

Brian Johnson CTA Done

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SPEAKERS

Brian Johnson, Jenn Tostlebe, Jose Sanchez

Jose Sanchez 00:14

Hey everyone. Welcome back to the Criminology Academy podcast where we're criminally academic. My name is Jose Sanchez.

Jenn Tostlebe 00:20

And I'm Jen Tostlebe.

Jose Sanchez 00:22

Today we have Professor Brian Johnson on the podcast to talk with us about racial and ethnic inequalities, particularly facial features and variation in criminal punishment.

Jenn Tostlebe 00:31

Brian D. Johnson is Professor of Criminology and Criminal Justice at the University of Maryland. He received his PhD in Crime, Law and Justice in 2003, from the Pennsylvania State University. Dr. Johnson was the 2008, recipient of the American Society of Criminology's Cavan Young Scholar Award and the 2011 American Society of Criminology's Division on Corrections and Sentencing Distinguished New Scholar Award, he was co-editor of criminology, the flagship academic journal in the discipline from 2016 to 2020. His current research interests include racial and ethnic inequalities in the justice system, court actor decision making, and contextual variation in criminal punishment. Thank you so much for joining us, Brian. We're excited to chat with you.

Brian Johnson 01:17

It's a pleasure to be here. Thanks for having me.

Jose Sanchez 01:19

Okay, so a brief overview what today is going to look like we're going to start off with some general sentencing questions in criminal courts and then we're going to move into a paper that was authored by

a guest that talks about facial profiling. And so with that said, Jenn, why don't you go ahead and get us started?

Jenn Tostlebe 01:38

Cool. Thanks, Jose. All right. So, we'd like to start off like we normally do with kind of a clarification question regarding sentencing in this case. And so based off of teaching undergraduates in particular, and then conversations I've had with other people, there seems to be kind of a conflation of the adjudication and sentencing phases of the criminal justice trial process where oftentimes people think they're the same thing. And so Brian, can you define what the adjudication and sentencing processes are in criminal court and then discuss when they typically occur?

Brian Johnson 02:14

Sure, yeah. Today, it's interesting to me, we often talk about a criminal justice or criminal legal system. But historically speaking, like the idea of the system is really pretty new. This didn't come about until the late 1960s, with the President's Commission on Law Enforcement, and the Administration of Justice when they sort of, first for the first time diagramed, the different stages of case processing. So, the specific stages that a defendant goes through, and their exact timing often vary from jurisdiction to jurisdiction. They're also different for misdemeanors and felonies and for juvenile and adult offenders. But typically, they include an initial appearance before a judge. So, after you're arrested, usually within 24 hours or 48 hours, in some jurisdictions, you're brought before a judge, for the judge to determine whether or not the arrest was legal, was there probable cause to make an arrest. And then after that, usually defendant will come before another judge or magistrate for an initial appearance, or a bail hearing. Sometimes these are the same thing. But the bail hearing a magistrate will determine whether or not the defendant should be released or held in custody. And whether or not any financial or other conditions are released might be set, including bail and bond. And then in those situations where the defendant can pay their bail or post bond, they're released, and if not, they're detained, awaiting their trial. Following that you have a preliminary hearing, usually, that's sometime you know, within a week or two weeks, but the prosecutor then has to come before a judge to present their case against the defendant. And again, the standard here is for the judge to decide whether or not there's probable cause that a crime has been committed. And so after that, in felony cases, the process is a little bit different. If it's a felony, usually the facts have to also be presented to a grand jury. The grand jury is just a group of people kind of normal people right now involved in the justice system, who review all of the evidence against the defendant to make a determination that yes, it looks like a crime is committed. If they vote that way, then a formal indictment comes down. The indictment process involves the defendant being arraigned in which case are brought before a judge in front of the court and the red formal charges against them to make sure that the defendant understands what they're being charged with. At this point, they can often plead guilty or not. If they plead not guilty, then the case gets remanded for trial. And I should say at any point in this process before after a formal indictment comes down, plea negotiations are likely to be taking place in which the prosecutor and the defense are meeting and discussing and trying to reach an agreement to have a defendant plead guilty, often to lesser charges, or sometimes to a specific sentence in exchange for their plea of guilty. It's interesting in the American system, roughly 95% of all cases end in guilty pleas. But for that small percentage of cases that go to trial, these involve kind of a lengthier process of trial preparation, that includes discovery, pretrial conferences, other kinds of motions and so on. And then after the trial, you know,

either defendants are going to be acquitted or they're going to be convicted. And among those defendants who are convicted, either by a guilty plea or at trial, then we finally get to the sentencing stage, all the rest of that stuff was part of that adjudication process, all of the different decisions that are part of case processing that lead up to a verdict, and then following a verdict where somebody's judged guilty, they're brought again before a judge for the formal sentencing hearing. And at that formal sentencing hearing, a judge can decide what the appropriate punishment is. This can include any combination of financial penalties like fines and restitution, community based sanctions, including probation, or jail or prison time. And so the overall time that it takes kind of to go through this process depends a lot on all of those different variables. And in some cases, you may have disposition within a few days for a criminal case. And in other cases, especially those that go to trial, they can take several months or even up to a year or more.

Jenn Tostlebe 06:09

Okay, and so just to clarify the process of going before the judge to either plead guilty or to hear your verdict, and then the sentencing decision, those are typically on separate days, or do they occur on...yeah, okay.

Brian Johnson 06:24

So, they're usually separate days. But in some cases, if a plea bargain has been reached, they can be the same. So in cases that are involving a trial, they would be separate, you would go before the judge and you just enter your plea, guilty or not guilty. If it's not guilty, then it gets remanded over for trial and trial date will happen down the road. If however, defendant has already reached the plea agreement, then they can come before the judge at that hearing. And have it be done in a summary fashion if the judge agrees to whatever the plea negotiation settled on. Right. Okay.

Jose Sanchez 06:55

So during the summer, I taught a Crime and Society class, which is really like our version of Intro to Criminal Justice. And one of the things that, you know, one of the first things that we teach in that class is that there are multiple goals for our system of punishment: deterrence, incapacitation, retribution, rehabilitation, and equity/restitution and restoration. Can you describe a little bit of what these goals of punishment are?

