

**CROSSING RACIAL BOUNDARIES:
A CLOSER LOOK AT THE ROOTS OF RACIAL BIAS IN
CAPITAL SENTENCING WHEN THE DEFENDANT IS
BLACK AND THE VICTIM IS WHITE**

*William J. Bowers**
*Marla Sandys***
*Thomas W. Brewer****

INTRODUCTION

In 1976, the United States Supreme Court assumed in *Gregg v. Georgia* and companion cases¹ that the reformed capital statutes of Georgia, Florida, and Texas would remedy the ills, including the risk of racial bias in sentencing that made the application of the death penalty unconstitutional according to *Furman v. Georgia*.² Yet studies of sentencing outcomes, notably research that expressly focused on the states whose statutes the *Gregg* Court endorsed, revealed that the pernicious influence of race in capital sentencing lingered on, most conspicuously so, in the racial boundary crossing black-defendant/white-victim (B/W) cases.³

Consistent with the mounting evidence of racial bias, in 1986 the U.S. Supreme Court acknowledged in *Turner v. Murray*⁴ the danger

* Northeastern University. We would like to express our appreciation to Michael E. Antonio, Associate Research Scientist, College of Criminal Justice, Northeastern University, for his assistance in the preparation of the tables included in this Article. This research was supported by a grant from the Law and Social Sciences Program of the National Science Foundation, SES-9013252.

** Indiana University

*** Kent State University

1. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

2. 408 U.S. 238 (1972).

3. See WILLIAM J. BOWERS & GLENN L. PIERCE, *ARBITRARINESS AND DISCRIMINATION UNDER POST-FURMAN CAPITAL STATUTES, CRIME AND DELINQUENCY* (1980) (demonstrating racial disparities in capital sentencing under the *Gregg*-approved statutes of Georgia, Florida, and Texas, as well as for Ohio's statute). DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990) is the most rigorous demonstration of the influence of race on sentencing outcomes in black-defendant/white-victim capital cases. See also SAMUEL R. GROSS & ROBERT MAURO, *DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* (1990).

4. 476 U.S. 28 (1986).

that both conscious and unconscious racial sentiments are likely to influence jurors' sentencing decisions in capital cases, and it identified the boundary-crossing black-defendant/white-victim cases as the ones in which jurors' racial attitudes are especially apt to confound the sentencing decision. The Court reasoned:

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved [such] aggravating factors Such a juror might also be less favorably inclined toward [a] petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.⁵

The Court emphasized that the sentencing determination in such cases is especially vulnerable to the influence of racial attitudes and prejudices because

in a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves [W]e are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact-finding [A]s we see it, the risk of racial bias at sentencing hearings is of an entirely different order, because the decisions that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.⁶

The remedy, according to *Turner*, was to be found in jury selection. The Court stated, "We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."⁷

Despite its recognition that the capital sentencing decision was especially vulnerable to biasing racial influences in black-defendant/white-victim cases, the Court denied relief a year later in the B/W case of *McCleskey v. Kemp*,⁸ in which statistical confirmation of the risk of racial bias in such cases was unrivaled.⁹ *McCleskey's* death sentence was a product of the same evidently flawed system that sentenced Tur-

5. *Id.* at 35.

6. *Id.* at 33-34, 36, 38.

7. *Id.* at 37.

8. 478 U.S. 282 (1987).

9. BALDUS ET AL., *supra* note 3, at 407. The U.S. Supreme Court conceded the validity of Baldus's statistical findings in *McCleskey*. 478 U.S. at 282 n.7.

ner to death. The crimes were virtually contemporaneous.¹⁰ Yet the Court denied, albeit narrowly (5-4), that McCleskey's risk was sufficient for relief.¹¹ It was not the risk, however, but the remedies, that distinguished these two cases. The Court was willing to require voir dire questioning but unwilling to abandon the death penalty in such cases. Ironically, the *McCleskey* Court cited its *Turner* ruling to show that it had taken the needed steps to counter racial bias in black-defendant/white-victim capital cases,¹² McCleskey's fate notwithstanding.

Has the legacy of racism in black-defendant/white-victim cases been purged? Has the Court's ruling in *Turner* made the difference? Is voir dire questioning about race in B/W cases the answer? We address these questions with the data of the Capital Jury Project.

II. THE CAPITAL JURY PROJECT

The Capital Jury Project (CJP) has collected a wealth of information about jury decision making from in-depth interviews with jurors who served on capital trials around the nation. States were chosen for the study to represent the principal variations in capital sentencing statutes.¹³ Juror interviews were conducted in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

10. According to the court opinions in these cases, *Turner's* crime was committed on July 12, 1978, and *McCleskey's* crime was committed on May 13, 1978. *Turner*, 476 U.S. at 28-29; *McCleskey v. State*, 263 S.E.2d 146, 147 (1979).

11. *McCleskey*, 478 U.S. at 308-09. After acknowledging that there is "some risk of racial prejudice influencing a jury's decision in a criminal case," the Court cited *Turner* as indicating "at what point that risk becomes constitutionally unacceptable." *Id.* (citing *Turner*, 476 U.S. at 36 n.8). It then found that *McCleskey* failed to meet that critical level of risk: "*McCleskey* asks us to accept the likelihood allegedly shown by the Baldus study as the constitutional measure of an unacceptable risk of racial prejudice influencing capital sentencing decisions. This we decline to do." *Id.*

12. In *McCleskey*, the Court explained: "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *Id.* The Court then listed protections, including change of venue "when there is widespread bias in the community," prohibition against racially biased prosecutorial jury selection and arguments before the jury, and questioning jurors as to bias "when there is a significant likelihood that racial bias may influence a jury." *Id.* The Court concluded, with respect to capital cases, "Finally, in a capital sentencing hearing, a defendant convicted of an interracial murder is entitled to such questioning without regard to the circumstances of the particular case." *Id.* (citing *Turner*, 476 U.S. at 28).

13. The sample includes states with "threshold," "balancing," and "directed" statutory guidelines for sentencing discretion. It also includes states with "traditional" and "narrowing" definitions of capital murder and states in which the jury decision is binding and those in which the judge can override the jury recommendation. Further details about sampling can be found in William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 IND. L.J. 1043, 1077-79 (1995).

Within each state, researchers selected twenty to thirty capital trials, roughly half of which resulted in the death penalty and half that resulted in a life sentence (or whatever alternative term of imprisonment applied under state law). Jurors were chosen randomly from those cases in an attempt to interview four jurors per trial.¹⁴ The questionnaire used for these in-depth interviews required an average of three and one-half hours to administer. It probed issues, such as what assumptions jurors made when deciding the penalty, how and when they made their decisions, what factors they considered, and their understanding of the jury instructions. Interviews were completed with 1,198 jurors from 353 trials in fourteen states. Additional information about CJP research design, methodology, and findings can be found on the CJP website at www.cjp.neu.edu.¹⁵

These interviews make it possible to examine the role of jurors' race—both the race of the individual juror and the racial composition of the jury—in the capital sentencing decision. They also make it possible to see how the influence of the race of the jury and jurors may operate in black-defendant/white-victim cases. The large number of cases from which jurors have been interviewed provides a sizable sample of mixed race juries, and, the interviewing target of four jurors per case yields enough jurors of both races to permit reliable comparisons between black and white jurors who served on the same B/W cases and, hence, were exposed to exactly the same evidence and arguments. Comparing the thinking and decision making of black and white jurors from the same black-defendant/white-victim cases ensures that observed differences by race of juror will not be due to differences in the crimes, defendants, or victims involved.

III. EARLIER RACE-RELATED FINDINGS

Racial bias in capital sentencing was first examined extensively with the CJP data in *Death Sentencing in Black and White*, presented at a conference on Race Crime and the Constitution held by the *University of Pennsylvania Journal of Constitutional Law* in 2001.¹⁶ In that ear-

14. Fewer than four jurors were interviewed in some cases owing to difficulties locating jurors or obtaining their consent, and more than four jurors were interviewed in some cases to get additional information about issues raised in earlier interviews or to more nearly equalize the number of interviews with jurors from life and death cases within a state.

15. For a complete list of publications reporting CJP findings, which is periodically updated and includes the full text of some articles, see <http://www.cjp.neu.edu> (last visited Apr. 4, 2004). The most detailed discussion of the research methodology can be found in Bowers, *supra* note 13, at 1077-79.

16. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).

lier research with these data, we found conspicuous evidence of racial influence in sentencing in the critical black-defendant/white-victim cases in which *Turner* warned of the dangers of both conscious and unconscious racism in jurors' decision making.

With respect to jury composition, we found two distinct and substantial patterns of racial influence in the black-defendant/white-victim cases: "white male dominance" and "black male presence effects." First, the dominance of white males on the jury was strongly associated with the imposition of a death sentence. Death sentences were more than twice as common in cases with five or more, as compared to those with four or fewer, white male jurors. Secondly, the presence of a black male on the jury was strongly associated with the imposition of a life sentence. Death sentences were far less common in cases with one or more black male jurors, as compared to those with no black male jurors.¹⁷ These striking race-linked differences associated with jury composition are shown in Table 1.¹⁸

TABLE 1. PERCENTAGE OF DEATH SENTENCES IMPOSED IN 74 BLACK-DEFENDANT/WHITE-VICTIM CAPITAL TRIALS SEPARATELY FOR NUMBER OF WHITE MALE, WHITE FEMALE, BLACK MALE, AND BLACK FEMALE JURORS

WM ^a #	Death %	WF #	Death %	BM #	Death %	BF #	Death %
0-3	35.3	0-3	54.2	0	71.9	0	55.5
4	23.1	4	50.0	1	42.9	1	61.9
5	63.2	5	61.5	2	36.4	2	60.0
6+	78.3	6+	52	3+	— ^b	3+	35.7

^a Abbreviations: W white, B black, M male, F female.

^b Percent omitted as unreliable when the number of trials drops below 10.

Furthermore, the CJP data show that in the black defendant/white victim cases, black and white jurors became polarized on punishment—whites for death and blacks for life—over the course of the trial. Even before the punishment stage of the trial, black and white jurors' punishment stands diverged more in these interracial than in intraracial cases. As the trial proceeded, this difference became considerably more pronounced. At the guilt phase, whites were three times more likely than blacks to take a pro-death stand on punishment (42.3% versus 14.7%). After sentencing instructions, they were four times more likely to do so (58.5% versus 15.2%). By the first vote on

17. *Id.* at 192 tbl. 1.

