SENTENCING LESSONS FROM THE INNOCENCE MOVEMENT

By Andrew E. Taslitz

The innocence movement, about which much has been written in these pages, has had a widespread impact on the way that criminal justice is administered in the United States. That movement has generally focused on one question: How can we maximize the chances of getting the "right guy," that is, of convicting the guilty while acquitting the innocent? The movement has considered a wide range of reforms designed to improve the accuracy of eyewitness identification procedures, suspect interrogations, forensic laboratory testing, and a host of other criminal justice processes. (*See generally* AMERICAN BAR ASSOCIATION, ACHIEVING JUSTICE: REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006).)

The sentencing phase of a criminal case seems at first blush so different from the guilt-determination phase—the phase with which the innocence movement is concerned—as to suggest that efforts to improve the latter have no relevance to bettering the former. After all, when a case reaches the sentencing phase, society has already expressed its judgment that the defendant is guilty. The question, therefore, is no longer who did it, but what punishment does the guilty one deserve? Granted, an injustice will be done at sentencing if we have the wrong person, but that moral wrong can be avoided by getting the guilt-determination phase right in the first place. Sentencing "accuracy" means something very different from the criminal trial's notion of historical accuracy at reconstructing what really happened.

This first impression is largely wrong, however, and whatever truth it does hold does not logically entail the irrelevance of the innocent movement's quest for historical accuracy. Both trials and sentencing hearings aim in part at fact-finding. Both involve two sorts of facts—the "raw" facts of who did what to whom, how and when, and the "normative" facts, such as mental-state determination, that at least partly embody a moral judgment about how evil were the offender's heart and mind. (*See* Andrew E. Taslitz, *Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The*

Sluggish Life of Political Factfinding, 94 GEO. L.J. ___, 31-37 (June 2006) (draft manuscript).) If who pulled the trigger, drove the getaway car, or ordered the drug sale are raw, "objective" facts to be proved at trial, so too are what quantity of drugs was sold, how many victims injured, and how much economic injury done "objective" facts to be proven at sentencing. If trial fact finders must make partly moral judgments whether a killer's heart was "depraved" or the motive was self-defense, so must sentencing fact finders pronounce judgment on whether the convicted acted with "racial bias," "deliberate cruelty" or "excessive brutality."

The U.S. Supreme Court has recently recognized, in its decisions in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and *Booker v. United States*, 125 S. Ct. 738 (2005), that sentencing in mandatory guidelines systems necessarily involves much "fact-finding" akin to that at trial. Indeed, the Court found the similarity so strong as to require at least one crucial similar procedural safeguard: determination of those facts that may raise a defendant's maximum potential sentence must be made by a jury rather than by a judge. This mandate has raised the question whether additional trial safeguards, such as the defendant's right to "confront" the witnesses against him or her, apply as well at sentencing, with some commentators answering that question with a resounding "yes."(*See, e.g.,* Nigel Holder, *Confrontation at Sentencing*: *The Logical Connection Between* Crawford *and* Blakely, 49 HOWARD L.J. 179 (2005).) Moreover, although the Court considered "advisory" guidelines and other relatively more discretionary systems not to trigger the same set of constitutional fact-finding protections as do mandatory guidelines systems, all sentencing regimes involve at least informal fact-finding to determine such things as how corrupt is the offender's character and how likely to reoffend. (*See*, *e.g.*, MARC MILLER & RONALD WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 602-04, 630-32 (2d ed. 2005).)

Because the trial and sentencing phases both involve fact-finding, therefore, lessons about how to get these facts right in one phase can illuminate how to do so in the other phase, even if each phase ultimately also involves some important differences. Because the innocence movement focused on raw factual accuracy at trial, its lessons would seem most readily transferable to raw fact-finding at sentencing. But, it turns out, the innocence movement also prompted the creation of new ways to improve the deliberative processes of both criminal justice policy makers and fact finders. Such improved deliberative mechanisms may be equally helpful in improving the "accuracy" of normative fact-finding at sentencing as well, a point to be explained shortly. There are, therefore, sentencing lessons to be learned from the innocence movement. In particular, there are four innocence teachings that I will in the pages to come argue are of immediate relevance to both sentencing practitioners and reformers: (1) subconscious cognitive processes matter; (2) data collection, combined with internal and external transparency, corrects errors over time; (3) minor errors cumulate into major ones when compounded at different stages of, and by different actors in, the criminal justice system; and (4) improved deliberation, both by fact finders and systemic reformers, reduces "errors of justice."