Brian Johnson 07:23

Yeah, sure. You just listed them. I think you're right, that those are the main least the primary goals that are justifications for how and why we punish individuals who are convicted of crimes. So, starting with retribution, this is kind of grounded in the Kantian notion of a categorical imperative, that suggests that all wrongdoing must be punished in order to achieve the goals of justice. This is kind of the so called eye for an eye philosophy, right? You know, you harm me, we're going to harm you back. Deterrence is a different theory. This really traces its roots to the kind of the classical 18th century work of Cesare Beccaria, who wrote this kind of thin volume on crimes and punishment, where he argued that punishments really should be utilitarian. That is, they should be designed to be swift, certain, and severe enough to prevent people from engaging in crime in the first place. Deterrence sort of assumes that people are rational individuals that they have free will, that they go through a cost benefit calculation, when faced with criminal opportunities to decide whether or not they're going to engage in

crime. And so under that kind of broad umbrella of deterrence theory, there's specific deterrence, or the idea that we punish individuals who have committed crimes so that they'll learn and they won't commit those same crimes in the future. And also general deterrence, which is kind of a broader application that suggests we punish people in part to set an example that will prevent other people from engaging in similar kinds of criminal behavior, incapacitation is just kind of the third goal of punishment. This is a little bit different. The argument behind incapacitation is that if we simply remove offenders from society, then they can no longer committed additional crimes. I think one sort of interesting variation on this is selective incapacitation, or the notion that there's a small number of "career criminals" that as high rate repeat offenders in society. And so if we can prospectively identify these people and remove them from society, in theory, we can have large crime reduction effects, policies, like three strikes and you're out are explicitly based on selective incapacitation. Fourthly, we have rehabilitation. This is really based fundamentally in a different idea that the goal of punishment should be to reform individuals by changing certain kinds of underlying behavioral patterns. This can include the biological, psychological, sociological causes of crime. It's interesting because for roughly a century, rehabilitation was really the foundational principle behind criminal sentencing in America up until about the late 1970s, early 1980s when we went through a period of sentencing reform. And many of those reforms that were passed during that time that went away from rehabilitation, at least indirectly gave rise to mass incarceration in America and to the rise of kind of their current problems with over incarceration. And then lastly, you mentioned as kind of a last goal, some argue that the primary goal of punishment should be really be to restore the harm caused by a crime. So this can be maybe sometimes as labeled as restoration. It aligns closely, I think, with the goals of restorative justice and emphasize punishment processes, like offender victim mediation that are aimed at repairing the harm done to the victim, to the community, and even to the person who committed the crime themselves. So, I guess overall, if I reflect on this, I think it's interesting that the different goals of punishment have predominated during different historical eras of America, we've kind of gone through these distinct shifts and have emphasized different kinds of goals of punishment or philosophies of punishment. But what's really unusual about the criminal legal system today is that we have this very dated medley of overlapping, conflicting goals of punishment, that are simultaneously in place in most state sentencing systems today. And the reason for this is because we went through this period of sentencing reform, but different states adopted different kinds of reforms to varying degrees. And the result has been sort of the balkanization of sentencing and correctional systems in America. In other words, every state has its own unique laws and systems of punishment. And they're often justified with reference to different kinds of goals of punishment. So, I think, you know, if I look at the system today, I might say that the primary defining goal of punishment is something called just desserts, which can loosely be understood as kind of a modern day repackaging of traditional retribution and deterrence theories, but kind of with a stronger emphasis on trying to match punishments to the blame worthiness and deserving to the crime, with a particular emphasis on proportionality, fairness, and punishment.

Jenn Tostlebe 11:40

Okay. Yeah, it seems, I guess it makes sense that a lot of different states kind of use these different goals of punishment to varying degrees. But I feel like that would make it much more complicated for someone like you who's interested in, you know, sentencing and punishment.

Brian Johnson 11:57

Yeah, I think I mean, one of the things that we probably don't do a great job as researchers is capturing all of the variation that exists, you know, much of the much of the research that's done on criminal sentencing is done in a small number of jurisdictions that have good data that's publicly available. And really, if we're conscientious about what we do, we should be more cognizant about the fact that many states have very different systems, and almost no research exists on it.

Jenn Tostlebe 12:22

Yeah. All right. So, you started to get into this just a little bit when you were talking about the changes in sentencing and policy in the 1970s, 1980s. But historically, we've kind of seen two main types of sentencing models, the indeterminate sentence and the determinate sentence. And currently, I think that determinate sentencing is kind of this predominantly used model. And so can you describe what these two are and then a little bit more in detail about the historical development of their use?

Brian Johnson 12:55

Yeah, so let me begin by saying that people always talk about kind of the shift from indeterminate to determinate sentencing, and that is a real thing. But you know, getting back to the point I was just making about this kind of balkanization of sets and corrections, we have almost no system in place today that's either purely determinate, or purely indeterminate. Almost every system is a mix of the two things. And the reason for that is because what fundamentally goes into those categorizations involves many different types of policies, policies that affect the structuring around sentencing decisions that are made, but also correctional decisions in terms of how and when offenders get released from prison. Other kinds of state laws that have been passed, like mandatory minimums or three strikes laws that can affect the likelihood and length of incarceration. And so, you know, we do talk about these pure models of determinate and indeterminate sentencing. But most state systems today operate somewhere in the middle, they're neither on the far one end of the spectrum, or on the other end. Historically, we did have a system that was almost entirely based on indeterminate sentencing, beginning at least in the late 19th century and through most of the 20th century. And when I say indeterminate sentencing, I'm talking about an approach where it was highly individualized to the individual defendant, that allowed judges to use very broad sentencing ranges, sometimes as crazy as from a day to life in prison. And then actual release decisions were made by back end correctional officials and parole boards. The reason for this was because the philosophy of punishment at the time that underlies indeterminate sentencing is rehabilitation, and rehabilitation, allowed for the possibility that different people engage in criminal behavior for different reasons. And because there were different reasons that different people committed crimes, the amount of time that would be needed to perform them would be naturally different across individuals. So, indeterminate sentencing was a paradigm regnant for most of the 20th century, until a number of social and political factors kind of coalesced in the late 1960s and early 1970s and really transformed the entire sentencing system in America. This included, among other things, widespread social discord surrounding the civil rights movement, prison uprisings like the one in Attica that killed nearly 40 people, ongoing social protests over things like the Vietnam War, etc. Secondly, crime was rising dramatically beginning in the 1960s. This was especially true violent crime, which had spiked kind of as the baby boomer generation moved into their crime prone ages in the 1960s. Third, there was a number of important pieces of social research published including things like now I would say the infamous Martinson Report that sort of was misquoted as concluding nothing works in corrections, questioning whether or not rehabilitation should be the

