</sup> *Id.* at 338-39.

<sup>346</sup> *Id.* at 339.

<sup>347</sup> *Id.* at 327.

<sup>348</sup> *Id.* at 338.

<sup>349</sup> *Id.*

<sup>350</sup> Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189 (2010).

“a significant association” between Black and guilty in contrast to White and guilty supporting the hypothesis that there is implicit racial bias in the presumption of innocence.<sup>351</sup> The study found that the stronger association between Black and guilty predicted judgments of ambiguous evidence as more probative of guilt discussed above in the first study.<sup>352</sup> Finally and ironically, participants with warm explicit feelings towards Blacks on the Modern Racism Scale were more likely, not less, to show implicit racial bias against Blacks.<sup>353</sup>

#### Summary

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

Eberhardt and colleagues’ studies established that priming participants with Black faces increased the ability to more quickly see degraded crime-relevant objects like guns and knives and that priming crime-relevant

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<sup>351</sup> *Id.* at 204.

<sup>352</sup> *Id.* at 206.

<sup>353</sup> *Id.* at 205.

objects facilitates attention to Black faces. Police officers remembered Black male faces as more stereotypically Black when primed with crime. They also described Black faces as looking more criminal than white faces — the blacker the faces the more criminal they looked. In the Osborne and Davies eyewitness memory study, participants recalled Black suspects as looking more phenotypically stereotypical for crimes that are stereotypically associated with Blacks. In the Levinson and Young study, a simple prime of dark forearm skin on the crime scene photo of a security camera at a robbery of a convenience store affected mock jurors' views of twenty items of ambiguous evidence. When primed with dark skin in the photo, mock jurors were more likely to convict than when primed with White skin, thus establishing the Biased Evidence Hypothesis. In Levinson's second study, Blacks were associated with guilt more than Whites were, and the defendant in the convenience store robbery was found "more" guilty when he had darker skin. Taking this all together, even beyond studies documenting the association between race and perceptions of criminality and dangerousness, recent research also points to the important role of Afrocentric features and skin tone in the presumption of dangerousness.

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

"Some may remember, if you have good memories, that there used to be a concept in Anglo-American law called a presumption of innocence, innocent until proven guilty in a court of law. Now that's so deep in history that there's no point even bringing it up, but it did once exist."<sup>354</sup>

While Professor Chomsky was not talking about the presumption of dangerousness that arises for Black criminal defendants, he could have

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<sup>354</sup> MIT Professor Emeritus, Noam Chomsky, Address at Barnard College (Oct. 17<sup>th</sup>, 2011), [https://www.democracynow.org/2011/10/18/noam\\_chomsky\\_on\\_israel\\_palestine\\_prisoner](https://www.democracynow.org/2011/10/18/noam_chomsky_on_israel_palestine_prisoner).

been. Traditionally, the presumption of innocence is the bedrock of our nation's criminal law. Described by the U.S. Supreme Court as: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."<sup>355</sup>

As we have described in some detail above, the presumption of innocence for Black defendants has become more likely a presumption of dangerousness—especially for Blacks with darker skin tones and greater Afrocentric facial features. Of course, we acknowledge that these effects may not necessarily be easy or straightforward to address. Blair and colleagues suggest that feature-based stereotyping may be difficult to control.<sup>356</sup> Therefore, we offer the following multi-pronged approach that involves both education and the adoption of practices to track and mitigate against these effects.

Research on the effects of implicit bias education is sparse, especially research examining the longevity of the effects of such efforts. This makes it difficult to make empirically supported claims about the potential effectiveness of education about one's biases. It is important to distinguish between "training" that attempts to diminish implicit bias itself and education about bias. The literature suggests that while some attempts at decreasing implicit bias may be successful for short amounts of time, these effects are short-lived.<sup>357</sup> Furthermore, it is unclear whether reducing implicit bias leads to behavioral change.<sup>358</sup> There may be more promise in interventions that spur knowledge and motivation.<sup>359</sup>

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<sup>355</sup> Coffin v. United States, 156 U.S. 432, 453 (1895). Justice White's opinion then indicates that the presumption is as old as Roman Law and quotes an evidence scholar that the presumption has been traced "to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embedded in the laws of Sparta and Athens." *Id.* at 454.

<sup>356</sup> Blair, *Automaticity of Race*, *supra* note 23 (finding that participants were largely unaware of their use of Afrocentric features in making social judgments and that they had difficulty avoiding this tendency when asked to do so).