18. Table adapted from Bowers et al., *supra* note 16.

punishment, the differential between white and black jurors reached more than seven to one (67.3% versus 9.1%).¹⁹

This progressive divergence of black and white jurors' stands on punishment during the trial raises the question of what they may have seen differently in these interracial cases and how such differences may have become exacerbated over the course of the trial. The CJP data reveal differences of perspective between black and white jurors in three kinds of punishment related considerations: lingering doubt about the defendant's guilt, impressions of the defendant's remorsefulness, and perceptions of the defendant's future dangerousness.²⁰

First, black jurors were far more likely than their white counterparts to have lingering doubts about the defendant's guilt. They were generally less willing to believe that the capital sentencing process is error free; they were more concerned than white jurors about the possibility that the jury made mistakes in reaching the punishment decision. These doubts arose during the guilt stage of the trial and were manifest in jurors' thinking about the defendant's responsibility and motivation for the crime. This pattern is consistent with other studies showing that blacks are far less likely than whites to trust the criminal justice system.²¹ Given the sordid history in the United States of all-white male juries, sheriff's posies, and lynchings associated with black-on-white killings, it is not surprising to find that black jurors' mistrust is pronounced in interracial B/W cases.

Second, black jurors were much more likely than their white counterparts in these cases to see the defendant as remorseful. Feelings that the defendant deserved mercy also divided black and white jurors in these cases. It may be that black jurors are more sensitive to subtle

19. *Id.* at 199 tbl. 2.

20. See *id.* at 205-21 tbls. 3-5 for a detailed presentation of this evidence.

21. Concerning African Americans' mistrust of the police, see W.S. Wilson Huang & Michael S. Vaughn, *Support and Confidence: Public Attitudes Toward the Police*, in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 31-33 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (citing a 1993 USA Today/CNN/Gallup poll showing that 74% of whites, but only 48% of blacks, rated their attitude toward the police as good); J.R. Lasley, *The Impact of the Rodney King Incident on Citizen Attitudes Toward Police*, 3 POLICING & SOC'Y 245 (1994) (finding that African Americans' perception of police fairness after the beating of Rodney King decreased much more than did that of other racial groups); P.A.J. Waddington & Quentin Braddock, "Guardians" or "Bullies"? *Perceptions of the Police Amongst Adolescent Black, White, and Asian Boys*, 2 POLICING & SOC'Y 31 (1991). Concerning African Americans' mistrust of the courts, see, for example, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 124 (1996); NATIONAL CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 22 (1999), available at http://www.ncsconline.org/wcpublishations/Res_AmPTC_PublicViewsCrtsPub.pdf (last visited Feb. 5, 2004).

indications of black defendants' sorrow or remorse²² and believing that the defendant is sorry may, in turn, encourage black jurors to feel that the defendant deserves mercy. By contrast, if white jurors do not perceive remorse on the part of black defendants, they might be less willing to grant mercy.

Third, white jurors were more likely than their black counterparts to see the defendant as dangerous in the interracial cases. Both black and white jurors in these cases reported that a great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness. But white jurors believed that, in the absence of a death sentence, such defendants will usually be back on the streets far sooner than do black jurors. This may, in part, explain why they were especially likely to stress the defendant's dangerousness as a reason for the death penalty. For their part, black jurors were less willing to concede that the defendant was dangerous or to believe that such offenders soon return to society if not given the death penalty. They were also conspicuous in rejecting the defendant's possible dangerousness in deciding to vote for life or death. Perhaps their reticence was a reaction to pressure they felt from white jurors to make dangerousness the rationale for a final death verdict.

What is more, these differences of perspective on aggravating and mitigating considerations between black and white jurors were most pronounced between the males of each race.²³ Thus, black males were the most likely, and white males were the least likely, to have lingering doubt about the defendant's guilt, chiefly about the extent of the defendant's involvement or responsibility for the crime. Again, black males were the most likely, and white males the least likely, to see the defendant as remorseful and to identify with the defendant's situation or that of his family. And, on the flip side, white males were the most likely, and black males the least likely, to see the defendant as dangerous and to believe that he would be released from prison soon if not given the death penalty. No doubt these differences of perspective between the males of the two races contribute in various ways to the observed differences in sentencing outcomes by jury racial composition—to the "white male dominance" and "black male presence" effects shown in Table 1.

22. According to Scott Sundby, remorse is more broadly interpreted by jurors to encompass acknowledgment of some degree of responsibility for the offense. See Scott Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

23. Bowers et al., *supra* note 16, at 233 tbl. 7.

These findings call for a better understanding of the role of jurors' race and jury's racial composition in racial boundary-crossing capital cases. More particularly, this research raises two related questions: (1) how does both the race and gender of individual jurors, especially black and white male jurors, contribute to the divergent perspectives they bring or develop in response to the same evidence and arguments at trial; and (2) how does the racial composition of the jury, especially the numbers of black and white males on the jury, influence the way in which these perspectives play out in jury deliberations and decision making? The challenge of answering these questions has led us to undertake this further examination of the available CJP data for a closer look at race-linked perceptions and perspectives in black-defendant/white-victim cases with mixed-race juries.²⁴ The findings of this further inquiry recommend an alternative to jury selection, as prescribed by *Turner*, if we are to continue using the death penalty in interracial cases.

IV. A CLOSER LOOK AT RACE-LINKED PERCEPTIONS AND PERSPECTIVES

The analysis that follows is divided into two sections. In the first section, we examine jurors' responses to structured interview questions to identify differences in jurors' perspectives on the crime and the defendant and to assess their receptivity to evidence and arguments of aggravation and mitigation. Our purpose is to see how the race-linked differences already uncovered come about, in order to understand their roots or underpinnings. In the second section, we draw upon respondents' narrative accounts of their experiences as capital jurors to elucidate the process of jury deliberations and decision making and to see how the dominance of white males and the presence of black males influence the process.

A. *Race- and Gender-Linked Perspectives: Structured Questions*

We now turn to how black and white male and female jurors who served on B/W cases differ in the ways they see the same crime and the same defendant and to how their receptivity to the same aggravating and mitigating considerations may differ. For this purpose, we compare the responses of white male (WM), white female (WF), black male (BM), and black female (BF) jurors from the twenty-five

24. This challenge has also led to an extension of the CJP that will focus exclusively on capital cases with mixed-race juries in which we are able to interview jurors of both races. The findings of this new research, however, are still several years in the offing.

black-defendant/white-victim cases in which we interviewed both black and white jurors. Subdividing these jurors by race and gender leaves us with relatively small numbers of jurors in each race/gender category: white males (WM=30), white females (WF=25), black males (BM=15), and black females (BF=19).²⁵

The small numbers of jurors in the respective race/gender categories from these twenty-five black-defendant/white-victim cases means that only quite sizable differences will be statistically reliable indications of true differences in the broader population of capital jurors of different races and genders who served on black-defendant/white-victim cases. Accordingly, we have employed a heuristic "20% rule" in selecting statistical differences for presentation; that is, a percentage difference between blacks and whites must reach twenty percentage points for the difference to be considered. The 20% rule has the following three specific applications:

1. Overall race difference: Both males and females of one race are above or below their counterparts of the other race by twenty percentage points.
2. Conditional race difference: A difference between blacks and whites of one gender exceeds a difference between blacks and whites of the other gender by twenty percentage points.
3. Specific race difference: A given race/gender category is twenty percentage points above or below each of the three other race/gender categories.

Differences that meet at least one of these three criteria appear in Tables 2 through 4 below,²⁶ and each is tested for statistical significance by a procedure appropriate to the type of difference.²⁷

25. The numbers of jurors on which percentages are based in the statistical tabulations that follow generally fall below these figures, owing to the failure of some jurors to respond to all questions.

26. The overall, conditional, and specific differences are not mutually exclusive. Thus, in Table 3, two of the conditional racial differences also qualify as race/gender-specific differences.

27. The test of statistical significance is run with dichotomous versions of the racial difference at issue and the criterion variable on which it is being compared. For the test of an overall racial difference, male and female jurors of each race are grouped; the comparison is between all of the white and all of the black jurors; the tested difference is identified as WJ/BJ in the tables. For conditional racial differences, blacks and whites of the identified gender are compared and those of the other gender are treated as missing; the tested difference is either WMJ/BMJ or WFJ/BFJ. For race/gender-specific differences, the jurors of a given race and gender are compared against jurors in the other three such categories; the four alternatives are represented as WMJ/O, WFJ/O, BMJ/O, or BFJ/O (in which the "O" stands for all other jurors). The criterion (dependent) variables are dichotomized at the point that maximizes the percentage difference between black and white jurors in Tables 2 through 4. This standardizes the comparisons of variables and economizes the presentation of statistical data. The <.10, <.05, and <.01 levels of statistical significance are indicated in Tables 2 through 5.

1. *The Crime: Characterizations*

Near the beginning of the CJP interview, jurors were asked to describe the crime to the interviewer so that he or she could "understand what happened and why." This open-ended query was then followed by a question that asked jurors how well various words or phrases described the killing. They were given four response options: "very well," "fairly well," "not too well," and "not at all." Differences were most pronounced in the percentage who said the words or phrases described the defendant "very well." Black and white jurors from the same cases differed according to the three-fold 20% rule on five of the twelve characterizations presented to them. These five characterizations appear in Table 2.

TABLE 2. PERCENTAGE OF JURORS SAYING VARIOUS WORDS OR PHRASES DESCRIBED THE CRIME "VERY WELL" BY JURORS' RACE AND GENDER^a IN BLACK-DEFENDANT/WHITE-VICTIM CASES WITH INTERVIEWS FROM JURORS OF BOTH RACES

	White Males	White Females	Black Males	Black Females	Tested Difference ^b
OVERALL RACIAL DIFFERENCES					
Victim made to suffer	46.7	52.0	20.0	31.6	WJ/BJ **
RACE/GENDER SPECIFIC DIFFERENCES					
Vicious	90.0	64.0	64.3	63.2	WMJ/O **
Repulsive	66.7	92.0	60.0	47.4	WFJ/O **
Cold-blooded	75.9	80.0	35.7	78.9	BMJ/O **
Depraved	53.3	58.3	42.9	21.1	BFJ/O **

* p <.10; ** p <.05; *** p <.01

^a Percentages are based on numbers of jurors within the following ranges: WM=29-30; WF=24-25; BM=14-15; BF=19.