philosophy of punishment that we use to determine sentencing. Other influential publications like both published by Judge Martin Frankel, that was, as I would say, scathing diatribe about current sentencing practices that sort of decried all of the evils of the indeterminate sentence. And then lastly, there were both political conservatives and political liberals who are arguing staunchly for criminal justice reform. And interestingly, they are arguing for reform for different reasons. So, the former were about combatting crime. And the latter really had identified inequalities in the justice system. But both liberals and conservatives blame judges and too much judicial discretion for the problems in the system. So, they came together, and in a very short period of time passed a spate of legislation that today we look back on and we call this kind of reformation period, the determinate sentencing movement, the goal of all of those different reforms that were passed, were basically to try to narrow sentencing ranges, to reduce judicial discretion, to require a greater proportion of the nominal time be served, and then also to remove kind of back end release options, such as discretionary parole. And so all of these different reforms were being passed, but differentially in different states, they were adopted to varying degrees. These include things like determinate sentencing laws that some states passed, sentencing guidelines, which I think we'll talk about more in a moment, dramatic expansion of the use of mandatory minimums including things like three strikes laws, abolition, or restriction on discretionary parole, and the passage of things like truth in sentencing laws that require typically, offenders to serve at least 85% of the pronounced sentence.

Jenn Tostlebe 17:19

Jeez, lots of different historical things going on. At the same time. That's cool. And to break it down and kind of see how everything came together to make this change. I was actually teaching over the summer, too. And we were talking about these models of sentencing. And so I do corrections work. And so I feel kind of ashamed to admit this. But I didn't even realize that parole like shifted, and how parole was used had shifted at this time, just because I still hear what like 80% ish of people are released from prison on parole. So, it's still a thing. It's just done differently. And I hadn't realized that.

Brian Johnson 17:59

So, two reactions to that, that I think are interesting, right? One is that some places have gone away from traditional parole, you know, discretionary release, under some supervision period, and they replaced it with mandatory supervision. In other words, after you not only do you have to serve almost all of your term, you know, 85%, in most places, but then when you're done, you have a mandatory period of supervision like three years or five years, you know, so parole used to be you got out early, right, if you had a 10 year sentence, you'd be eligible, let's say, you know, after a third of your sentence, and you would just have to serve the rest of the 10 years in the community. And now you get that 10 year sentence, you've got to serve eight and a half years. Plus you get another three years or five years tacked on to it for supervision time. Yeah. So it's really changed the way that the system works.

Jose Sanchez 18:45

Yeah, yeah, I'm not an incarceration scholar, so I'm not as ashamed. But it is interesting, but to your point about how we kind of see like a mix of both determinate and indeterminate. So, I remember when I was teaching those two specific models to my class, I kept thinking, I'm teaching it this way. And I think it was useful for them to kind of reduce it down to like a bare bones explanation as to what they were. Because the first, like, I think 90% of them had never taken anything related to criminology or

sociology. So, like, it was good for them. But as I kept digging more into it, I kept thinking, I don't know that I could point to one system that only does it this way, or only does it that way. And then I thought maybe, I don't know, I've only ever lived in Southern California and Colorado. So, maybe they do it this way somewhere else. But at least in those two states. I couldn't think of a time where it was purely just one style of sentencing that they would use.

Brian Johnson 19:48

Yeah, it is interesting, because you know, people talk about the determinant sentencing movement. Right? And as though there was this fundamental shift and there was I mean, the passage of all the laws we just talked about, But because many states didn't adopt those laws, you have places, you know, you actually have more places that are, let me rephrase that you have fewer places that use sentencing guidelines, for instance, right, less than half the states have sentencing guidelines. But most people when they think about the modern sentencing system, they think of guidelines systems, even though most states didn't actually pass guidelines and don't have guidelines today. And similarly, you know, many states invoked limits on parole that said, you know, maybe you had to serve more of your sentence, or maybe you were ineligible for parole if you committed certain types of violent crimes, but relatively few states just got rid of parole entirely. So, it still exists in some form for most places.

Jose Sanchez 20:39

Okay, so speaking of guidelines, I think we can get into them a little bit more. So like, so sentencing guidelines are often used to give judges suggestions for handing down a sentence. And these are technically advisory recommendations based on the seriousness of the crime and the criminal background of the offender. However, it seems like judges are generally bound by the guidelines, or at least it seems that way. Can you elaborate on what sentencing guidelines are exactly maybe provide us with some of the critiques that have come about because of deadlines?

Brian Johnson 21:18

Yeah, so you said a lot of important things there in your introduction to it. First, let me back up a little bit. There are different kinds of sentencing guidelines. And again, there's no one model, every state that has passed guidelines, which is just under half of all of the states right now, has created their own model. So, we have, you know, we don't have one system of guidelines out there, we have 24 or 23 different states specific ones, and also in the federal government. And the guidelines, in some sense can be kind of arranged on a continuum in terms of how "mandatory" they are, or how advisory. So some states have passed just simple descriptive guidelines that are based on past practices. That just said, we want to codify what judges are already doing, just to provide them with information on average, in a first degree robbery case, this is the typical sentence judges in this jurisdiction give. Other states passed what they call presumptive guidelines, or prescriptive guidelines, presumptive just means that we presume that you have to follow them unless there's a good reason not for and prescriptive means we're trying to prescribe new sentencing patterns, we're actually trying to change the patterns of existing sentences that judges are giving. And so all of those different dimensions combined. So, you can have voluntary guidelines, you know, that really don't enforce that much of a burden on judges, you can have almost mandatory guidelines where judges have to almost always follow them unless there are really unusual circumstances in a case. So, the degree to which guidelines mandate, what judges can do really varies from place to place, depending on how mandatory or how advisory guidelines are.