<sup>357</sup> Calvin K. Lai et al., *Reducing Implicit Racial Preferences: II. Intervention Effectiveness Across Time*, 145 J. OF EXPERIMENTAL PSYCHOL. GEN., 1001 (2016).

<sup>358</sup> Patrick S. Forscher et al., *A Meta-Analysis of Change in Implicit Bias* (July 1, 2017) (unpublished manuscript) <https://osf.io/b5m97/download>.

<sup>359</sup> We know of no published academic studies on effective implicit bias education programs in courts. In non-legal contexts, one study of gender-related implicit bias training for university faculty found improvement in workplace climate, Molly Carnes et al., *Effect of an Intervention to Break the Gender Bias Habit for Faculty at*

According to some researchers, awareness of prejudice is “one of the important first steps in reducing prejudice and discrimination.”<sup>360</sup> One study examining racial bias of professional basketball referees, for example, found a reduction in biased decision-making following significant media attention to the issue.<sup>361</sup> The authors suggest that awareness of bias heightened by the media attention explains the reduction.<sup>362</sup> It is worth noting that although information about race-based bias and discrimination circulates throughout the criminal justice system and may be known to some degree by judges, prosecutors, defense lawyers, probation officers, court staff and jurors, the presumption of dangerousness and the role of colorism and Afrocentric facial features is not. Given the lack of knowledge about this type of bias, education for participants in the criminal justice system at the local, state and federal levels may be a good first step.

Other research points to the joint influence of awareness and concern in decreasing a person’s use of stereotypes.<sup>363</sup> In a 12-week study of an implicit racial bias intervention, students who expressed concern about discrimination showed larger reductions in bias 4 and 8 weeks after the intervention than students who were not concerned. Other research suggests that motivating people to self-regulate by making them more aware of their stereotypic responses can decrease racial bias, including

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*One Institution: A Cluster Randomized, Controlled Trial*, 90 ACAD. MED., 221 (2015). Another study found that university students’ implicit racial bias decreased and their awareness and concern increased after an implicit bias training intervention. Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXP. SOC. PSYCHOL., 1267 (2012). A follow-up study by these researchers replicated the effects of the intervention on concern and also found greater objection to racial stereotyping two years post-intervention. Patrick S. Forscher et al. *Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity* 72 J. EXP. SOC. PSYCHOL. 133, 138, 143 (2017).

<sup>360</sup> Nao Hagiwara, et al., *The Independent Effects of Skin Tone and Facial Features on White’s Affective Reactions to Blacks*, 48 J. EXPERIMENTAL SOC. PSYCH. 892, 896 (2012).

<sup>361</sup> Devin G. Pope et al., *Awareness Reduces Racial Bias* 1, 5 (Nat’l Bureau of Econ. Research, Working Paper No. 19765, 2013).

<sup>362</sup> *Id.* The authors argue that decrease in bias was not due to specific actions by the NBA or to a shift in bias over time. *Id.* at 1-2, 4, 6-7.

<sup>363</sup> see Devine, *supra* note 359 at 1273.

decreased application of stereotypes and greater rejection of racist jokes.<sup>364</sup>

Therefore, we suggest that this education should include basic instruction about psychological principles like stereotyping and priming and how both can affect decision making and on strategies for mitigating the expression or effects of stereotypes. Of course, substantively it should also focus on the stereotype of Blacks as criminal, violent and dangerous and the role of colorism and Afrocentric facial features at each of the decision points (e.g. arrest, bail, trial, sentencing) in the criminal justice system. And because the first entry point in the criminal justice system is often the decision to arrest, law enforcement officials at all levels should receive this education as well. The studies analyzed in this article on the role that colorism and Afrocentric facial features play in the length of sentences should also be addressed.

It is important, however, that such education efforts avoid a host of possible backfire effects.<sup>365</sup> First, there is always the possibility that trainings such as these will prime stereotypes, and trainers should take care to mitigate these.<sup>366</sup> Second, they should avoid producing among participants false confidence in their objectivity.<sup>367</sup> Third, some research suggests that advertising the prevalence of stereotyping can increase bias, presumably because it communicates a social norm for stereotyping.<sup>368</sup> An alternative is to communicate a norm of endeavoring to counter

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<sup>364</sup> Mason D. Burns et al., Training Away Bias: The Differential Effects of Counter-Stereotype Training and Self-Regulation on Stereotype Activation and Application, 73 J. EXP. SOC. PSYCHOL., 97 (2017).