The unconscious matters. Much of the initial resistance to innocence movement reform efforts might have stemmed from the movement's reliance on social science concerning the operation of the unconscious mind. Many police and prosecutors, because they work hard and are well meaning and properly view most alleged crime victims as acting in good faith, can have a hard time accepting that their energy, experience-informed judgments, and passion can result in exactly the opposite of what they want to achieve. It can be even harder to accept that mysterious, invisible forces like the "unconscious" are working to countermand sincere efforts to convict only the guilty. Yet the social science supporting that conclusion is often overwhelming. (C*f.* Andrew E. Taslitz, *Forgetting*

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Freud: The Courts' Fear of the Unconscious in Date Rape Cases (2006) (unpublished draft manuscript).)

For example, eyewitnesses believing that they have correctly chosen their assailants from lineups may be unaware that they have instead guessed, choosing the persons in the line who looked "most like" the real wrongdoers. Nor will the officers be aware that their response, "good job," to the witness selection may change the witnesses' initially tentative identification at the lineup into one of absolute certainty at the trial. (*See* ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 37.) Likewise, in the area of confessions, officers may see their deceptions and persistence as simply "breaking down" a lying subject's resistance to telling the truth, not fully appreciating how such tactics can, under certain circumstances, lead even the innocent—sometimes *particularly the innocent*—to confess falsely. Truth sometimes lies in the things unseen. (*See id*. at 11-14; Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. ___, 11-15 (forthcoming 2006) (draft manuscript).)

Data collection and transparency work. There is a natural human tendency to dismiss as pointless collecting information on questions whose answers we "already know." Correspondingly, however, those resistant to change might favor endless data collection as a way to stave off reform. Yet there is a middle ground, one combining cautious experimentalism with data collection and transparency. The innocence movement has increasingly come to embrace this center. The ABA's recent innocence recommendations concerning improving eyewitness identification procedures are an example. There is a dispute in the social scientific community about whether simultaneous (showing all lineup participants at once) or sequential (showing the witness one face at a time, for an up-or-down vote) methods are superior. The overwhelming majority of researchers come down on the side of sequential methods. Nevertheless, a persuasive and increasingly influential group of scholars argue that there are gaps in the research, that more field (as opposed to laboratory) research is needed, and that the costs of implementing the new methods and the risk of increasing nonidentifications of the guilty may not be worth the benefits. Neither side in this debate has argued, however, that current simultaneous methods have been proven better than the newer sequential ones. At most, say the dissenting researchers, we just do not know enough to choose one method over another. (*See* ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 34-35.)

The ABA, rather than counseling inaction or bowing to simple scientific nose-counting, chose another course: recommending that in certain locations one police department follow sequential methods, another retain simultaneous ones, all under the guidance of social scientists who would collect data and consider what lessons flow from them. These data would be openly shared among the law enforcement community and with the public. (*Id.* at 25.) Such transparency opens the interpretation of the new data and their purported lessons to critique. Perhaps even more importantly, however, transparency can create political pressures for change while promoting acceptance of its legitimacy. Thus, should widespread efforts of the sort recommended by the ABA generate data supporting sequential methods, the police are both more likely to adopt them and accept them, all with public approval. Police departments resisting change in the face of such data would face withering criticism by the media, politicians, and the legal community. Should the data point in favor of the status quo, on the other hand, police will find it legitimately politically easier to resist simply jumping onto the reform bandwagon. Fostering an attitude of candid experimentalism to avoid errors of any sort may be the best benefit of all flowing from the ABA approach. (*See generally* Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L., POL'Y & ETHICS (June 2006).)

See the forest, not just the trees. One major lesson of the innocence movement is that systemic forces can lead to bad results that are invisible to those focusing on each phase or practice of the system in isolation. The best example of this is the cumulative impact of small errors. Unwarranted reliance on a deceptive informant might, for example, lead police to become too quickly wedded to one theory about who committed a particular crime. Convinced of the suspect's guilt, the police energetically pursue collecting evidence inculpating this suspect while ignoring trails leading to other suspects. (*See, e.g.,* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision,* 50 HOWARD L.J. ___ (June 2006) (dangers of early theory commitment); ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 53-67 (on informants).) A detective with an abiding conviction of the target's guilt places the individual in a lineup, not realizing that the detective is subconsciously conveying "minimal cues" to the witness about whom to select. A "minimal cue" is a smile, a change in tone of voice, a widening of the eyes, or other positive physical reaction displaying itself as the witness's eyes alight on the target. The witness unknowingly picks up on these cues, selecting the target not because of true recognition but because of the detective's encouragement. (ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 29, 34, 37 (nonverbal cues); Andrew E. Taslitz, *Does the Cold Nose Know?: The Unscientific Myth of the Dog-Scent Lineup*, 42 HASTINGS L.J., 15, 48, 52, 104 (1990) (minimal cues defined).) The detective confronts the defendant with this result, seeking to elicit an admission of guilt. When the target nervously denies guilt, the