So, there's lots of variations. But that being said, typically, most guidelines are based on kind of two dimensional grids. So, you have a sentencing table and across one dimension, we score something like the current severity, or the severity of the current offense and then typically, on the other dimension, we score something like the prior criminal record of the defendant. And then we're those two columns, that column in that row meet, there'll be a recommended sentence range, virtually all of the guidelines provide ranges to judges. So, it'll say, you know, this is the minimum recommended sentence, this is the maximum. Some of the places, some of the guidelines will also have mitigating and aggravating ranges, which kind of broaden it even further. And then even in states that have relatively narrow, recommended sentences, judges are still allowed for the most part to depart from guidelines. Again, depending on how strict the guidelines are, they may have to provide written reasons. Those reasons may be subject to appeal, if the prosecution or defense disagrees with the departure. But judges are still allowed when there are extenuating circumstances to go above or below the recommended ranges. In terms of critiques of guidelines, I would say guidelines for the most part, academics probably agree more about this than other sentencing reforms in terms of the success of guidelines, that is, most treatments of state sentencing guidelines, find them to be fairly effective, increasing uniformity among judges. For sure there's more accountability, right. Prior to guidelines, I mean, judges, they could kind of do what they wanted, and there was no way of judging whether or not what they were doing was appropriate. You know, at least now we have improved data collection in states that have guidelines. I think it's improved accountability. You know, in many states, you have to provide actual reasons for the sentence or reasons for the departure. So, we know more information about how and when and why judges are making the decisions that they are and so on. I'll say the one exception to that to the idea that guidelines have been a successful reform initiative, probably is the federal system in the federal justice system, a very different kind of sentencing guidelines passed. So, the sentencing guidelines in the federal system have been staunchly critiqued by academics and really by practitioners too. And the reason for this is because the federal guidelines compared to the state guidelines are very rigid, they're very severe, and they're very mechanical in their application. The architects of the federal guidelines, their intention was to account for every possible factor, right that a judge might want to consider. So, that we literally just have to plug in all of the variables and we get an output over here that says, here's the appropriate sentence. And I think that the experience with the federal guidelines has been, most practitioners and scholars who study these things, you know, agree that you cannot codify every single thing that a judge might ever want to consider. So, you know, the federal guidelines have been highly criticized for not allowing for kind of individual considerations for particular defendants or their circumstances, or other kinds of factors that typically judges would consider. The federal guidelines are also unique, because they're based on something called Real Offense Sentencing, that uses, "relevant conduct", to determine the sentence. So, once a person's been convicted of a crime, the sentencing hearing, federal judges are allowed to consider all of the facts of the case. And they use a legal standard called presumption of the evidence. In other words, there just has to be more, more evidence that something happened than it didn't. So, let me give you one example, if there's a federal bank robbery case, right, and maybe one of the co-defendants in the bank robbery, had a firearm, a defendant who didn't have a firearm and wasn't charged with or convicted of a firearm can still be sentenced for that firearm, if one of their co-conspirators in the bank robbery. You know, if the judge believes beyond a preponderance of the evidence, that is, it's more likely that they had a gun and they didn't, even if it wasn't charged, and it wasn't convicted, they can still sentencing for that. So, there's lots of nuances like this in the federal guidelines that make them particularly severe, and particularly

rigid, I think. And, you know, there are a lot of critics of the federal guidelines. But as state systems go most places that pass state guidelines, I think people think they've done a decent job.

Jenn Tostlebe 26:52

So, you mentioned with the state guidelines that judges can go outside of the recommendations, they just kind of have to provide a reasoning for it. Is that harder to do then in the federal system? Since it is, it seems more strict and straightforward?

Brian Johnson 27:07

Yeah. So, great question. I don't want to get into too much of the history of it's actually the federal system has changed fundamentally. So, that was always true. The federal system, it was much harder for judges to use individual considerations or factors to go outside the guidelines, when they did try to depart, you know, oftentimes, the departures are subject to appeal and so on. Much of that changed in 2005, the Supreme Court, there was a very important case called The bBooker Decision. I mean, it was US v. Booker in 2005. Where, essentially, you know, without getting into too much of the detail, the defendant who was Booker was charged with X amount of drugs, the judge decided in the case, right, that they actually had possessed Y amount of drugs, sentence them for the larger amount, and went above sort of the expected cap and the case to you know, produce a much longer sentence. And it was appealed and eventually, long story short, this went all the way up to the Supreme Court. And they decided in a five to four decision that judges weren't allowed, right, to use things that weren't proven before a jury, they argued it was a violation of your right to a jury, because the facts of the case that were used at sentencing weren't actually proved beyond a reasonable doubt to a jury. So, after 2005, the federal guidelines have become less strict and less stringent, and there are more opportunities for judges to consider individual factors.

Jose Sanchez 28:24

Okay, so I think we've set a pretty good foundation to start moving into your paper. And so this paper, like we mentioned, was authored by our guest, Brian and his colleague, Brian King, and it's titled facial profiling, race, physical appearance and punishment, and it was published in criminology in 2017. In this paper, Brian and Ryan King use an interdisciplinary approach by combining psychological ideas of social perception and criminological perspectives on judicial decision making to investigate the associations between physical appearance, threat perceptions, and criminal punishment. To do so they link information on criminal histories and sentencing information with booking photographs for over 1100 male felony defendants in Minnesota. Is that a fair summary of your paper? Brian?

Brian Johnson 29:20

Excellent.

Jose Sanchez 29:22

Okay, so we're gonna open up with our first question. And, you know, everyone gets asked this question, Brian. So again, I'm sorry that you're not necessarily especially in this regard right now. But what was the impetus behind writing this paper? And so what were the gaps that you were trying to fill here?