^b Abbreviations: W white, B black, M male, F female, J jurors, O all other jurors / compared to.

One of these crime characterizations—"the victim was made to suffer"—distinguished between black and white jurors of both genders in these B/W cases by at least twenty percentage points, and tested significant at the p < .05 level. Specifically, white males and females were more likely than their black counterparts to say that "the victim was made to suffer" described the crime "very well." Note that the

Given that the sampling of jurors was clustered by trial, a traditional test of statistical independence such as Chi Square would not be appropriate. However, the STATA 8.0 software package allows the user to calculate an F statistic adjusted for multilevel and stratified data. The p-value associated with this F statistic can be interpreted in the same way as the p-value for the Chi Square statistic (See StataCorp. 2003. Stata Statistical Software: Release 8.0. College Station, TX: Stata Corporation, Stata Survey Data: Reference Manual Release 8.0, pg. 73) The probability levels reported in Tables 2-4 have been computed with an adjustment for the clustering of jurors by trial.

use of the construction "was made to" rather than the simple past tense of the verb "suffer" implies that the suffering was more than incidental to the crime, that the defendant willfully or intentionally inflicted or imposed the suffering. The greater recourse of white than of black jurors to this description of the same black on white crimes implies that white jurors of both genders see these crimes as more grievous or agonizing for the white victim owing to the deliberate actions of the black defendant than do black jurors who served on the same juries.

The other four instances in which we find sizable and statistically significant race-linked differences were each distinctive to a different race/gender category. More often than others, white males saw the crime as "vicious," and white females felt it was "repulsive" (by twenty-six and twenty-five points, respectively). The belief that the crime was vicious implies a malicious or malevolent motivation or a cruel or brutal method of killing (or both); they are both obviously severe indictments of the offender. The repulsive appellation distinctive to white females describes a visceral response to the crime. This is more the emotional impact of the crime on the observer, or in this case the juror, than a characterization of the crime per se. It seems likely that seeing the crime as vicious disposes the juror to think death is the appropriate punishment and that feeling it was repulsive provides emotional support for such a conclusion.

By contrast, compared to the other groups, black males resist the notion that the killing was cold-blooded and black females the inference that the crime was depraved (by forty and twenty-two points, respectively). That is to say, the characterizations that distinguish black males and black females, respectively, from the other categories of jurors are both respects in which the black jurors in question fall below the other three groups in assigning this attribution. Cold-blooded conveys a harsh, calculating motivation and a depraved, degenerate, perverted character of the perpetrator. Black jurors are less likely to use these pejorative attributions.

These four race/gender-specific black/white differences reflect complementary disparities in the perceived heinousness of these interracial crimes. The crimes are more vicious for white men and less cold-blooded for black men; this compounds the difference in perceived aggravation between the men of the two races. They are more repulsive to the white women and less depraved to the black women; again the difference in aggravation is cumulative. These complementary differences, together with the differences in "victim made to suffer" for whites and blacks of both genders, leave little doubt that white jurors

see these black defendant/white victim killings as more heinous or aggravated than do their black counterparts in the very same cases.

Needless to say, these characterizations of the crime harbor inferences about the defendant. That is, whether the crime was vicious or cold-blooded, depraved or repulsive, and whether the victim was made to suffer, convey impressions of the defendant, his character, and motives. We should not be surprised, therefore, to see differences by race in characterizations of the defendant as well.

2. *The Defendant: Characterizations*

After asking about the crime, the interview turned to questions about the defendant. The first of these listed twenty-one words or phrases and asked jurors how well each describe the defendant. Race-linked differences in terms of the three-fold 20% rule appeared for eight of these twenty-one words or phrases; seven were differences in the percentage saying "very well"; and one (at the bottom of the table) in the percentage saying "not at all." There are no overall racial differences that hold for both male and female jurors by as much as twenty points. There are three conditional differences that exceed twenty percentage points for one but not the other gender. In five instances, a single specific race/gender category (most often black males) differs from the other three by at least twenty points. The seven characterizations that describe the defendant "very well" and the one that describes him "not at all" appear in Table 3.

All three of the conditional racial differences show a sizable, thirty to forty percentage point, difference between blacks and whites of one gender but only a difference of twelve or fewer points for the other in these B/W cases. Two of these conditional differences that hold for males have been reported earlier.²⁸ Thus, in predicted dangerousness, white men most often and black men least often, said the defendant was "dangerous to other people," and in perceived remorse, black men most often and white men least often said the defendant was "sorry for what he did." The third conditional racial difference not previously observed holds for women but not men. When the issue is mental well-being; black women were most and white women least likely to say the defendant was "emotionally unstable or disturbed." Hence, this further exploration of the data adds the characterization "emotionally unstable or disturbed" to perceived remorse

28. See Bowers et al., *supra* note 16, at 233 tbl. 7. These two characterizations are "dangerous to other people" and "sorry for what he did."

TABLE 3. PERCENTAGE OF JURORS SAYING VARIOUS WORDS OR PHRASES DESCRIBED THE DEFENDANT "VERY WELL" OR "NOT AT ALL" BY JURORS' RACE AND GENDER^a FOR BLACK-DEFENDANT/WHITE-VICTIM CASES WITH INTERVIEWS FROM JURORS OF BOTH RACES

	White Males	White Females	Black Males	Black Females	Tested Difference ^b
CONDITIONAL DIFFERENCES					
Dangerous to other people	63.3	52.0	26.7	42.1	WMJ/BMJ **
Sorry for what he did	7.4	20.0	46.7	31.6	WMJ/BMJ **
Emotionally unstable or disturbed	23.3	12.0	20.0	42.1	WFJ/BFJ *
RACE/GENDER SPECIFIC DIFFERENCES					
A good person who got off on the wrong foot	10.7	8.0	53.3	10.5	BMJ/O ***
Someone who loved his own family	0.0	10.0	50.0	12.5	BMJ/O ***
An occasional drug abuser	11.5	18.2	38.5	16.7	BMJ/O *
Doesn't know his place in society	35.7	29.2	40.0	5.9	BFJ/O **
Doesn't know right from wrong (% "not at all")	40.0	68.0	35.7	44.4	WFJ/O **
	60	66.7	32.0	57.9	

* $p < .10$; ** $p < .05$; *** $p < .01$

^a Percentages are based on numbers of jurors within the following ranges: WM=26-30; WF=20-25; BM=12-15; BF=16.

^b Abbreviations: W white, B black, M male, F female, J jurors, O all other jurors / compared to.

and predicted dangerousness, as a sizable race-linked difference in these cases, though one confined to females.

Why do these strong aggravating and mitigating factors divide or polarize black and white jurors of one gender but not the other in B/W cases? Perhaps these are domains in which men or women are generally granted primacy. And it may be that the racial polarization of males or females is partly owing to their tendency to assert that primacy in jury deliberations to the point of becoming adversaries on these gender primacy issues. In other words, these may be factors that tend to pit blacks and whites of one gender against each other—that make them take sides or feel they are at odds in these cases. And there may be a parallel among the crime characterizations shown in

Table 2. Thus, an instrumental continuum that encompasses both vicious and cold-blooded would place white and black males at opposite ends and leave the females of both races in between. Likewise, an expressive continuum including both depraved and repulsive would separate white and black women and leave the men of both races in between.

Of the five defendant characterizations distinctive to jurors in one of the race/gender categories, three are specific to black males and one each to black and to white females. Black males were especially apt to see redeeming qualities in the defendant. They were substantially and significantly more likely than others to say that he was "a good person who got off on the wrong foot" and "someone who loved his own family" (above any other race/gender category by forty-three and thirty-nine points, respectively). That is, black males see basic virtues or redemptive values, such as "good person" and "loved family," when others do not. They were also more willing than others by a smaller margin (of twenty points) to concede the defendant's adverse lifestyle of being "an occasional drug abuser," consistent with having "got off on the wrong foot."

Women jurors were distinctive in their reactions to two phrases that might be regarded as clichés. Black females were less likely than other jurors to see the defendant as "not knowing his place in society." This language is toxic in that it was used as opprobrium for blacks under Jim Crow. The virtually blanket rejection of this characterization of the defendant among black females suggests that they are especially sensitive and resistant to such race-linked labeling or stereotyping and the punitiveness it implies. White females were more likely than others to deny that the defendant does not "know right from wrong" (the percentages pertain to the "not at all" response). Not knowing right from wrong may be seen by them as an "excuse" that could exempt the defendant from death as punishment, an excuse they are especially unwilling to grant the black defendant whose victim is white.

The absence of crime or defendant characterizations that significantly distinguish between blacks and whites of both genders is conspicuous. In fact, there is only one such factor among the five in Table 2 and none among the eight in Table 3. By contrast, crime and defendant characterizations that distinguish black male jurors from others are most common. In particular, the fundamentally redemptive qualities of being a good person who got off on the wrong foot and being someone who loved his family (in Table 3) are characterizations that distinguish black males by roughly forty percentage points from the

nearest other race/gender categories. Are these very sizable differences in defendant characterizations between black male and other jurors reflected in other things jurors thought, felt, and observed during the trial?

3. *The Defendant and His Family: Observations, Thoughts, Feelings*

The questioning in the CJP interview moved from jurors' characterizations of the defendant to their observations of the defendant during the trial and the thoughts and feelings they had about the defendant and about his family. Jurors' responses to this series of questions tend to provide a personalized view of the defendant in the trial context. In all, these questions included some twenty-five statements to which jurors could give a "yes" or "no" response. Black male jurors figure prominently in all ten of the factors that show racial differences. Two of the ten factors display racial differences that hold for both male and female jurors; the other eight differences are all distinctive to black males. The ten statements to which jurors' responses differed by race of juror appear in Table 4.

The largest overall difference we have seen so far between black and white jurors in these B/W cases appears in Table 4. It is the much greater tendency of blacks than whites of both genders to say they "found the defendant likable as a person." The differences are forty-two points between black and white males and thirty-three points between black and white females. This much greater tendency of blacks of both genders to see the defendant as a likable person surely discourages the dehumanization of the defendant thought to be crucial for a death verdict.²⁹ This marked tendency to see the defendant as a likable person among black male and female jurors, together with the lesser but consistent tendency of white male and female jurors to believe that the defendant made the victim suffer (shown in Table 2), present a fundamentally contrasting picture of the crime and the defendant between black and white jurors irrespective of gender. The other factor in Table 4 that divides black and white jurors of both genders is the more common impression among whites that the defendant "appeared bored" during the trial. Evidently, the white jurors were more apt to find the black defendant's courtroom demeanor or behavior inappropriate for someone whose life was at stake.

29. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse To Condemn To Death*, 49 STAN. L. REV. 1447, 1451 (1997).

TABLE 4. PERCENTAGE OF JURORS AFFIRMING STATEMENTS ABOUT THE DEFENDANT AND HIS FAMILY BY JURORS' RACE AND GENDER^a FOR BLACK-DEFENDANT/WHITE-VICTIM CASES IN WHICH BOTH BLACK AND WHITE JURORS WERE INTERVIEWED

	White Males	White Females	Black Males	Black Females	Tested Difference ^b
OVERALL RACIAL DIFFERENCES					
Found the defendant likable as a person	22.2	9.5	64.3	42.1	WJ/BJ **
At trial the defendant appeared bored	66.7	62.5	33.3	42.1	WJ/BJ **
RACE/GENDER SPECIFIC DIFFERENCES					
At trial defendant appeared sorry	10.0	20.8	73.3	36.8	BMJ/O **
Imagined yourself in defendant's family's situation	30.0	48.0	80.0	47.4	BMJ/O **
Imagined yourself as a member of defendant's family	24.1	4.0	46.7	21.1	BMJ/O **
Imagined yourself in defendant's situation	26.7	28.0	53.3	31.6	BMJ/O **
Defendant reminded you of someone	13.3	0.0	46.7	15.8	BMJ/O ***
Defendant's family seemed very different from yours	69.0	64.0	26.7	47.4	BMJ/O **
At trial defendant appeared uncomfortable	17.2	16.0	46.7	26.3	BMJ/O **
Defendant's mood change after the guilty verdict	17.2	20.8	60.0	36.8	BMJ/O **

* p <.10; ** p <.05; *** p <.01

^a Percentages are based on numbers of jurors within the following ranges: WM=29-30; WF=21-25; BM=14-15; BF=19.

^b Abbreviations: W white, B black, M male, F female, J jurors, O all other jurors, / compared to.

Most distinctive about the pattern of findings in Table 4 is the fact that black men alone were decidedly different from the other jurors on the remaining eight of these ten factors. Not surprising, in view of the conditional difference in characterizations of the defendant as remorseful in Table 3, is the greater tendency of black male jurors than others to say "at trial the defendant appeared sorry" (thirty-six points above any other race/gender category and sixty-three points above white males). In fact, the corresponding percentages for these two statements about remorse in Tables 3 and 4 are quite similar, except that black males more often said that the defendant *appeared* sorry than that he *was* sorry (73.3% versus 46.7%). Although some black male jurors evidently discounted appearances of remorse, it seems clear that they were more likely than others to perceive them.

Conspicuous is the tendency of black male jurors to identify or empathize with the defendant and his family. Three of these statements explicitly involved the juror imagining him or herself in the shoes of the defendant or his family: "Imagined yourself in the defendant's family's situation," "imagined yourself as a member of the defendant's family," and "imagined yourself in the defendant's situation." Notably, it is the defendant's family's situation with which black male jurors most distinctively identify (exceeding others by more than thirty points).

The defendant and his family were also more likely to provoke recollections and comparisons in the minds of black male jurors. These jurors were more likely than others to affirm that "the defendant reminded you of someone," (by thirty-one points) and to deny that "the defendant's family seemed very different from yours" (by twenty-one points). Here again, the responses of black male jurors suggest that they more often saw themselves as a person like the defendant and like the members of his family. The consequences of greater identification and empathy with the defendant and his family may account for the heightened sensibility of such jurors in response to the final two statements in Table 4, the observations, "at trial the defendant appeared uncomfortable" and "the defendant's mood change after the guilty verdict was handed down."

Thus, black and white males differ substantially, not only in respect to strong aggravating and mitigating considerations, such as dangerousness, remorse, and lingering doubt, but also in the ways they see the crime (i.e., vicious versus not cold-blooded) and in the degree to which they personalize the defendant and identify with him and his family. The differences are most distinctive for black males; their stands and responses depart from others' more often and more substantially. The distinctiveness of their responses suggests why the presence of a single black male on the jury can have the very sizable effect on sentencing outcomes we have seen in Table 1.

Although white males are not as different from others in most of these respects, their perceptions and perspectives are nevertheless consistent and largely at odds with those of black males. In fact, on five of the eight factors that show black male specific effects (in Table 4), white males were at the opposite extreme, as they were in characterizations of dangerousness and remorse (in Table 3).³⁰ To the extent that white male jurors dominate the jury in numbers or

30. The same also holds for lingering doubt, as shown in Bowers et al., *supra* note 16, at 233 tbl. 7.

assertiveness, they may reinforce each others' perspectives and thus generate a climate of punitiveness that leads other jurors to disregard evidence of mitigation or to give it short shrift in considering punishment.

Above all, these data make it clear that identification or empathy with the defendant, and even more so with the defendant's family, is distinctive to black male jurors in these B/W cases. More than others, they appear to place themselves in the role of the defendant's parents. They identify with this situation, even to the point of imagining themselves as a member of the defendant's family. They are more likely than others to see similarities between the defendant's family and their own. They are also more likely than the other jurors to say they imagined themselves in the situation of the defendant. The identification black male jurors make with the defendant and his family must make them especially sensitive to the human dimensions of the capital sentencing decision, and it must surely enhance their receptivity to mitigation. Is it surprising that black male jurors in these black-defendant/white-victim cases are much more likely than others to identify with the defendant who himself is a black male?

4. *Receptivity to Aggravation and Mitigation*

In addition to jurors' perspectives on the crime, the defendant, and the defendant's family, we have also sought to determine whether jurors' race and gender are related to their receptivity to the prosecution's evidence and arguments of aggravation and the defense's evidence and arguments of mitigation at the punishment stage of the trial. For this purpose, we have adopted a scaling procedure developed by Thomas W. Brewer that matches the arguments advanced by prosecution and defense with the considerations jurors reported as more or less important in their punishment decision.³¹

The measure of receptivity to aggravation draws upon seven matched pairs of prosecution arguments and juror punishment consid-

31. See Thomas William Brewer, *Don't Kill My Friend: The Attorney-Client Relationship in Capital Cases and Its Effect on Jury Receptivity to Mitigation Evidence* (2003) (unpublished dissertation, University at Albany, State University of New York) (on file with author) (abstracted in 64 *DISSERTATION ABSTRACTS INT.* 631 (2003)). Brewer developed a Mitigation Scale based on twelve statements describing evidence and arguments advanced by the prosecutor at the punishment stage of the trial and corresponding considerations that the juror reported as being "very," "fairly," "not very," or "not at all" important in their punishment decision. He found that receptivity to mitigation was significantly greater for black jurors in black-defendant/white-victim cases than for other juror, defendant, and victim racial combinations. Here, we extend and refine that finding by examining receptivity to aggravation as well as mitigation, by narrowing the sample to black and white jurors who were interviewed from the same cases, and by examining gender as well as race of juror.

erations, and the receptivity to mitigation scale uses ten such matched mitigation arguments and punishment considerations.³² The individual juror's receptivity to aggravation is the average of the importance he or she attributes to the aggravation arguments that he or she reports the prosecutor advanced; receptivity to mitigation is likewise the average importance in a juror's sentencing decisions of the arguments he or she said the defense advanced in the case.³³ Of course, these measures of receptivity are limited by the particular questions asked about arguments and considerations of aggravation and mitigation, reproduced in the Appendix.

For the four race/gender categories of jurors, Table 5 presents the mean receptivity score and the percentage of jurors with low (.00-.99), medium (1.00-1.99), and high (2.00+) receptivity scores, first on the mitigation scale and then on the aggravation scale.³⁴

White jurors are much less receptive to mitigation than their black counterparts in these B/W cases. This is evident in both the mean mitigation scale scores and in the percentage of jurors scoring less than 1.00 on the mitigation scale. The fact that white jurors' mean scale scores are slightly less than 1.00 indicates that they typically found mitigation arguments "not very important" in deciding on punishment. A score of 1.00 also implies that for every mitigation argu-

32. In a section of the interview that asked about the penalty, trial jurors were presented with sixteen aggravation arguments the prosecutor might have advanced and fourteen mitigation arguments the defense might have made. In a later section of questions that asked jurors about how they reached their punishment decision, there were separate batteries of twenty-three and thirty-nine considerations or factors that might have been important in jurors' decision making. Of the sixteen aggravation arguments, seven could be matched with punishment considerations, and of the fourteen mitigation arguments, ten could be matched with such considerations. The exact wording of the arguments and considerations used in the construction of these two scales appears in the Appendix.

33. For each aggravating or mitigating argument reported by a juror, he or she could indicate that the corresponding consideration was "very important" (scored 3), "fairly important" (scored 2), "not very" important (scored 1), or "not at all" important (scored 0), in his or her decision about punishment. A juror's aggravation or mitigation receptivity score is the average of the importance responses (scored 0 through 3) for those arguments that he or she said the prosecutor made with respect to aggravation or the defense attorney made with respect to mitigation. For example, if a juror reported that the prosecutor advanced three of the seven aggravation arguments and indicated that one was "very important" (score 3), one was "fairly important" (score 2), and one was "not at all" important (score 0), as a punishment consideration, he or she would receive a score of 1.67 on the receptivity to aggravation index. Jurors who reported that none of the seven aggravation arguments or none of the ten mitigation arguments were made have missing values on the respective scales and are therefore excluded from the analysis. The scale values are strictly averages; there is no adjustment or weighting for the number of aggravating or mitigating factors on which the scale score is based.

34. We depart here from our earlier practice of presenting the criterion variables in dichotomous form at the point of greatest difference by race in order to show more of the distribution and divergence of scores on the two receptivity scales.