detective perceives the target's discomfort as, in fact, evidence of a consciousness of criminality. Accordingly, the detective uses increasingly aggressive interrogation techniques, ultimately resulting in the target's false confession. At trial, the jury, faced with a confident lineup identification and a confession, easily convicts.

No one of these errors may have been sufficient to result in this injustice. (*See* Taslitz, *Wrongly Accused*, *supra*, at 11-16.) The culmination of all of them, however, does the job just fine. (*See* John A. Humphrey & Saundra D. Westervelt, *Introduction,* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 1, 5 (2001 ed.) (cataloguing systemic factors that "alone or in concert with each other" have caused wrongful convictions).)

Improving deliberation reduces errors of justice. "Deliberation," at its best, involves open-minded discussion among well-informed individuals seeking to reach a judgment in service of the common good. Deliberation, in this sense, comes neither naturally nor easily. Institutions must be designed to promote deliberative processes. Deliberation increases the likelihood of avoiding error while enhancing democratic legitimacy. Deliberation can take place both at the level of crafting criminal justice rules and policies and at the level of case-specific application of those polices. (*See* Taslitz, *Democratic Deliberation, supra*, at 61-63.) The ABA innocence recommendations seek to improve deliberations at both levels.

> Track the science of eyewitness identification.

At the level of policy making, the ABA has, for example, suggested creating internal police-prosecutor systems to keep track of the evolving social science concerning eyewitness identification accuracy and to periodically deliberate over whether changes in existing procedures are therefore required. (ABA, AD HOC INNOCENCE COMMITTEE REPORT, *supra*, at 23.) Even more broadly, the ABA has recommended that each jurisdiction create ongoing processes for monitoring the risks of convicting the innocent or acquitting the guilty. (*See id.* at 1.) The ABA's report on this recommendation includes a number of illustrative mechanisms, all of which involve the widespread involvement of all relevant justice system players (judges, defense counsel, prosecutors, victims, police) in exposing mistakes and working toward solutions. (*See id.* at 1-9; Taslitz, *Democratic Deliberation, supra*, at 4-6, 30-64.)

At the case-specific level, the ABA has recommended, for example, greater use of jury instructions and expert testimony on the dynamics of eyewitness identification. The goal of these techniques is to promote more informed jury deliberation about whether the state really got the right person. (Taslitz, *Democratic Deliberation*, *supra*, at 4-6, 61-66.)

Applying innocence lessons to sentencing practices

Now we are in a position to examine the value of these lessons for sentencing policy and practice. In the pages to follow, I offer one primary example of what the innocence movement has to teach us at sentencing rather than any comprehensive assessment. My hope is that this illustration is sufficient to make the point.

My example concerns the role of race in the sentencing process, for race is an ideal example of both the role of the unconscious at sentencing and the dangers of not seeing the sentencing forest through the offender trees. Although I could have written about race and sentencing entirely as a topic on its own, without having put it in the context of a comparison to the innocence movement, doing so would have obscured the continuities in fact-finding dynamics between the guilt and sentencing phases, with the innocence movement having shed so much light on the former.