Brian Johnson 29:39

Yeah, so this is actually a follow up paper to a closely related paper that we published in American Sociological Review the year before. And that first paper was the one that sort of sparked the idea behind this paper. So the first paper is looking at skin tone. And I might be getting ahead of us here in the questions but I think this is good context. And really the idea was Ryan and I started talking about studies that were looking at race disparity in sentencing. And one of the things that we realized was that virtually all prior studies looking at sentencing disparity used official measures of race and ethnicity, and relied on these kinds of categorical indicators that failed to account for the possibility that there might be important variations within racial and ethnic groups. And one of those dimensions that we thought might vary would be skin tone. Now there's a fairly well established research literature and sociology that looks at what's called colorism bias, or the idea that darker skin tones, even within racial categories might produce less favorable outcomes across different contexts. And so we were aware of that we thought, well, nobody has looked at this in the context of the criminal justice system. And as we were going in we working on that study, we collected the data initially to look at skin tone, and its impact on punishment decisions. And while we were doing that we were coding, we were looking at all of these photographs, looking photographs for people who had been convicted. And we said, well, you know, there is a lot of variation on skin tone. And this seems really important. But, there's also variation and all these other things that we hadn't really thought about til we started looking at, you know, hundreds and hundreds of booking photos. And at that point, we were, you know, we were designing a coding instrument, we thought, well, why don't we code these other things that, you know, seem to be showing up in a lot of photos that might, you know, affect the way that judges or other court personnel react to the physical appearance of a defendant. And so at that point, you know, we kind of looked at the psychological literature, which is pretty well established looking at other kinds of facial features, things like attractiveness, you know, baby faced appearance, and other kinds of physical characteristics and create, you know, included them in the coding instrument. So, that was the genesis of this paper was after we looked at skin tone, we thought, well, let's look at these other physical features, and see whether or not they're related to punishment decisions. So talking about this, it always makes me or I guess, while I was reading through your paper, it just consistently made me think of that phrase, like, don't judge a book by its cover. So, don't judge a person just because of their outward appearance. However, as you talk about, you know, this is commonly done as a shorthand for people to make judgments about kind of the inner qualities of others. And so we're gonna get into criminal justice and the consequences of this from a criminal justice perspective. But before we do that, in what ways have like economists, sociologists, and psychologists examined physical appearance judgments? And what kinds of consequences can these judgments have for the people who are getting judged? Yeah, that's a really good question. There's a huge research literature and those other disciplines that you mentioned, that looks at different kinds of physical traits, and how they're related to various types of life outcomes. You know, it's impossible to summarize all that work briefly here. But I will say some of the interesting findings, in my opinion, look at things like lifetime earnings, you know, economic outcomes, various aspects of socio economic dimensions, including things like employment outcomes, lifetime earnings, educational attainment, and so on. There's also some research looking at things like, you know, kind of social interaction, things like dating and dating outcomes, and how that's affected by physical appearance. Maybe that's less surprising. But then also like political science work, looking at things like elections, and who's most likely to win an election. And so, you know, I think the gist of all of this work is that it finds evidence that people routinely make character judgments based on physical

appearance. And it suggests that there are these kinds of stereotypical or gut reactions that people have based on someone's appearance that can play a key role in cognitive decision making. So for example, you know, the political science research finds politicians who are judged to be more trustworthy, and appearance, that of other factors are more likely to be reelected. A lot of work finds that attractiveness of individuals predicts all kinds of life outcomes, you know, everything from sort of the socio economic to the social and sociological outcomes. There's a lot of work on that some of it refers to what's called the halo effect, you know, the idea that if we find somebody attractive, we look at them, we think they're attractive, we immediately think they're good person, you know, they must have all these other positive qualities because we have this positive reaction when we look at them. So yeah, like I said, you know, I won't go through all of that literature, because it is half the literature. But for the most part, like there's pretty, I think, well established findings for things like attractiveness and baby faced appearance and initial kind of threat reactions. There's also some work not in the context of the criminal justice system, but looking at other things related maybe to crime as an outcome. For instance, you know, studies that look at just appearance and predict whether or not somebody has engaged in crime or not, and they do better than chance, which is maybe surprising. So, you know, there is a pretty well established literature that suggests that the hearing something individual can affect, you know, the way that they're treated.

Jose Sanchez 35:04

Yeah, I'm always really like interested with research like this or like this discussion, because I always feel like people generally have, like, an intuitive sense that this is happening. And so we make decisions about it, but actually get into here. So like, the science behind it is always interesting. So like, I think, maybe set the story out here, I'm not sure. But growing up, like, for whatever reason, like I always wanted to shave my head. While my parents were adamant that I could not shave my head. My dad was always very much like, people are gonna think you're a gang member, people are gonna think, you know, they're gonna see this like, Hispanic kid with a shaved head, they're gonna think you're out there gangbanging and so no, you can't shave your head. And so, like that was like, so in a sense, my parents knew that having that appearance would or could have some type of detrimental effect. And you know, of course, my parents aren't sociologists. But, you know, I always find it interesting that some of these things we see on a day to day basis, and I just kind of getting to hear, like the research behind it, I've always found so interesting.

Brian Johnson 36:14

That's a great personal story, right? But you can imagine why your parents would have that reaction, you know, because there were all sorts of sensitive to this without the research, right? You know, that you, you see somebody and we all make snap judgments. There's no doubt about this in the literature, like, we know, this happens, right? human cognition happens in this very fast fractions of a second. And we're not even aware of it most of the time, right? We're doing this constant. When we see other people we're making judgments without realize when we're doing it.

Jose Sanchez 36:43

Right. Okay, so let's start moving a little more into criminal justice. You know, given we just spent several minutes, maybe like 20 minutes or so talking about, you know, sentencing and sentencing guidelines. So, we've started to see that sentencing can be a little complicated. And so research shows

that judges often use stereotype short hands to make punishment determinations. Why might it be necessary for judges to take this approach?

Brian Johnson 37:15

Yeah, I mean, I guess my reaction to that is, I don't think it's unique to judges. Now, there might be some kind of organizational factors that make it more likely or that help explain why this happens, in the sense that judges are often asked to make complicated decisions under time and information constraints. And so one thing that, you know, stereotypes or other kinds of cognitive shortcuts that we use, you know, one of the things that can strengthen their impacts are time limitations and information limitations, right? When we don't have complete information and enough time to make fully rational decisions, we may engage in this kind of shortcutting process, the stereotypes, you know, they tend to involve implicit cognition, right? That we're not aware that we're doing this, this kind of snap judgment that we're making, you know, what's going on somewhere, I liken it to a computer, right? You can open up a Word document, and you know that you've opened up that Word document, and you're writing it, but there's a processor running behind, right and the entire time and that processor is doing all kinds of stuff that we're not really that aware of right? On the brain is kinda like that, too. It's constantly running a processor in the background, even though that thing that we're working on at the moment, you know, that is drawing all of our attention. You know, it's not the only thing that's happening. So, anyway, this implicit cognition process, I think, affects judges and affects other people to other decision makers, you know, just, it's human nature. It's part of our sort of cognitive process. I would say, you know, from a sort of scientific perspective, stereotypes tend to be cognitive shortcuts that are used by human decision makers, you know, in order that they're used to increase efficiency of data processing. That is we draw on past experience and cultural mores, right adapted over time to make judgments under time and information constraints in order to try to streamline our decision making. So to the extent that judges you know, they don't have time to get to know each individual before them personally, right? They don't spend time with them get to make have their own sort of in depth, reaction or in depth relationship with a person right. So, they rely on these other kinds of decision making cues and appearance is one of those cues.