TABLE 5. RECEPTIVITY TO AGGRAVATING AND MITIGATING ARGUMENTS BY JURORS' RACE/GENDER COMBINATIONS FOR BLACK-DEFENDANT/WHITE-VICTIM CASES IN WHICH BOTH BLACK AND WHITE JURORS WERE INTERVIEWED

	White Males	White Females	Black Males	Black Females
RECEPTIVITY TO MITIGATION SCALE				
Mean receptivity to mitigation	.96	.99	1.30	1.61
Percent scoring:				
0.00 to .9	48.0	57.1	10.0	14.3 *
1.00 to 1.99	44.0	33.3	80.0	64.3
2.00 or more+	8.0	9.6	10.0	21.4
Number of jurors	(25)	(21)	(10)	(14)
RECEPTIVITY TO AGGRAVATION SCALE				
Mean receptivity to aggravation	2.22	2.24	2.42	2.25
Percent scoring:				
0.00 to .99	11.1	8.7	0.0	6.7
1.00 to 1.99	14.8	13.0	14.3	26.7
2.00 or more	74.1	78.3	85.7	66.7
Number of jurors	(27)	(23)	(14)	(15)

* The overall racial difference (WJ/BJ) in the low (vs. medium and high) receptivity to mitigation category yields a Chi Square significance of $p = .054$.

ment found "fairly important," another was "not at all important"; for every one found "very important," two others were "not at all important."³⁵

The percentage scoring less than 1.00 on the mitigation scale underscores the difference by race of juror. It shows that roughly half of the white jurors, but only 10% of black males and 14% of black females fell below the "not very important" threshold for mitigation, where "not at all" responses outnumber or outweigh any "fairly" or "very" important responses. The roughly forty-point overall black/white difference in percentage scoring low on the mitigation scale (38.0 points for males and 42.8 points for females) reaches statistical significance at the .10 level ($p = .054$).³⁶ Evidently, many more white than black

35. Note that the base numbers of jurors are relatively low for the mitigation means and percentages owing to the exclusion of jurors who reported that the defense made none of the ten mitigation arguments on which the scale is based. The failure of jurors to report mitigation arguments could itself reflect a lack of receptivity to mitigation. That is, some mitigation arguments that were actually made may not have registered with these jurors. Hence, there could be an upward bias in the mitigation scale scores.

36. Chi Square tests were conducted with the scale scores dichotomized between .99 and 1.00 and between 1.99 and 2.0. The only difference that tested significant was between black and white jurors (WJ/BJ) in the percent low receptivity to mitigation $p = .054$.

jurors were unwilling to give effect to considerations of mitigation in their punishment decisions.

Jurors are much more receptive to aggravation than to mitigation. The mean aggravation scores far exceed the mean mitigation scores; they are above 2.00 for jurors in each race and gender category. In effect, jurors in all race and gender categories found the arguments they said the prosecution advanced were, on average, between "fairly" and "very" important in their decision making on punishment. Moreover, racial differences are slight and inconsistent. The mean for black males at 2.4 is slightly above those for the other three categories, which are all on a par very slightly above 2.2. In percentage scoring high on receptivity to aggravation, black males are a few points above, but black females a few points below, the percentages for whites of both genders. These differences in receptivity to aggravation are not substantial or consistent enough to qualify as anything more than random fluctuations.

It is clear from these data that African Americans of both genders are more likely than their white counterparts in these black-defendant/white-victim cases to consider, and to give effect in their sentencing decisions to, arguments of mitigation that articulate why the defendant's life should be spared.³⁷ Perhaps this is not surprising because, as we have seen above, they are more likely in these cases to find the defendant likable as a person, more likely in the case of black females to see him as emotionally unstable or disturbed, and more likely in the case of black males to see him as remorseful and to identify with him and his family.

More surprising, perhaps, is the fact that blacks are roughly on a par with whites in receptivity to aggravation. Evidently, their greater concern with mitigation has not blunted their sensibility to the heinous character of the crime and the defendant's role in it. In fact, an examination of the components of the aggravation index indicates that black jurors of both genders attributed more importance than whites to "the loss and grief of the victim's family" and "the punishment wanted by the victim's family" as arguments for the death penalty. This greater sensitivity to the loss, grief, and desire for punishment on the part of the victim's family may reflect the fact that black jurors are more familiar than whites with the realities of loosing a family member to murder in their own communities, if not in their own lives.

37. Brewer has also found that black jurors in black-defendant/white-victim cases are distinctively more receptive to mitigation than other defendant/victim/juror combinations. See Thomas W. Brewer, *Race and Jurors? Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victim's Race in Combination*, (under review) (on file with author).

A critical question is: Do the much lower receptivity to mitigation scores of white jurors mean that many of them fail to “give effect” to mitigation in their punishment decisions, contrary to the requirement of *Morgan v. Illinois*?³⁸ We saw in Table 2 that white jurors see these crimes as more heinous than do black jurors. In various combinations, white males and females were significantly more apt to say that the victim was made to suffer, the crime was vicious, and it made them sick to think about it. There is evidence that becoming obsessed with the grotesque character of the killing may have the effect of blunting or blocking jurors’ willingness to consider mitigation.³⁹ Certainly, to the extent that the character of the killing convinced jurors that the punishment should be death even before the penalty stage of the trial, they could be expected to attribute little or no importance to mitigation arguments.⁴⁰ A closer look at the accounts jurors gave of their decision making in selected cases will provide additional perspective on these matters.

B. Race-Linked Jury Dynamics: Narrative Accounts

We turn now to jurors’ accounts of their deliberations on punishment to learn how race plays out in their decision making. We are interested both in the ways in which the racial differences observed in the foregoing statistical analysis surface in the thinking of jurors as they respond to one another’s arguments and in what we might call the jury dynamics of decision making that include the steps jurors take, the arguments or tactics they use, and with what success they are able to bring their perspectives to bare in the jury’s decision making.

For this purpose we examine the decision making of four juries—two all-white juries dominated by males and two mixed-race juries

38. 504 U.S. 719 (1992).

39. See Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011 (2001) for evidence from jurors’ accounts of a tendency of jurors to discount or ignore evidence of mitigation in the face of an aggravated killing. See also William J. Bowers et al., *Foreclosed Impartiality In Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998), for evidence from jurors’ accounts that grotesque details of the crime, especially as conveyed by photographs of the victim’s body, tend to prompt a decision that the punishment should be death at the guilt stage of the trial.

40. The greater tendency for white jurors to see the B/W killing as heinous, as shown in Table 2, appears not to be reflected in greater receptivity to aggravation scores in Table 5. Perhaps this is because the heinousness of the crime as perceived by white jurors when the defendant is black and the victim is white constitutes a single compelling dimension of aggravation that they become obsessively concerned about to the exclusion of other aspects of aggravation. Such a single-minded concentration on one as opposed to several aspects of aggravation would have the effect of reducing the receptivity to aggravation score because it is the average of the importance attributed to the full complement of aggravation arguments.

with at least one black male juror. These four cases have been selected because they illustrate themes in the dynamics of decision making characteristic of white male dominated juries and of juries with a black male present. All four are black defendant/white victim cases; two were drawn from the eleven B/W cases with all white juries and five or more white male jurors;⁴¹ the other two come from the fourteen mixed race B/W cases in which we interviewed at least one black male juror.

These accounts will illustrate some of the ways in which jurors' races come to play in the joint or group decision making of capital juries. What we see here, together with what the statistical analyses show, will provide some tentative answers to the question of what is the role of jurors' race in capital sentencing, especially in racially sensitive cases in which the killing crosses racial boundaries.

1. First White Male-Dominated Jury

The deliberations on cases in which all of the jurors are white are remarkable precisely because they come across so lacking in controversy or dispute; the tension that characterizes mixed race juries is largely absent. Indeed, there appears to be relatively little disagreement among the jurors, in either the guilt or punishment decisions. While some jurors find these decisions emotionally difficult to reach, they are not ordinarily marred by dissent. In fact, it is not uncommon for jurors to make the two decisions at the same time, that is, to reach their stand on punishment during guilt deliberations. Both of the following white male dominated juries illustrate this pattern.

In this first Missouri case, there were ten white men and two white women on the jury. The jury voted for death for an African-American man who killed his white wife whom he believed was having an affair. When asked "what were the main areas or points on which jurors disagreed [during guilt deliberations]," one of the female jurors responded:

J: I'd say there was a few jurors that were willing to come up with a guilty verdict if it automatically meant the death penalty. So we argued that out a little bit cuz we tried to explain how it doesn't automatically mean that. We still have the penalty phase. And they were like, no, no, no, that's not right. We did disagree about that. It was just that they were dealing with their own issues on how they

41. There were fifteen cases with mixed-race juries and five or more white male jurors, but the all white juries were selected for examination on the premise that they offer the clearest examples of the dynamics of white male-dominance in sentencing African American defendants whose victims were white.

felt about the death penalty and not really focusing on this phase, they just couldn't get beyond that.

Another juror from this case also acknowledged that the jury discussed the punishment during the guilt deliberations. When this (male) juror was asked if the jurors talked about whether the defendant would or should get the death penalty, he said: "I think some of the jurors may have talked about that." And when he was asked what the jurors said, he responded: "[P]retty much that he was guilty and that he should get the death penalty."

The implication here is that these jurors are not waiting to hear mitigating circumstances—that once they pass the threshold of guilt, death is the presumptive sentence. Could it be, however, that they would change their minds once they were exposed to mitigating circumstances at the penalty phase of the trial? Not so for these ten white male and two white female jurors deciding the fate of this African-American man. Rather, the jurors seem to have virtually ignored evidence or arguments of mitigation. Another male juror expressed difficulty in recalling how they arrived at their punishment decision:

I: In your own words, can you tell me what the jury did to reach its decision about the defendant's punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?

J: You know through our whole discussion here the guilt or innocent portion of it, I can recall dates, names, years, and then we get into the [punishment] portion of it. I'm not having the same responses. I'm not remembering as clearly, I don't know if that's a self defense thing.

This same male juror acknowledged that one of the female jurors appeared to be having a difficult time:

J: I think it probably affected [juror's name] more than anybody in the whole group. She didn't cry though. At times there were hugs that were given cuz she was, we could kinda tell she, uh, she didn't cry but she was close. Some of the guys just gave her a "pep hug" or whatever and uh, there was real bonding with that group.

A female juror who was reluctant to go along with the majority corroborated the difficulty that some of the jurors experienced in arriving at the punishment decision, but she too does not point to mitigation as the reason:

J: It was, uh, I don't know. There were several of us who weren't in agreement for awhile, right away, just not sure really, I think we just weren't ready to make that decision. There really wasn't any reason, it was just like, this is, we need to think this over more. Difficult decision to make. It's probably the most difficult decision ever.