Racial disparities in sentencing: the data

Nationwide, about 44 percent of the incarcerated are African American, though they constitute but 12 percent of the country's total population. (*See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., PRISONERS In 2003, at 9 (Nov. 2004), *available at* http://www.ojp.usdoj.gov/lojs/prisons.htm; ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: CENSUS 2000 BRIEF 3 tbl. 1 (Mar. 2001); *available at* http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf).) According to Justice Anthony M. Kennedy, in some cities, more than half of young African-American men are under criminal justice system supervision, while about one out of every 10 African-American men in their mid- to late-20s in this country is behind bars. (Justice Anthony M. Kennedy, *Address to ABA House of Delegates*, August 9, 2003.) Others paint an equally or more dismal picture, finding the percentage of the prison population that is African American to be 50 percent or higher, the lifetime chances of a black male's incarceration being one in three compared to one in six for a Latino male and one in seven for a white male, and the increase in African-American women imprisoned rising 204 percent between 1985 and 1995. (*See* DAVID COLE, NO EQUAL JUSTICE 4 (1999); Marc Mauer and Tracy Huling, The Sentencing

Project, *Young Black Americans and the Criminal Justice System: Five Years Later* (1995).) Latinos, though to a lesser degree, are also disproportionately represented in the criminal justice system, with African Americans and Latinos in the year 2000 jointly constituting 62.2 percent of the total federal and state prison population. (*See* Angela Arboleda, *Latinos and the Federal Criminal Justice System*, National Council of La Raza, Statistical Brief No. 1 (July 2002); Human Rights Watch, *World Report 2002* 4.)

Whatever the causes of these racial and ethnic disparities, the current conventional wisdom is that racial bias in sentencing is not a significant contributing factor. As leading criminologist Michael Tonry put it, "[m]ost modern empirical analyses of sentencing conclude that when legitimate differences among individual cases are taken into account, comparatively little systematic difference in contemporary sentencing outcomes appears to be attributable to race." (MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 4 (1995).) The methodologies supporting these conclusions have sometimes been vigorously challenged. (*See*, *e.g.*, Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 782-84 (1993).) What is more important for my purposes, however, is that such sweeping conclusions overstate the data-supportable inferences, oversimplify the problem, and mask the powerful likely contribution of unconscious cognitive biases in sentencing.

The Sentencing Project, in a recent survey and analysis of the literature on this question, concluded that racially discriminating sentencing indeed "persists despite sentencing reforms and the implementation of structured sentencing," though "the presence of direct discrimination is not uniform and extensive." (The Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature* 5 (January 2005).) Restated, while in some geographic areas, there is no evidence of such direct sentencing discrimination, in others, there is clearly such evidence, although the effects are generally modest *when race is the only variable considered*. (*See id.* at 5; *see generally* Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 CRIM. JUST., Nat'l Instit. Just. 427-501 (2000).) In the 40 studies published on this question between 1980 and 2000, 35 analyzed jurisdictions and periods in which determinate or guidelines sentencing systems—designed, in part to eliminate racial disparities—were in place, yet still some disparities continued. (*See* Spohn, *supra*). Moreover, direct discrimination was "more prominent" at the federal than state level, with Latinos more likely to be disadvantaged in the decision whether to incarcerate, blacks more likely to suffer comparatively greater sentence length. (The Sentencing Project, *Racial Disparity, supra*, at 4.)

Disparities become far more stark, however, when the interaction of race and ethnicity with other offender characteristics is examined. Age and unemployment are two particularly important interactive factors. Thus a Pennsylvania study concluded that white men aged 18-19 were "38 percent less likely to be sentenced to prison than black men of the same age group" and black men aged 18-29 were four times more likely than white men over 50 to face incarceration. (The Sentencing Project, *Racial Disparity, supra*, at 37.) Nationally, in 1997, 71 percent of juveniles arrested were white, but they accounted for only 37 percent of those detained or committed. Correspondingly, African-American youth were in general six times more likely than their white counterparts to be incarcerated and *48 times* more likely to be sentenced to state juvenile facilities for drug offenses. Young persons of color are likewise disproportionately represented among juveniles transferred to adult court, while, for youth charged with violent offenses, whites averaged 193 days of incarceration, blacks 254 days, Latinos 305 days. (*See* ABA, *Kennedy Commission Report*, *supra*, at 49.) Employment status further complicates matters, with one study, for example, finding unemployed blacks to be 5.2 times more likely to be incarcerated than employed whites, with young black male defendants facing even more severe disparities, and another study finding that unemployment substantially raised the likelihood of incarceration for young Latino males and increased the sentence length for young black males. (*See* Theodore G. Chiricos and William D. Bales, *Unemployment and Punishment: An Empirical Assessment*, 29 CRIMINOLOGY 701-24 (1991); Tracy Nobiling, Cassia Spohn & Miriam DeLone, *A Tale of Two Counties: Unemployment and Sentence Severity*, 15 JUST. Q. 401-27 (1998).)