Jenn Tostlebe 39:19

So, related to this Steffensmeier and colleagues kind of argued that the judicial decision making or judicial decision making is guided by the focal concerns perspective, which we've talked about, I think, and one other episode, but it emphasizes community protection offender blameworthiness and individual and organizational practical restraints, which some of what you just discussed. Can you briefly describe these focal concerns in more detail and then talk about how these might reflect kind of judicial reliance on stereotypes, including the level of threat that they pose?

Brian Johnson 39:55

Yeah, so the theory again, without trying to go into too much detail, right, the theory you laid it out Pretty well, it basically argues that there are a small number of key things that judges, and judges can't consider everything, so there are these small set of focal concerns the most important things that they judge when they're faced with somebody charged with a crime. So, dangerousness is one and there's kind of two dimensions to each one of the focal concerns. So, dangerousness is kind of the harmful, or the likelihood that somebody's going to engage in another crime, and a judgment about how serious

that crime would be right? If they were to to reoffend. Blameworthiness, kind of the second one involves two things. It's kind of the harmfulness of the action and the wrongfulness of the action, you know, and those are two different things, right? You can be driving in a rainstorm, and accidentally, you know, maybe you're driving too fast in a rainstorm, you slide off the road, and you kill a pedestrian, right? There's a lot of harm there. But it might not be that wrongful, as opposed to maybe you're drunk driving, you're going 100 miles an hour, and you hit a lamppost. Right? You did less damage, but it's more in some ways, you're more blameworthy. In any case, so there's kind of two dimensions to each of that. And then the last one, the practical considerations, you know, there's two dimensions here, too. One is individual. So, you know, you look at the particular individual and you know, one of the things that has come out in this literature is, is judges may have an impression about persons, "ability to do time", you know, they think some types of defendants are better suited to prison sentences than others. So, that's an individual consideration, that's just kind of unique to the person and then there are organizational practical considerations. So, things like you know, is there available jail space, you know, maybe they want us in somebody, or they want to incarcerate somebody, but they know that there's no room in the local jail, so they decide not to. So anyway, each one of those dimensions of focal concerns has these kind of, you know, more subtle elements to them. But the basic argument is that a person's physical appearance can affect the way that a judge or another a different court actor assesses the level of dangerousness or the level of blame worthiness or culpability, or practical considerations, like you know, whether or not this is the kind of person they're comfortable sending to prison. And so, in our study, one of the things that we did was had sort of naive raters, or we had a panel of graduate students who didn't know anything about the photographs, they didn't know that they were convicted offenders, you know, that this was a criminal justice sample or anything else. And we just had them fill out kind of a survey based on the person's appearance. And one of the things that we asked was, how dangerous does this person look to you, you know, how culpable or blameworthy and you know, if you had to send them to prison, how able to do time do you think they would be? And what we found was that the assessment of all three of those focal concerns were highly interrelated. So, we combined them into this scale that we call threat perception, you know, that somebody who scores high on dangerousness and blameworthiness and ability to do time, you know, there's some kind of an innate reaction to their pictures, that leads people to judge them as being more threatening.

Jose Sanchez 42:55

So I know, we mentioned before, there's that we try not to get too into the weeds of like methods and analysis. But I do, I am wondering, would graduate students maybe be a little more cognizant of like, I shouldn't mark someone as more dangerous, just because they might be a little scary?

Brian Johnson 43:15

Well, it's possible. I mean, you know, what we asked them for was, so the way that we did this is we flashed pictures in front of them. And we had picture on a screen and we asked them, you know, question, how blameworthiness and well we asked for was their gut reaction? You know, so we said, just, you know, your initial reaction to this picture, how would you score them? I believe, was it a 10? Point? I can't remember if it was a seven point or 10 point scale, that is a fairly refined skill to think. Okay, you know, and so, I guess if what you're saying is true, that graduate students would be more sensitive, you know, to using physical appearance to make these judgments than if anything that probably strengthens our findings, right? Because you would say we'd be less likely to find something

using graduate student raters, if they're less likely right to use physical appearance to rate these things and even using graduate student raters, we still find pretty sizable effects here.

Jose Sanchez 44:05

Right? That's a great point. Okay, so you've touched on this a little bit. And so we mentioned things like physical attractiveness, having a baby face, visible scars, face tattoos, and all these things that can influence judicial decision making. Could you maybe walk us through theoretically as to why each of these might matter? And not? I think some might be a little more. I always hate saying obvious, but are like links might be a little easier to make when you think of like facial tattoos. Like that might make a little more sense to people. But some of these other ones, maybe not as much. So if you walk us through them a little bit.