<sup>365</sup> For a review, see Victoria C. Plaut & Christina S. Carbone, *Considering Audience Psychology in the Design of Implicit Bias Education*, ENHANCING JUSTICE: REDUCING BIAS, edited by Sarah Redfield et al. (2017).

<sup>366</sup> Though to our knowledge no study has tested this proposition, the priming literature cited in this article would suggest that it is something to watch out for.

<sup>367</sup> Self-perceived objectivity has been linked to more bias, *See e.g.*, Eric Luis Uhlmann & Geoffrey L. Cohen, "I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORG. BEHAVIOR & HUM. DECISION PROCESSES 207 (2007). Research on "moral credentialing" suggests that giving people an opportunity to demonstrate that they are not bigoted can lead to more bias, *See, e.g.*, Benoit Monin & Dale T. Miller, *Moral Credentials & the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001).

<sup>368</sup> Michelle M. Duguid & Melissa C. Thomas-Hunt, *Condoning Stereotyping? How Awareness of Stereotyping Prevalence Impacts Expression of Stereotypes*, 100 J. OF APPLIED PSYCH. 343 (2015).

stereotyping.<sup>369</sup> In this regard, it might be especially helpful to have judges themselves participate in conducting these sessions, as this could help to embody that norm. Fourth, educators should understand and try to mitigate defensiveness related to perceived threats to autonomy and identity-related threats that may arise in reaction to mandatory trainings on bias.<sup>370</sup> Trainings could motivate interest by appealing to common principles of fairness and highlighting the danger of making decisions based on arbitrary characteristics and the importance of maintaining the legitimacy of the courts.<sup>371</sup> Finally, there is always the danger that training initiatives will become viewed as “check the box” or could even become merely symbolic.<sup>372</sup> It is incumbent on institutional leaders to make sure both that trainings are conducted carefully and that their effects are assessed.

It is both vital and daunting for judges to take the lead in encouraging and mandating this training. It is daunting because most state and federal judges are overworked and under resourced. It is even more daunting because studies indicate that both judges and probation officers have significant cognitive “blind spots” about racial bias. That is, as penned in a recent opinion by Supreme Court Justice Anthony Kennedy: “Bias is easy to attribute to others and difficult to discern in oneself.”<sup>373</sup> In one of the studies conducted in 2016 by one of the authors of this article it was determined that “92% of senior federal district judges, 87% of non-senior federal district judges, 72% of U.S. magistrate judges, 77% of federal bankruptcy judges, and 96% of federal probation and pre-trial services officers ranked themselves in the top 25% of respective colleagues in their

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<sup>369</sup> *Id.*

<sup>370</sup> See e.g., Plaut, *supra* note 365, for a review.

<sup>371</sup> Furthermore, some authors highlight the promise of highlighting moral implications of bias for decreasing implicit prejudice. Félice Van Nunspeet, Naomi Ellemers & Belle Derks, *Reducing implicit bias: How moral motivation helps people refrain from making “automatic” prejudiced associations*. TRANSLATIONAL ISSUES IN PSYCHOL. SCI. 382–391 (2015).

<sup>372</sup> LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS 5 (2016) (referring to organizational policies or structures that lack effectiveness but keep their symbolic value).

<sup>373</sup> *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). See generally, Emily Pronin, et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369 (2002); Mark D. Alicke, et al., *Personal Contact, Individuation, and the Better-Than-Average Effect*, 68 J. PERSONALITY & SOC. PSYCH. 804 (1995).

ability to make decisions free from racial bias.”<sup>374</sup> In the earlier study it was determined that 97% of a group of state court administrative law judges attending an educational conference rated themselves in the top 50% in terms of their ability to “avoid racial prejudice in decisionmaking.”<sup>375</sup>

Given the difficulty of identifying and acknowledging one’s own biases, it might be helpful for judges, court staff, probation officers, prosecutors and defense lawyers to have the experience of taking an implicit association test, not as a “diagnosis” of their own bias but rather to experience the difficulty of overriding habitual responses. For example, they could take a test on the Project Implicit website, <https://implicit.harvard.edu/implicit/>, starting with the Black-White race IAT and the Light Skin-Dark Skin Skin-tone IAT. This would enlighten the takers and hopefully help them overcome any difficulty they might have in acknowledging and confronting their own biases, as it did the judge author of this article.<sup>376</sup> The results remain confidential and no one would know the results but the IAT test takers.