Race and the unconscious

A number of scholars have argued that these disparities partly stem from judges' unconscious perception that young black or Latino males are more "dangerous and problematic" than white youth or older males facing similar charges and having similar prior records. (*See* Spohn, *supra.*) Accordingly, "judges single them out for incarceration (and, to a lesser degree, for longer prison terms for public safety reasons)." (The Sentencing Project, *Racial Disparity, supra*, at 8.) Other researchers maintain that judges do not so much viscerally react to race and ethnicity as they do seek a "'perceptual shorthand'. . . informed by stereotypes about race, age, and gender" in a world of imperfect information. (*Id*.) Concludes the Sentencing Project, "[I]n the interest of protecting society, sentencing judges will therefore sentence the offender based, in part,

on stereotypes about perceived antisocial and incorrigible natures of young black and Latino males." (*Id*.)

But the problem of subconscious stereotyping begins much earlier in this system in ways that directly impact sentencing. Black male juveniles are thus more likely to be institutionalized than similarly situated whites because authorities assume that black parents will offer their children inadequate support and will be uncooperative with the justice system. Probation officers are indeed more likely to view black male juveniles' problems as due to deep-seated character traits, and white male juveniles' difficulties as due to situational factors. Probation officers thus recommend harsher punishment for young black, relative to white, males, resulting in greater levels of incarceration. Having already been incarcerated, if such youths reoffend, judges are more likely to treat them harshly, throwing up their hands at the prospects for real rehabilitation. (Taslitz, *Wrongly Accused, supra*, at 7.)

It is not only youths who suffer from authorities' unconscious biases early in the criminal justice process. Thus blacks pay a higher "trial penalty" than do similar situated whites, one study in Pennsylvania, for example, notably finding that conviction via a trial rather than a plea increased significantly the odds of black over white incarceration. (*See* JEFFREY T. ULMER, SOCIAL WORLDS OF SENTENCING: COURT COMMUNITIES UNDER SENTENCING GUIDELINES (1997); Jeffrey T. Ulmer and John H. Kramer, *Court Communities Under Sentencing Guideline: Dilemmas of Formal Rationality and Sentencing Disparity*, 34 CRIMINOLOGY 383-408 (1996).) Drug offenders can reduce their sentences in the federal system by offering "substantial assistance" to the prosecution, such as conveying information about narcotics trafficking or cooperating in building a case against other offenders. Yet a 1997 study found that whites providing substantial assistance averaged a "23% reduction in the likelihood of incarceration, while comparably situated Latinos received a 14% reduction and blacks received a 13% reduction." (The Sentencing Project, *Racial Disparity, supra*, at 9; Celesta Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses,* 31 L. & SOC. REV. 789-82 (1997).) Indeed, one effect of sentencing guidelines limiting judicial discretion has been to shift it to prosecutors, where unconscious racial bias may have freer rein, not because prosecutors are worse people than judges, but because they have relatively more discretion. (*See Justice Kennedy Commission Report*, *supra*, at 59.)

Prosecutors have particular discretion in charging and plea-bargaining decisions. This shift in sentencing discretion in some instances has dramatically *increased* racial disparities. Thus a Federal Judicial Center Report found that in 1990 "African-Americans were 21 percent and Latinos 28 percent more likely than whites to receive a mandatory prison term for offenses that fell under the mandatory sentencing laws." (*Id.* at 60; MARC MAUER, RACE TO INCARCERATE 136 (2001).) Yet it is the prosecutors' charging decisions, more than any decisions made by the judiciary, that significantly determine the prospects for mandatory prison sentences applying. (*See Justice Kennedy Commission Report*, *supra*, at 60.)

Prosecutorial racial variation in charging decisions and plea-bargaining is rarely venal or due to conscious discrimination. Rather, it once again stems from the interaction of unconscious racial biases with class-based ones, poorer blacks being among those most likely to enter the criminal justice system in the first place. (*See id.* at 54-55.) A prosecutor may, therefore, offer a more favorable plea bargain to a white than a black defendant facing similar charges and having a similar record because the prosecutor "honestly and sincerely believes that one suspect is contrite while another is not because of the suspect's manner and behavior." But the suspect whose manner and behavior is viewed as more laudable is the one acting more like the (usually) white prosecutor. Yet the prosecutor has no conscious idea that an unconscious failure of empathy is at work. (*Id.* at 53.) Similarly, in the words of the *Justice Kennedy Commission Report*:

> Prosecutors and judges, who have been to college and law school, may tend to find defendants more attractive if they are educated and well employed. When a prosecutor offers a plea bargain to a white defendant that permits the defendant to avoid jail time but fails to offer a similar deal to a black defendant with the same charge and criminal background, race is rarely, if ever, a conscious consideration. The black defendant may be less educated, might be more likely to be unemployed, and may not have community supports of the same stature as the white defendant. The prosecutor may feel that the white defendant is more deserving of leniency, because the defendant has better prospects, not because the defendant is white. Judges may approve plea bargains favoring white defendants for the same reasons prosecutors may offer the bargains. The judges may not know that a black defendant charged with the same crime and having the same criminal record was not offered as good a deal.

(*Id.* at 53.)

Such prosecutorial unconscious attitudes related to race and class, combined with similar judicial reasoning processes, may further disadvantage racial minorities at sentencing. Thus black defendants face a higher chance of

being jailed pretrial rather than released on bond relative to white defendants. Yet some researchers argue that pretrial jailing makes conviction more likely than acquittal, conviction of more serious rather than less serious offenses more likely, and incarceration upon conviction more likely. (The Sentencing Project, *Racial Disparity, supra*, at 10 (summarizing the data).) Other indicators of unconscious racial biases at work are that blacks victimizing whites receive more severe sentences than blacks victimizing blacks or whites victimizing whites and that Latinos and blacks convicted of certain offenses, such as drug and property crimes, are far more likely to face harsher sentences than comparably situated whites, both for low- and high-level offenses (*Id.* at 12).

Perhaps the most fascinating illustration of the subtlety with which unconscious racial biases can interact with other factors is a recent study of sentencing disparities based on "Afro-centric features." "Afro-centric features" are those of hair texture, nose-width, and lip fullness stereotypically associated with African Americans. The authors engaged in both experimental studies and observational studies of actual sentencing practices and outcomes in Florida. The experimental studies revealed the subjects to have higher judgments of the aggressive nature of individuals displaying Afro-centric features. (*See* William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afro-centric Features*, 10 MICH. J. RACE & L. 327 (2005).) Even when the subjects were given more specific, individualized information about each individual, such as prior instances of aggressive behavior, "the Afro-centric facial features of the individuals continued to impact the probability judgments," for "over and above the very large impact of information about prior levels of aggression engaged in by the individuals, those with more pronounced Afro-centric facial features were judged as more likely to engage in aggression . . . than those with less strong Afro-centric features." (*Id.* at 339.)

> Pretrial jailing makes conviction more likely.

Even more disturbing, however, and when controlling for all other factors, "Afro-centric features significantly predicted [real-world] sentence length over and above the other factors." (*Id.* at 348.) This effect was independent of race considered in isolation. Furthermore, this effect was observed despite judges having much more individualized information about each individual at the time of sentencing than did the subjects in the experimental situation. Cautionary instructions to subjects in the experimental situation about the existence of the Afro-centric features bias and the need to overcome it had, moreover, little, if any, effect in eliminating the bias. (*See id.* at 338.) This result raised worries about whether judges could themselves overcome this bias in sentencing. The authors summarized their conclusions thus:

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

(*Id.* at 350.)

Nevertheless, there is cause for optimism in resolving Afro-centric features bias. The authors themselves found no current sentencing discrimination in Florida based upon race as a factor distinct from Afro-centric features. Having traced the history of racial sentencing discrimination in that state, the authors concluded that heightened judicial consciousness about the racial bias problem enabled judges to monitor and overcome their racial biases. Cautionary instructions about racial bias given in the laboratory also had positive effects. The failure of a cautionary instruction about Afro-centric features to have a similarly favorable impact on laboratory subjects may be due to the judges' inability consciously to discriminate such features and less societal awareness of featural, as opposed to purely racial, discrimination. The authors themselves believe that educating judges about featural bias can over time help to reduce it.

Furthermore, the instruction given in the lab experiments explained featural bias and urged avoiding it, but did not explain to jurors the psychological mechanisms at

work that account for the process and make it hard to control. Research in other areas suggests that these latter sorts of instructions may be far more effective in limiting bias. (*See* JODY DAVID ARMOR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 139-59 (1997).) That research is also consistent with studies demonstrating that subconscious racial bias has its greatest impact in "normatively ambiguous situations," ones in which the role of race is not obvious and individuals can easily justify their actions to themselves on grounds other than race. For example, jurors given an instruction to ignore inadmissible evidence that wrongly reached their ears—evidence in itself having nothing to do with race—were less able to obey the judge's cautionary instruction not to rely on that evidence when criminal defendants were black rather than white. Making race and its impact salient, however, and thus the normative implications of ignoring potential unconscious racial discrimination clearer, can, some scholars believe, nevertheless moderate such racial bias's impact. (*See* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 36-44, 135-39 (2006).)