I: So, when you did go along with the majority, you just came to that point?

J: It just happened, it was weird how it happened, it was like a fog that just happened.

It seems clear that a reasoned evaluation of mitigating circumstances was not the focus of this jury's penalty deliberation. One of the jurors mentioned that the defendant's mother and brother testified, yet no one referred to what they said or reported taking their testimony into account. While one or two of the jurors were hesitant to vote for death, there was no explanation in terms of mitigation. Moreover, while some of the jurors found the experience emotionally difficult, there was no mention of pressure or antagonism in the jury room. In fact, one of the jurors described the final decision as occurring in "a fog." And another juror talked about consoling and "pep hugging" a juror who was troubled by the experience.

Husbands who kill wives suspected of infidelity are uncommon on death rows. What trumped or disabled mitigation in this case? One possibility is the defendant's perceived future dangerousness. The female juror was asked:

I: How did [defendant] appear to you during the trial?

J: On the stand, he was sweating and he showed a lot of anger. He leaned forward. My little spot was right next to his. I was a lil' bit nervous cuz you, you could just tell it was building up inside of him. He just got a lot of anger and um, um, and so he almost, I was alm. . . I guess I felt intimidated because he would lean forward and just, you guys have to believe me, this is[n't a] bullshit kind'a thing. Looking at him sitting there from when he started talking and I, I would say he's a little bit frightening.

This same female juror went on to describe her thoughts or feelings about the defendant's family as follows:

J: After the trial was over, there was a lot of fear in the jury about the family, like they would be out there waiting when we got out if we sentenced him to death. So we asked the sheriff's department to bring the security people in when we gave down the sentence and kept the people in the courtroom till we were all out of the building and on our way out so, there was some fear there but, projected fear. You never know. You don't know the family.

One of the male jurors, while stating that he was not concerned with the defendant returning to society if not given the death penalty, went on to say that he "pack[ed]" a gun for a week afterwards:

J: No, I did carry it. Course, I do go anyway, anytime I travel. Anytime I travel anywhere's I do carry it. That's just from past experience.

Yet this is not so much the defendant's future dangerousness as a visceral fear of him personally and of his family's retaliation for the imposition of the death penalty. These primal responses to the defendant and his family seem out of line with his status as an independent businessman in the community with no criminal record but in line, perhaps, with conscious and unconscious racial attitudes that the Court in *Turner*⁴² anticipated in murder cases that cross racial boundaries.

There is another indication that unconscious racial attitudes may have been at work—that a black man who marries a white woman and also kills her made the crime especially offensive. When asked “what was the best thing about the give and take of jury deliberations,” one juror explained:

J: The best thing I think we all had a good sense that we were representatives of other citizens in the state and we were making a decision as representatives, that it wasn't just our opinion that this that we were speaking for other Missourians.

Do other jurors who serve on mixed-race juries in black-defendant/white-victim cases express the same fear of the defendant or his family? Do jurors experience the same fear when they are the same race as the defendant? The following cases provide some answers.

2. *Second White Male-Dominated Jury*

In this second example of an all white jury deciding the fate of a black man (in this case accused of killing a white child), there are equal numbers of men and women. With five or more white males, the jury still qualifies as “white male-dominated.”⁴³ As such, it is not surprising that the jurors in this case, just as in the first example, express little disagreement concerning the evidence, the interpretation thereof, or the appropriate verdicts.

All four jurors who were interviewed, two men and two women, not surprisingly pointed to the defendant's confession as a critical reason for finding the defendant guilty of the capital offense. As one of the female jurors said when asked when she first thought that the defendant was guilty of capital murder:

J: Opening arguments. I was willing to be convinced otherwise, if the evidence showed it, but from the opening arguments the defense came in saying that yes, he did it. And from everything that was said by both attorneys in their opening arguments, there wasn't any-

42. 476 U.S. 28.

43. This designation is based on the stark difference in the likelihood of a death sentence between juries with four or fewer and five or more white male jurors (shown in Table 1).

thing there to convince me that it should be anything other than capital but as I said, I was willing to be convinced otherwise if there was evidence that would show this.

One of the male jurors noted that the defendant's confession was indicative of his honesty, but that fact was actually used against the defendant. When this juror was asked whether the defendant appeared sincere, he responded: "Well, he was honest in the fact that he, you know, said he'd done it, told his lawyers that he did it. Course, they were copping second degree." This juror went on to explain that "we knew what the verdict was gonna be for [guilt]. We coulda deliberated right there. The defense lawyer coulda been one of the jurors. They already told us about the guilt. We didn't even have to go into the jury room."

Jurors on this second case seemed less apt to discuss punishment preferences during the guilt phase. These jurors were also more likely to acknowledge, but no less likely to dismiss, mitigation. For instance, the male juror said that "yea, something mental there but not to the point that he didn't know what he was doing." This same juror noted the defendant's complicated family history. He agreed that the defendant was likely abused as a child and that he was "not [brought up] the way you and I were brought up." This juror also noted that the defendant's family "definitely didn't love him. They came into the courtroom and they didn't even look at him." He then went on to say that he "maybe [felt] pity a little bit the way they lived, you know" and that he

would've like to talk to them about bringing them to the Lord, that's for sure, I would've liked to help them just to be people, the whole bunch of 'em starting with his dad. You know, it's depravity all the way through. All the way down the family. You know, the sins of the father were passed on through the third and fourth generation, bringing them into society and into the real life.

Hence, clearly, this juror sees what is thought to be mitigation, and yet, when he was asked to describe the jury's deliberation on punishment, he said: "[W]e went to [the room]. We went over judge's instructions. Took first vote. 11 yes, death, 1 no." The juror then talked about the one hold out wanting to review some evidence after which "we voted again and uh, 12 [for death] but there was three hours so there was some back and forth." There was no mention of any arguments or persuasion or problems in reaching consensus on the penalty.

The female juror's description of the sentencing stage, of the mitigation and the deliberation on sentencing, was quite similar. She noted that the defendant "was described as mildly retarded but from my ob-

servations he seemed to be very intelligent and manipulative,” even though this juror acknowledged that the defendant may have “completed the 12th grade” and that his his IQ was at a fifth-grade level. She also recalled that the defense stressed the defendant’s “deprived background” as the primary reason why he should not receive a sentence of death. And when asked about the points on which jurors disagreed, this juror said “mitigation, was his background a mitigating circumstance? Really a small issue.” Her description of the sentencing deliberation is illustrative of just how easy it is for white jurors to dismiss mitigation in the absence of blacks on the jury:

J: Well, we got started by reading the judge’s instructions and then by discussing what the defense claimed was mitigating. Basically [the defendant’s] background and whether that could be considered to be a mitigating circumstance or deserved the death penalty. We took one vote and one person voted against the death penalty and without identifying that person, we tried, we kind of guessed that that person thought possibly that there were mitigating circumstances. So, we discussed again what the instructions said, which was not, when you say that he had a deprived background, but would you say that this deprived background was a circumstance that should excuse him from the death penalty, then we took another vote and it was unanimous that he get the death penalty. So, apparently the person was then decided as to whether he had a deprived background. We all agreed that he did but that didn’t excuse him from the punishment for what he did.

The other male juror who was interviewed on this case also noted the existence of mitigation:

J: [The jury] talked a lot about [the defendant’s] past, [how he was] raised in a poor family. [At] age 10, [he was] living in an abandoned car but at another girl’s age of 10 [the victim in this case], he took her life. He had no structure in his life; 24 brothers and sisters; his father was a busy man. He had it rough.

This juror also noted that there was one juror who was initially reluctant to vote for death:

J: We had one person on the jury that was a little slower than most people and did not vote for the death penalty. We didn’t single that person [out] or anything. What we did from that point was we opened it up for a discussion and if he wanted to discuss why or why not. After we got to talk, we revoted and it was unanimous.

The jurors on this case thus acknowledged the existence of mitigating circumstances but readily dismissed them as unimportant considerations in deciding on the penalty. Unlike the first case, these jurors did not express fear of the defendant or his family; they did, however, express anger, outrage, and disgust at his family, though these feelings did not register as mitigation for the defendant. In reviewing the rea-

sons why these jurors voted for death, it appears again as though once the threshold of guilt was met, the death penalty was largely a foregone conclusion. Moreover, even when there was disagreement, as was the case with the single juror who initially voted for life, the jurors went out of their way to talk about the unity of the jury. As the female juror quoted above said when asked about the best thing about the jury: "All were paying attention and willing to listen to each other. No resentment. I thought we all paid attention to what happened in the trial phase and the guilt, punishment phase."

The cases discussed thus far comprised all white jurors. We have seen that mitigation is occasionally mentioned but readily dismissed. There is sometimes fear of the defendant and especially his family, while at other times there is anger and resentment. Sometimes the punishment is discussed in the guilt phase; sometimes it is not. The two juries were similar in that there was no question of the defendant's guilt in either case. Similarly, the jurors wax eloquently about the unity of their jury, even when there was apparent disagreement. Finally, while some of the comments may allude to racial issues, overt discussions of race were lacking. Do the same patterns hold when African Americans enter into the mix of the jury? We now turn to evidence pertaining to that question.

3. *First Jury with an African-American Male Juror*

The first case with an African-American male juror is a South Carolina case that also had three white male jurors, five white female jurors, and three African-American female jurors. This jury voted for life for an African-American man convicted of killing a white police officer. The jurors all agreed on the general circumstances of the crime. In particular, the defendant had been drinking with a female friend; the friend called the police; the police showed up; the defendant tried to elude the police by climbing out a back window; the defendant had a gun; and, the police officer who had responded to the call from the friend died from a gunshot wound. Killing a police officer qualifies as a capital offense in South Carolina.

A white female juror provided some important context for understanding the jurors' guilt and punishment decisions. When she was asked if there was anything about the case that stuck in her mind or that she kept thinking about, she responded:

J: We did have a big issue that happened, well to us it was a big issue. We had two black guys that came in one day and they just didn't sit down, they stood at the back of the courtroom, and it was like they were staring at possibly the blacks on the jury. And they

just stood there. Shortly after that, we went to lunch, there were three of us jurors in this particular car, and I said, I know we're not supposed to discuss this case but I said I have a feel of something that happened, and so the [court agent accompanying them] said what was it; if you have a feeling, general, you know, and I went on to explain. I said how, my question to you and the other two jurors is, did [you] feel the same that I did? And both the other jurors said yes, we did. And so as soon as we got back after lunch, because our [court agent] said "I'll take care of it", and so soon as we got back, these two gentlemen came back in and did the same thing. And by that time, the judge had been informed, by one [court agent], and they had been dismissed. But there's always been, . . . I've never said it before, or never been part of it before until then, and didn't ever think about it until then, but I've always heard that black people will take care of black people. You know what I mean? And I got the feeling that they were there to remind this man, he's our brother, so hold out as long as you can, and damned if he didn't do it; he's the one that hung us up for so long. Yeah, that's what really sticks out in my mind.