In addition to judges being educated on the serious effects of racial priming affecting the length of sentences,<sup>377</sup> there are some practical steps that judges can take now. At least in federal court, for over a decade, presentence reports contain a full-face photo of the defendant to be sentenced. It is likely that many state courts follow this procedure. The ostensible purpose of this photo practice was to refresh the judge’s memory of the defendant if the judge took the guilty plea or tried the defendant. Most busy judges who sentence the defendants some time after the plea or trial thought this refresher might be helpful. The judge author of this article had

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<sup>374</sup> Mark W. Bennett, *Implicit Racial Bias in Sentencing: The Next Frontier*, 126 YALE L.J. FORUM 391, 396-397 (2017)

<sup>375</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009).

<sup>376</sup> Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problem of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 149-150 (2010) (explaining his shock and awe at finding out as a former civil rights and civil liberties lawyer he had a high anti-black implicit bias).

<sup>377</sup> U.S. SENTENCING COMM’N, REPORT DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE *BOOKER* REPORT, 2-3 (NOV. 2017) (finding, using multivariate regression analysis, that “Black male offenders received sentences on average 19.1 percent longer than similarly situated White male offenders” in the period studied – fiscal years 2012-2016).

this photo removed several years ago for offenders he was sentencing due to concerns of racial priming, especially colorism and Afrocentric facial feature priming, well documented in the social psychological literature discussed in this article. We suggest all sentencing judges do the same. While it is impossible to avoid the priming when seeing the defendant in person in the sentencing, we suggest the following procedure to avoid the potential impact of the racial prime. Determine a potential sentencing range based on the pre-sentence report, any sentencing memoranda from the parties, character letters and other materials reviewed prior to sentencing. This is consistent with research suggesting that setting criteria in advance of decision-making can help reduce bias.<sup>378</sup> Once in the courtroom, if the sentencing range changes upward because of something that happens in the sentencing hearing, (e.g. a particularly powerful and persuasive argument by the prosecutor, evidence not anticipated, or a particularly terrible allocution by the defendant) make sure the upward increase from the original anticipated sentencing range is based on objective factors unrelated to the racial characteristics of the offender.

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

Lastly, as described in this article, there is substantial evidence that most Whites presume Black defendants guilty in criminal cases, thus subverting the presumption of innocence. This is due to, as we have argued, and overwhelming social science evidence supports, the deeply rooted and entrenched stereotyping of Blacks as criminal, violent and dangerous. Should juries be instructed that strong social science evidence suggests that White jurors have a more difficult time giving Black defendants the full benefit of the presumption of innocence? Because the

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<sup>378</sup> See Eric Luis Uhlmann & Geoffrey L. Cohen, Constructed Criteria: Redefining Merit to Justify Discrimination, 16 *PSYCHOL. SCI.* 474, 478 (2005).

focus of this article is on the effect of colorism and Afrocentric facial features in sentencing, and the clear majority of criminal defendants are sentenced by judges not juries, we leave this intriguing question, and proposed language for the instruction, to others to scrutinize and develop.

## VI. CONCLUSION

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

Moreover, colorism and Afrocentric bias have consequences for criminal justice outcomes. Our review of the existing empirical research on the relationship between skin tone and sentencing is by no means definitive, but it does give reason to believe that phenotypic characteristics such as skin tone and Afrocentric facial features matter for sentencing. Furthermore, cognitive science underscores the automaticity and pervasiveness of the presumption of dangerousness both in comparisons of judgments about Blacks versus Whites and also in the intra-group comparison that motivates this article. Namely, skin tone and Afrocentric facial features affect judgments ranging from thinking someone looks like a drug dealer; to judging the appropriateness of police use of force; to shooting targets in a videogame; to judging evidence as probative of guilt. Often these effects are unrelated to explicit racial prejudice.

The influence of seemingly arbitrary characteristics such as skin tone and facial features on legal outcomes raises questions about the fairness

and legitimacy of the criminal justice system. The presumption of innocence is a bedrock principle of U.S. criminal law, yet a presumption of dangerousness looms large in judgments about Black defendant, and especially those with darker skin tones and greater Afrocentric features (surprisingly, including a small percentage of White defendants with these features). Moreover, people seem to be unaware of their influence. While the historically entrenched, culturally perpetuated, and automatic nature of these processes could render them challenging to dismantle, steps can and should be taken to monitor and diminish their effects.