Several tactics suggest themselves. First, reformers might seek to foster training classes and materials for judges to understand and resist featural bias. Second, defense lawyers might bring the problem to a sentencing judge's attention. Ideally, a defense lawyer might even seek to call an expert to testify about the degree of a client's Afro-centric features, the biases subconsciously thereby triggered, and the nature of the sentences locally being given to similar offenders with less Afro-centric features. Such an expert might also lay the groundwork for an equal protection challenge to a sentence. Although such a challenge might fail because "featural bias" is not the same as "racial bias," the objective reality is that far more African Americans than whites will have Afro-centric features, so there will be a racially disparate impact. Unfortunately, equal protection challenges also generally include a requirement of discriminatory *purpose*, likely meaning a *conscious* purpose. (*See* ANDREW E. TASLITZ & MARGARET PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 443-45 (2d ed. 2003).) Still, surely sentencing *equality* principles—similar punishments for similar crimes by similar offenders—should counsel equal sentences unaffected by facial appearance. Arguments rooted in statutory aspirations to the equality principle might thus provide a greater chance of success. Similar sorts of strategies can be used in challenging and correcting other interactive racial biases in sentencing—those based on the intersection of age, gender, class, and other characteristics with race. Proper data gathering and deliberative mechanisms—two points worth addressing briefly below—will further enhance all these reform and practice strategies.

Data gathering

Data gathering, as a way to combat racial bias in sentencing, is indeed a strategy embraced by the ABA's Justice Kennedy Commission. Notably, the commission urges the state and federal governments to create criminal justice racial and ethnic task forces having a responsibility to, among other things,

> design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition, and sentencing; make periodic public reports on the results of their studies; and make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

(*Justice Kennedy Commission Report*, *supra*, at 47.)

Data gathering, combined with transparency, is not mere window-dressing. Efforts to gather data concerning racial profiling have, for example, shown that the problem is real, enhanced public and governmental support for solutions, and led to real change in local policies. (*See* DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 175-207 (2002).) The experience of the innocence movement likewise shows that the accumulation of data, if it points in one relatively clear direction, can over time persuade people of good faith of the urgency for change and how to go about it. These changes have included, at times, legislative as well as judicial and executive action. (*See generally* ABA AD HOC INNOCENCE COMMITTEE REPORT, *supra*.) The Justice Kennedy Commission, rather than relying solely on task force data gathering and data dissemination, sought to involve legislatures more directly in their own data collection and action mobilization. The commission argued that legislatures should be required

> to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

(*Id*. at 47.)

Importantly, the commission's call is to look at discriminatory *effects* rather than consciously discriminatory purposes.

Data gathering and transparency strategies can be used well beyond the issue of race—reaching all aspects

of sentencing policy and practice. Professors Marc L. Miller and Ronald F. Wright, for example, after criticizing the limited effectiveness of the Federal Sentencing Commission as a repository and disseminator of sentencing knowledge, have recommended the creation of a national sentencing institute to work with federal and state legislatures and commissions to answer important sentencing policy questions. Miller and Wright note that such an institute would aid not only the scientific sentencing community in conducting research, and the legislatures and commissions in setting sentencing policy, but also judges, prosecutors, defense lawyers, and probation officers. They explain:

> Judges who must sentence offenders under the Guidelines with some binding power might want to know about the distribution of sentences within a Guidelines range, or the frequency and impact of different Guidelines adjustments, the reasons given to explain different types of departures, and the subsequent criminal history of offenders who also received these sentences. To do so, however, judges would need to be able to answer a basic question: How have similar cases—with similar offense and offender characteristics and similar applicable Guidelines provisions—been sentenced by other judges?

(Marc L. Miller & Ronald F. Wright, "*The Wisdom We Have Lost": Sentencing Information and Its Uses*, 58 STAN. L. REV. 361, 371 (2005).)