The black male juror gave the following account of the crime:

J: Sheriff came down to arrest [the defendant]. He was in the house. Jumped out the window with a shot gun. As he jumped, the shot gun went off. The gun accidentally went off and shot police officer around the side of the house.

He went on to say:

J: The other police officers didn't see him do it, that's what I'm referring to. See, they [were] coming down the hall when the shot went off; they didn't see him do it, all they heard was shots.

When asked for additional words to describe the killing, his succinct response was that it "was just an accident."

The white jurors seemed to agree that the crime was not premeditated. As a white female juror said when asked to describe the killing:

J: I don't feel he woke up that day and said I'm going to kill someone in the Sheriff's Department. It's just the fact that he didn't want to be pinned up and he didn't care who got in his way. He was like an animal that did not want to get pinned up.

Another white female juror echoed this story, but with an expression of empathy for the defendant and concern that the black male juror understand her reasoning. Half-way through this juror's description of the crime she said:

J: Can I tell you my personal feelings here? What I felt all along was, and I tried to tell the black guy that was on the jury, was that I do not feel that [the defendant's name] got up that morning with the intentions, hey, I got up and I'm really going to kill somebody today premeditated, but I just feel like that he was afraid, he was hemmed in, and he was scared. He didn't know what to do. And here was

this gun, and where it came from, if it was her's [the woman who called the police] I do not know. All I know is that I felt he did not get up that morning and say I am deliberately going to kill somebody. I just think he got hemmed in, he got scared, and he ran, you know, he was trying to get away from being caught. I felt sorry for him. I thought he was a victim of circumstance.

The jurors thus agreed that the killing of the police officer was not a premeditated event, but the African-American man went one step further in describing the situation as an accident. These different perceptions of the crime, not surprisingly, emerged in the jury's guilt deliberations, though the jurors did not talk about these differences until they were asked about the penalty deliberations. The third white female juror who was interviewed came straight to the point in the following exchange:

Q: [I]n your own words, can you tell me what the jury did to reach its decision about defendant's punishment?

J: We had almost come up with what the sentence was going to be before we could arrive on the guilty verdict. We had pretty much decided among ourselves if we gave the guilty verdict that he would do life imprisonment.

The third (white) woman who was interviewed had this to say about the punishment decision:

J: One person [a white male juror] thought he should get the death penalty, he was strongly for it. They all listened to him and then voiced their own opinion, aloud. Not sure if he gave in or truly changed his mind. It took two hours to "pull him over," trying to change his mind. And that's when the other person [the black male juror] voiced out and said, "that's the reason I didn't want to say he was guilty." They almost read each other's mind. [The] two men were polar opposites in the trial, also opposite races.

As to the actual penalty decision, the African-American male juror explained that a sentence of thirty years without parole was the compromise:

J: The only way the one [hold-out for death] would vote for life was 30 years without parole. That was the only way he would agree to giving life. . . . We gave him the 30 years with no parole and, we came back out, the prosecuting lawyer tacked on another ten years for the weapon. So, for having the weapon they gave him another ten years, and if, me, myself, knew that when we [were] in the jury room deliberating, I might not have signed this 30 years with no parole. . . . The judge told us when we came out of [defendant's name] case, [if] we'd of took a few more hours, he was going to declare a hung jury [on sentence] and he was going to give him 20 years. So, but we made a decision before it came to that, 'cause it took us so long. I'm the one that was holding out, that's why it took so long to come to a decision on this case. And if we waited that

much longer, he was going to declare the sentence. I thought 20 years with no parole would be long enough.

The African-American male juror had reservations about the capital murder conviction and took a stand against the death penalty at the guilt stage of the trial as a condition for his vote to find the defendant guilty of capital murder. One white female juror acknowledged that the jury pretty much decided on a life sentence at guilt. Two of the white female jurors agreed that the crime was not premeditated and believed for that reason that the defendant should not be executed. They did not, however, express any reluctance to vote for guilt of capital murder as did the African-American male juror. At the penalty stage, one white male juror advocated the death penalty, but the black male juror resisted staunchly to the point, he reports, of "being the one who was holding out, that's why it took so long." It seems that several of the white jurors performed their duties under a cloud of suspicion that the black male juror might have been acting under the influence of other members of his race who appeared in the courtroom, hardly an atmosphere conducive to constructive deliberations and a "reasoned moral" decision.

4. *Second Jury with an African-American Male Juror*

The final case to be presented differs from the others in that race was the ultimate dividing line between votes for life and death. The three African Americans, one of whom is male, voted for life while the remaining jurors voted for death. In Florida, where this case was tried, the jury needed only a majority vote, not unanimity, to make a sentencing recommendation and the trial judge could reject the jury's recommendation. The jury recommendation was for death (9-3) as was the judge's final sentencing decision.

This case is similar to the others presented previously in that the white jurors saw little mitigation. For instance, a white male juror did not recognize favorable military service as mitigation even when it was presented. When asked to describe the defendant, this juror said:

J: He had been a Marine and he had had a lot going for him—he did well in there. He was even an athlete but I think he didn't like the authority. He was a professional black. He moaned about his problems and blamed them on a white society being against a black male. He should have blamed his problems on his own shortcomings.

When asked, "What information about the defendant or the crime would have made you change your mind about what the punishment should be?" this juror replied: "[A]ny mitigating circumstance; none were put forth." Thus, the juror recounts circumstances traditionally

offered in mitigation, only to dismiss them as irrelevant to his punishment decision.

One of the white female jurors acknowledged mitigators, stating that the jury discussed the defendant's "occasional use of crack cocaine and alcohol, and could this have affected his behavior." This juror also hinted at the defense having presented mental health evidence when she said the "[the jury] couldn't believe he was insane because of his actions afterwards." But in response to structured questions, she indicated that these factors had no affect on her punishment decision.

The African-American man on the jury agreed with his fellow jurors that the defendant was guilty but disagreed with them on the presence or importance of mitigation. Indeed, he mentioned several mitigators. For instance, when asked "what defense evidence or witness at the punishment stage of the trial was most important or influential," this juror replied: "The psychiatrist because he said he gave [the defendant] all of these psychological tests and he failed them." This juror also mentioned that the defendant "didn't have a chance to, he never had a fair shake in life" and that the defense attorney argued that the defendant should not receive a sentence of death "because at the time he was mentally imbalanced and under the influence of drugs and alcohol and didn't know what he was doing." Clearly, this black male juror mentions multiple mitigators and recounts them as legitimate considerations from his perspective.

The fact that Florida does not require a unanimous vote for a jury punishment recommendation likely contributed to the somewhat muted penalty deliberations. The foreman of the jury, a white male, described the process as follows:

J: [I] saw there were disagreements about the death penalty. Some had already made up their minds that they didn't believe in the death penalty. That was one of the main topics, it wasn't whether he deserved it or not but some person had told the attorney that they were neutral but behind closed doors it was very evident that no matter what the crime was, they wouldn't recommend death. We discussed the heinousness, the fact that [the defendant] could have walked away from the crime, the people standing at the door watching and him turning back and trying to keep [the victim] quiet; the seriousness of the crime. None of us could understand why he did it. I don't think that any minds were changed during the process of discussing. I think many decisions had been made prior to this by the time we deliberated, the decisions had been made. I do believe that I could have swayed some people if I had been more emphatic.

In a telling comment, the foreman goes on to answer a question asking about areas of disagreement:

J: We all agreed that he deserved the death penalty but there were some things that were unsaid, such as some people had no justifiable reason for why death should not be imposed; we had justifiable reason for imposing death.

The African American man's take on the jury's sentencing deliberation was quite different:

J: In the room with the other jurors, most of the men jumped up and said this was the work of a mad man, he should get death. A few of us said no and it went on and on and on. Tempers started flaring. A few ladies started crying.

The interviewer then asked if there were any other topics discussed, to which the juror responded:

J: The foreman told us the evidence is before you. We also discussed the fact that he had the chance to walk out but went back and repeatedly stabbed her and beat her and strangled her and there was no reason why he should not get the death penalty. We voted once or twice. I'm sorry, we voted once the vote was 3 or 4 against death.

When asked directly why he was reluctant to vote for death, this black male juror's story went to race:

J: I know he was guilty of murder and at the time I thought [the victim] could have been my mother but at the same time when I saw, I think there were three jurors who were black, we knew from tempers flaring that the others wanted the death penalty and [we] knew why. I kept thinking if this were reversed, if a white man kills a black old lady, would they be as, in such a rush to kill him? Also, the taking of a human life will not bring back the life. Some others in there felt the same.

The interviewer then asked:

I: Do you think race was really an issue?

J: In the jury, yes. It was wrong what he did and it could have been my mother but I still would have felt the same way against death.

And when he was asked what he thought the strongest factors were for a life sentence, he said: "To take a life will not replace a life. No matter how bad the individual is, he can change; I know that for a fact." This same black juror went on to acknowledge that he thought of other cases when deciding this case:

Q: In making your punishment decision, did you compare the defendant or his crime to any other murderers or murder cases you knew about? How did you know or learn about the other cases(s) or murderer(s)?

J: From watching the news and from reading the newspaper. As a matter of fact, I don't know if you are familiar with this but we had a white male kill a woman and her husband and left them in the woods. The same guy had been on trial several times and they gave

him life it was a white man. This my belief: If we're going to have a death penalty, use it on everyone, don't use it, most of the death penalties carried out are carried out on who? Black males.

This African-American man clearly believed that traditional mitigators were present in the case and yet his ultimate decision was based on what he thought was fair from a personal and broader historical perspective. The white jurors, in contrast, noted but dismissed the mitigators. They likewise dismissed the views expressed by the African-American jurors (facilitated no doubt by Florida's failure to require unanimity on punishment). The white jurors pointed to the heinous and senseless nature of the crime as reasons for death. They could see "no justifiable reasons for life." They disregarded the African-American jurors' sense of fairness, as well as indications that some of the white male jurors were animated for death. This is a case in which the jurors' backgrounds, their attitudes and beliefs, appear to have dictated the dynamics of the deliberation. The fact that such characteristics differed along racial lines should not be surprising, it is perfectly consistent with the *Turner* Court's predictions.