Brian Johnson 44:44

Yeah, I mean, so I talked a little bit about attractiveness. There's a huge research literature that finds that attractiveness is related to all kinds of life outcomes, lifetime earnings and dating outcomes, the probability of marriage and all of these other kinds of sociological life outcomes in society. And this does go back to this idea of the halo effect, right that when you find somebody attractive, you tend to rate them higher across the board on positive qualities. And this can be everything from kind of the internal thing that are they nice, right? Do you think that they're going to be friendly? Do you think you rate them? You know, there have been studies that looked at warm and cold, you know how warm or cold you think they are in terms of the personality, and attractiveness is positively correlated with all of these other kinds of positive attributes. So, you can imagine a judge at sentencing, you know, doing the same thing without realizing it. Now, let me be clear, I don't think judges are looking at defendants and saying, you know, you're pretty good looking, I'm gonna give you a break, I just think that there is this kind of subconscious process of evaluation, right, when an attractive defendant, they may give them the benefit of the doubt on the margin, right to say like, maybe this person is a little more trustworthy, maybe they're a little more honest, maybe they're less likely to reoffend. And all of that translates into this difference. Baby faced appearance was something we were not going to look at, we weren't that interested in this, until we got into the psychological literature. And again, there's a very large literature on this, that all looks at baby faced appearance. So, what is that? You know, I wish I could show on the podcast, pictures, because we have some great examples of people, this person scored, you know, a seven on baby faced appearance, and you're looking I mean, look like an adult baby, right? But you know, they tend to be, you know, chubby cheeks, and you know, baby characteristics. And people with that kind of facial appearance tend to be associated with childlike traits, things like being naive, you know, weak, honest, etc. So, in the context of sentencing, you can imagine a judge, you know, looking at somebody like that and thinking, well, maybe you know, they weren't guilty, they're less likely to be guilty, or they're less likely to be culpable for their behavior, if they think that they're more naive. The latter two, we just the tattoos and scars. We were not intending to code those either until we started looking at pictures. And we were surprised by how common it was, for people in the sample to have face, you know, visible tattoos on their face or their neck, as well as visible scars. And I guess the reasons for this, you know, are probably self explanatory. This is, you know, these are the population that we're studying here are all people who have been convicted of an offense, many of the people in the sample were repeat offenders who had been in the system more than once, you know, and the tattoo, I think, is a really interesting finding. It's a really strong finding, you know, if I have kids, I'm

single, but if I have kids some day, you know, and I'm faced with, Jose, if I'm your parent that I'm faced with that, I won't care if my kid shaves their head, because that at least the hair will grow back, I will not allow him to get a face tattoo. Because it has a really, really strong effect on outcomes, right? And, you know, maybe that shouldn't be surprising, but I think there are a few reasons for this part of it is, you know, those tattoos may signify things. Maybe it's related to gang membership, right, or other kinds of deviant lifestyles, and judges see those things and they're indicators. Again, I think these are subconscious indicators to judges, you know, but a face or neck tattoo is, you know, it's going to be correlated in their mind, you know, with deviant lifestyles and perhaps with criminal activity, and scars. Now, scars was interesting, we thought that they would be the same, right, that people with scars would also be viewed as more dangerous and more culpable and more likely to go to prison. And actually, the effect for scars was in the opposite direction. And I think that, you know, we struggled without that, well, why wait? If you have a scar, would you be less likely to get a prison sentence? And I think in the end, the answer is, you know, there's a sign of victimization. In many of the pictures where somebody has a visible scar, it's still, you know, we didn't just code scars, we coded things like bandages, was there an injury, of visible physical injury to their face. And so our guess is that, you know, that actually signal victimization, you can imagine two people who are in an assault, right, and one of them, you know, catches, either, you know, a fist or a knife or something in the face, you know, and a judge is faced with that defendant, and they say, oh, you know, you look like you were on the losing end of the battle. So, no, we were surprised by that, but we still found effects for it.

Jose Sanchez 49:03

Okay, so since we can, like, seems like you're just raring to go with it, and even like, touched on it a little bit, let's just get into your results. So, your first research question was whether defendant rays and physical qualities including physical attractiveness, having a baby face appearance, visible scars, and face tattoos are related to subjective perceptions of threatening appearance with a sample of convicted offenders. And so you mentioned that having scars kind of seem to swing in the opposite direction that you maybe thought it would, what that your results suggest for some of these other ones. I'm guessing when we've kind of alluded to some of these, but maybe give us like the explicit findings on some of these.

Brian Johnson 49:49

Yeah, so I think I've alluded to the results for the most part already, but I can briefly recap them are basically in line with predictions we find that both race and appearance significantly predict threat perceptions So, all of those variables, we just talked about the race of the defendant. And also, you know, how attractive baby faced whether there was a visible tattoo or scar. It impacted naive raters assessments of how threatening on defendants were in terms of those focal concerns that we talked about how blameworthy, dangerous, able to serve time in prison, and they were, you know, the second research question, which is kind of related to that asks about actual punishment decisions, you know, do these factors impact the likelihood of a prison sentence in felony cases. And we also find evidence of this, specifically, you know, more attractive defendants have lower odds of having an executed prison sentence. When I say executed prison sentence. What I mean is, the study was done in Minnesota, and under the Minnesota guidelines, one of the discretionary decisions that judges make is, you know, whatever the recommended sentence was, they can either suspend the sentence and the person just goes to probation, or they can execute the sentence and the person goes to prison. And so

we're looking at the likelihood in those cases where the judge has discretion, that they're going to impose an actual prison sentence rather than probation. So, we find that more attractive defendants have lower odds of imprisonment, baby faced appearance is the same, visible tattoos increases the likelihood of prison. And our final models, we don't find that scars are significant, but in the kind of preliminary stages looking up to it, they tend to be negatively related with incarceration.

Jenn Tostlebe 51:25

So then your final research question, I guess, examine this intervening role of subjective perceptions of threat and sentencing. So, it had two parts. First, to examine whether offenders who were perceived to be more threatening in appearance were more likely to be sentenced to prison, which I guess you've already touched on that a little bit where yes, they were more threatening, they were more likely to be sentenced to prison. But then you were really interested in whether perceptions of threat mediated or could explain the association between physical traits and the decision to imprison the offender? Did you find any evidence of this mediation?

Brian Johnson 52:03

So not really, but let me take a step back if I can. So, there's two things going on here, right, we have the physical characteristics of the defendant, like how attractive they are, then we have a summary measure based on these kinds of focal concerns about their threatening appearance that involves you know, how dangerous blameworthy, able to serve time they are, when we look at that kind of index. Based on those focal concerns, we don't find that it's a significant predictor of prison sentences, we do find that the individual level items, things like attractiveness, and baby faced appearance matter. But the reason for all of this, I think, in the end, and I think this is your next question, so I may be skipping ahead. But it's because threatening appearance is very closely tied with prior criminal history of the defendant. This is a really interesting finding that kind of gets lost in the paper, if we don't control for criminal history, so if we include all the other measures in the model, and then we don't include a control for how serious your prior criminal record is, threatening appearance has a very strong effect on incarceration, when we include a measure for your prior record, it disappears. And the reason is, because there's a strong positive correlation between threatening appearance and criminal history. And so defendants who have more extensive involvement in the criminal justice system, in terms of you know, more prior arrests, more prior incarcerations, et cetera, they tend to be scored significantly higher in terms of their threatening appearance. That's a really interesting finding, because it's not what we expected. And, you know, it raises a lot of questions. Why would that be? Right? So, you know, it's a long winded answer to your question. But, you know, we don't find a direct effect, but I think it's because it's confounded with criminal history.