In the current post-*Booker* advisory guidelines system, the authors note, a judge will find sentencing data even more useful than under the previous mandatory regime because the range of options available to a judge in an individual case is greater. What matters to judges, of course, matters to advocates, who must persuade judges to accept the advocates' position.

Deliberation

Finally, apparently recognizing the potential value of multiperson deliberative bodies in making judgments, including those about sentencing, the Kennedy Commission has recommended that criminal justice racial and ethnic task forces "include individuals and entities who play important roles in the criminal justice process, and invite community participation from interested groups like advisory neighborhood commissions and local civil rights organizations." (*Justice Kennedy Commission Report*, *supra*, at 47.) Task forces so constituted make room for more diverse perspectives, give more groups political voice, enhance legitimacy and public support, and allow for widespread oversight by ordinary citizens and interested organizations, thus restraining governmental abuses and promoting error-correction. (*See* Taslitz, *Democratic Deliberation, supra*, at 7-30.)

The Kennedy Commission's recommendations, however, address only sentencing *policy*. But deliberative theory has an important role to play as well in putting policy into action in individual cases. Post-*Blakely* and *Booker*, many jurisdictions are moving toward mandatory guidelines systems, combined with jury fact-finding at sentencing. (Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1419-22 (2005) (survey of *Booker*'s impact on state sentencing legislation and practices).) A small number of states also permit the jury to make, or at least to recommend, the actual sentence itself in noncapital cases. Such systems raise the prospects of reaping the benefits of group deliberation at sentencing via the jury, the long-standing American deliberative fact-finding institution. (*See* Taslitz, *Temporal Adversarialism, supra*, at 29-69.)

On the other hand, deliberative processes can go awry for a number of reasons. Jurors, for example, are good at *ranking* the relative seriousness of crimes, but, lacking knowledge and experience, they are less effective at choosing the precise quantity of punishment in a way that promotes proportionate sentencing and equal treatment across cases. (*See* J. J. Prescott & Sonia Starr, *Improving Criminal Jury Decisionmaking After the* Blakely *Revolution* 23-25 (2005) (unpublished manuscript).) Questions that are too complex may lead to juror decisions "through impulse rather than cognition." (*Id.* at 31.) Jurors holding dissenting views may be reluctant to voice them and may reduce the effort put into their decision, choosing to "free-ride" on the judgments of others. (*See id.* at 34-35.) They also may get in line to impress their jury peers. (*See id.* at 37.) Some "low-status" jurors may likewise defer to "higher status" jurors, and the reluctance of dissenters to express their views can thus lead to "group polarization"—deliberation moving the majority toward a more extreme version of its original position. (*See id.* at 44-45.)

Fortunately, these are not intractable problems. Bifurcating guilt and sentencing phases; expanding juror information bases by, for example, giving them sets of sample cases and sentences with which to compare to the current one; breaking down and thus simplifying their tasks; giving them more guidance on how to conduct their tasks and on the importance of each individual's contributing and of procedures they might follow to ensure the airing of dissenting views; efforts to select truly diverse juries in which dissenters might reach some critical mass; and asking jurors to submit predeliberation opinions anonymously are among the techniques that can counteract these negatives. (*See id.* at 38-53.) There is reason to believe that such efforts can significantly reduce subconscious racial bias as well. (*See* Raina Jones, *Why Properly-Constituted Sentencing Juries Will Do Better Than Judges in Reducing Racial Disparities* (unpublished manuscript).)

Is all this effort worth it? In mandatory guidelines systems, there is no choice but to rely on jury fact-finding. One of the lessons of the innocence movement is that we cannot afford to make less than our best efforts to help jurors to get it right. The same should be true in the context of jury sentencing.

But we should care for another reason as well. Much sentencing fact-finding (such as a determination that an act was done with "deliberate cruelty") involves essentially moral judgments. Those judgments, in particular, our system leaves to the voice of the community when they must be made at trial. There is no sound reason for a different value system at sentencing. American democratic theory embrace's the community's moral voice via the jury over the judge's dictates. American democratic theory also mistrusts the state in such matters, including, as Justice Scalia noted in *Blakely*, fearing the power of an elite corps of judges divorced from the everyday concerns of the community. (*See* Taslitz, *Temporal Adversarialism, supra*, at 22-23 n.53, 70-86.) Just as quality deliberation about guilt helps to avoid the error of convicting the innocent, so does quality deliberation in the sentencing context avoid the error of punishing far more, or far less, than justice, and monitoring of the state-as-Leviathan, require.