Jenn Tostlebe 53:47

Yeah. And it's very interesting.

Jose Sanchez 53:50

Given how fundamental the process of sentencing is in our criminal justice system. What are the implications that we can take away from this paper for research and policy and practice?

Brian Johnson 54:03

Yeah, that's a huge question, difficult. But essentially, I think for research purposes, you know, this in collaboration with the partner paper that looked at skin tone, suggests to me that, you know, very simple categorical measures of race and ethnicity, which we almost uniformly use in studies of criminal justice outcomes, is probably not the best way to go. Now, obviously, you know, there are data limitations, and there are reasons people do this. And I've done this in other research myself, but we really should be working, I think, to collect better measures that include more nuance than just, you know, whatever a police officer checks on an arrest report. You know, this includes more nuanced measures of race and ethnicity that might be self reported by defendants themselves. One of the things I can tell you that we found that was interesting that didn't come up was that when we asked student raters to grade we also asked them to score which race or ethnicity the person was and one, we found a fair bit of disagreement among coders, we had multiple coders, they didn't always agree, you know that somebody was African American or Hispanic or white, or Asian. And so, you know, perceptual race, the way that people see somebody and how they view them varies across perceivers. And the other thing that was interesting, is it often different from the official record. So, you know, the way that somebody has scored in their police report as being black or being Latino, or white, or Asian or Native American, when we have independent people view their pictures, say what race are they, they oftentimes don't agree with how they're coded on the official record. So, you know, using the official measures of race really captured something a little bit different than I think self reported race or perceptual race. And, you know, there isn't a lot of work looking at the nuances of the differences in the way that we actually capture this very fundamental variable for so much of what we do for research on the criminal legal system. So, I think for research, that's probably you know, the number one application is thinking more deeply about what it means to have measures of race and ethnicity, how we should measure these, how we should capture them, you know, in looking at differences in the possible measures and their implications for our conclusions. In terms of policy and practice, you know, it's hard to go very far with this. I mean, I suppose, first thing is, I think this needs to be replicated. There are not a lot of studies. In fact, I don't know of any other studies that look at physical appearance in the context of the criminal courts. So, before I would be comfortable saying anything about, you know, policy changes, or you know, what we should do in terms of implications, I think this kind of work has to be replicated with other data and other jurisdictions. If we do find evidence right across time and place, that physical appearance, and things like attractiveness are consistently related to punishment outcomes, then there are some, I think, interesting policy implications. There's no reason I don't think legal reason, that you have to have a defendant paraded in front of a judge at sentencing. You know, other studies have been done, for instance, taking away names from criminal court files, because, you know, some names have racial implications, right? Depending on whether they're legitimate or not, is another question. But you know, certain names will trigger certain kinds of assumptions about a person's race and ethnicity. And there is some research showing that just changing the name on something like an employment application can affect the likelihood of a call back. You know, so it does suggest, at some point down the road, if these findings are replicated, maybe we need a truly blind system of justice, judgment, or of justice, in which you know, the defendant can either participate remotely in a hearing where they don't have to have the video on right with technological changes. This is becoming a reality. More and more courts are using things like zoom for preliminary hearings and court related hearings. So maybe it's something like that, right? Where doesn't have to physically see the person. But I think that's a long way down the road. We first we need to replicate these findings in other jurisdictions.

Jose Sanchez 57:55

Yeah, absolutely. It's super interesting, especially when you brought up like the zoom with the camera off. Like, I know that I don't know when someone will be able to study that. Because like, I think like, just think about it, I would hypothesize that having a camera off will probably not be looked at favorably.

Brian Johnson 58:14

I can tell you. I don't like it when students turn their camera off. Yeah, that's kind of what came to mind. Sleeping or they're playing with your cat or something. You know, they're not paying attention.

Jenn Tostlebe 58:24

Yeah.

Jose Sanchez 58:25

Yeah. So But anyways, like you said, like, that's probably, we're still probably a ways away from seeing that work done. But anyways, those are all the main questions that we have for you. Is there anything else you'd like to add? Anything that we've been get to touch on?

Brian Johnson 58:38

No, I think you guys did a really nice job. And I think this is fabulous that you're hosting this podcast on your own initiative. I really think that this is a great initiative. And I'm looking forward to seeing you know, who else you have on the shows down the road and listening to the voice I think has become very interesting podcast. So, thanks for having me on.

Jenn Tostlebe 58:56

Yeah, thank you.

Jose Sanchez 58:58

Thank you for coming on. Is there anything you would like to plug anything coming out in the near future that we should be on the lookout for

Brian Johnson 59:06

No. I appreciate it. But I yeah, I don't know. You know...

Jenn Tostlebe 59:11

Are you gonna be at ASC?

Brian Johnson 59:13

I will be at ASC. Yes. So we can talk them and you guys can track me down. You know, we'll catch up.

Jose Sanchez 59:19

Cool. Perfect. And where can people find you? Are you on the Twitterverse? Or maybe just email?

Brian Johnson 59:26

Yeah, I'm lucky that I have an email that's about as logically advanced as I am at this age. Yeah, email, people can feel free to send questions.

Jose Sanchez 59:42

Well, thank you again. We enjoyed talking with you. This was wonderful. Yeah.

Brian Johnson 59:47

Well, thanks so much.

Jenn Tostlebe 59:48

Appreciate. I feel like we're gonna have to have you back because there's just more questions now. But thank you for your time. And it was a great chat. Yeah. Great talking with you. Hey, thanks for listening.

Jose Sanchez 1:00:00

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Jenn Tostlebe 1:00:09

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Jose Sanchez 1:00:21

or email us at thecrimacademy@gmail.com. Til next time!