V. CONCLUSIONS AND IMPLICATIONS

In *Turner v. Murray*,⁴⁴ the U.S. Supreme Court found a constitutionally unacceptable risk that white jurors' life or death decisions would be influenced by racist attitudes when a convicted capital defendant is black and his victim is white. The Court observed that white jurors might be especially inclined to view black defendants as "violence prone" or "morally inferior," owing to conscious and unconscious racial attitudes. Similarly, the Court's prescient opinion anticipated that white jurors may be less sympathetic to evidence of mental disturbance and that their fear of blacks would make them more likely to vote for death.⁴⁵

The Court was right, though the story is nuanced by race and gender. The statistical evidence reveals that white male jurors were far more likely than African-American male jurors to think of the African-American defendant as dangerous to others and far less apt than their black counterparts to see the defendant as sorry for what he did. White women were much less likely than black women to acknowledge the defendant's emotional disturbance. Concerning the tendency to identify with the defendant, African-American male jurors were significantly more likely than others to imagine themselves in the situation of the defendant's family, to imagine themselves as a mem-

44. 476 U.S. 28.

45. See text accompanying *supra* note 5.

ber of the defendant's family, to be reminded of someone by the defendant, and less likely than others to see the defendant's family as different from their own. And, as the Court supposed, the evidence shows that white jurors of both genders are much less receptive to arguments and evidence of mitigation than African-American jurors who served on the same black-defendant/white-victim cases.

The narrative accounts of jurors in B/W cases document subtler ways in which racial attitudes may infect the decision process. For example, a white female juror spoke of the jury's fear of retaliation by the defendant's family as prompting a request for an escort to their cars at the end of the trial. Another white female juror interpreted the presence of two African-American males standing at the back of the courtroom as promoting solidarity among the African-American jurors. Still another white female juror reacted with fear to an African-American defendant sweating on the stand, without wondering whether his sweat might have reflected his fear. A white male juror wished to bring the defendant's African-American family to the Lord, viewing the whole family as depraved because the father had so many children. One white male juror saw his jury's death sentence in the black defendant/white victim case as a statement representative of "all Missourians."

Beyond the influence of race on the thinking of individual jurors is the specter of its effects on jurors acting as members of a decision-making group. We have seen in Table 1 that the racial composition of the jury, more specifically the number of white men and black men on the jury, strongly affects the sentence imposed in B/W cases. Jurors in white male-dominated (and all white) juries describe the work of the jury in terms of unity, agreement, and speaking for all Missourians. Conspicuous in these white male dominated juries is the lack of serious discussion of mitigation. Jurors speak of "pep hugs" and explain the final decision as the lifting of a "fog." In contrast, when there are African Americans, or at least one African-American male, on the jury, conflict is evident and mitigation is voiced and considered. In addition, there is a tendency for the jurors themselves to acknowledge how race colors their perspectives and how the race of other jurors may do likewise.

These findings point to the decisive failure of the remedy the Court authorized in *Turner*. The Court's remedy was to rely upon voir dire questioning to detect deeply ingrained and often unconscious racial attitudes. Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or vic-

tim. But the tools are not working. All of the cases examined here were tried after *Turner* became effective. That is not to say that we know from this study whether or to what extent there was an attempt to discern prospective jurors' attitudes toward people of the opposite race. What we do know, however, is that whatever attempts may have been made thanks to *Turner*, the risk of racial bias remains all too manifest.

It is no easy matter to assess the views of people regarding race, especially in the environs of an open courtroom. People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.⁴⁶ When asked if they could and would follow the judge's instructions, they are loath to say "no" in the face of such an authority figure. Moreover, they have no prior experience in making a life or death decision so saying whether their racial attitudes will influence their decision is not merely hypothetical, it is void of the kind of grounded experience on which someone can make a reliable inference. When it is acknowledged, as the *Turner* Court does, that racial bias may be unconscious as well as conscious, the difficulty is compounded. Straightforward questioning is hardly an effective tool for getting at the unconscious.⁴⁷ What is more, prosecutors have the upper hand in shaping the racial composition of juries by ridding them of minority candidates through the use of peremptory strikes.⁴⁸ And, it is well recognized that the *Batson* prohibition against the exercise of peremptory strikes on the basis of race is ineffective in practice.⁴⁹

46. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 *PSYCHOL., PUB. POL'Y AND L.* 201 (2000).

47. As Patricia G. Devine et al. state:

That is, despite disavowing prejudice consciously and responding without prejudice on easily controllable explicit self-report measures, many people who report being low in prejudice show bias on responses that are less amenable to control. For example, when race bias is assessed with implicit measures, which theoretically bypass conscious control, bias is often observed even among those who claim to be nonprejudiced.

Patricia G. Devine et al., *The Regulation of Explicit and Implicit Race Bias: The Role of Motivations To Respond Without Prejudice*, 82 *J. PERSONALITY & SOC. PSYCHOL.* 835, 835 (2002) (citations omitted).

48. See Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 *U. PA. J. CONST. L.* 3 (2001).

49. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 *NOTRE DAME L. REV.* 447, 501 (1996) (reviewing reported decisions of federal and state courts applying *Batson* between April 30, 1986 (the date of the *Batson* decision) and December 31, 1993, and concluding that many of the currently accepted bases for peremptory challenges, such as economic and geographic criteria, as well as attorneys' subjective

What does this failure presage about remedying the unacceptable risk of racial bias in cross-race capital cases? Is there some other way to assemble a jury of the defendant's peers that will render an unbiased punishment decision? Or is it necessary to restrict the use of the death penalty in a way that will diminish such a risk, or to abandon its use in boundary crossing interracial cases, or to abolish it altogether on account of the more pervasive influence of race in capital punishment? At the time of *McCleskey*, the Court was unwilling to restrict the use of the death penalty to only certain kinds of cases,⁵⁰ and the ruling itself appeared to foreclose remedies that looked beyond the circumstances of the particular case. In *McCleskey*, the Court cited case-specific steps, such as change of venue, the requirement that peremptory strikes be race-neutral as imposed by *Batson*, and indeed, the *Turner* ruling on voir dire questioning about race in interracial cases, as the kinds of remedies that would suffice.⁵¹ In view of *Turner's* failure and the Court's single-minded focus on case-related remedies, is there another case-specific way to diminish the risk of racial bias in interracial capital cases?

Affirmative jury selection is one answer. The basic premise of affirmative jury selection is that the opposing attorneys decide upon jurors to be included rather than excluded from the jury. After all jurors have been questioned and challenged for cause, it gives the defense and prosecution the right to include rather than to exclude jurors on a peremptory basis. Instead of evaluating prospective jurors to identify those they wish most to exclude, the opposing attorneys would evaluate them to determine the ones they most want included on the jury. After jurors have been excused for cause, the prosecution and defense would submit their inclusion lists; the trial judge would seat all jurors who appear on both lists; and for the remaining unfilled seats on the jury, the judge would seat persons still on the two lists according to their priority rankings, alternately seating the highest pri-

judgments, continued to exert a disproportionate negative impact on choosing black and Hispanic jurors).

The *Batson* doctrine has been rendered so ineffective a tool against racism or sexism that one jurist has been led to note that *Batson* and its progeny have proven to be less an obstacle to discrimination than a roadmap to it (citations omitted). The savvy litigator can succeed with the most blatant discriminatory purpose by a simple manipulation of the neutral explanation coupled with a dose of disingenuousness.

Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 545.

50. Justice Stevens did advocate restricting the use of the death penalty to only the most aggravated cases where the Baldus data indicated that the risk of racial bias was less pronounced.

51. *McCleskey v. Kemp*, 478 U.S. 282, 308-09 (1987).

ority juror from the defense and then from the prosecution list until all twelve seats on the jury have been filled.⁵²

The mechanics might differ. Some have suggested that affirmative selection be provided only for the defense,⁵³ but the fundamental principle of deciding who should be *on* rather than who should be *off* of the jury is the essential feature. As its advocates have argued, affirmative jury selection in cases with minority defendants has a long common law history and is conspicuously faithful to the Sixth Amendment guarantee to the defendant of an impartial "jury of his peers."⁵⁴ In the capital sentencing context, they would be persons he believes would be able to understand and give effect to his evidence and arguments of mitigation. They would be a jury of his peers as well as his victim's peers.

The fact that African-American capital defendants often fail to have African-American representation on their juries, that the absence of an African-American male juror is associated with astonishing differences in sentencing outcomes, and that receptivity to mitigation differs so greatly between black and white jurors when the defendant is black and the victim is white, call desperately for a remedy. Affirmative jury selection is no guarantee of even-handed justice in such cases. As sometimes happens, minority jurors are not even represented in the venire.⁵⁵ Moreover, when both black and white jurors are represented on the jury, there will almost surely be divergent perspectives among the jurors along racial lines in terms of such critical considerations as lingering doubt about the defendant's guilt, perceptions of his remorsefulness and future dangerousness rooted as they are in race-linked perceptions of the crime, the defendant, and feelings toward the defendant and his family. These divergent perspectives are bound to be the source of controversy and sometimes

52. See Tracey L. Altman, Note, *Affirmative Selection: A New Response to Peremptory Challenge Abuse*, 38 STAN. L. REV., 781, 800-12 (1986); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Mmedietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777 (1994); Tanya E. Coke, Note, *Lady Justice May Be Blind, but Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994); Deborah Ramirez, *Affirmative Jury Selection: A Proposal To Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161; Donna J. Meyer, *A New Peremptory Inclusion To Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251 (1994); HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* (2003).

53. See Meyer, *supra* note 52.

54. See Ramirez, *supra* note 52.

55. Arguably, the law should prescribe that, in the trial of cross-race capital crimes, there must be representatives in the venire from the minority racial group. Peers of the defendant as well as the victim should be represented.

antipathy among jurors—sentiments that are not conducive to easy or fault free decision making.

Yet, the capital sentencing decision, unlike the jury's verdict on guilt, is not supposed to be a matter of consensus on findings of fact but a reasoned moral judgment each juror makes individually in light of all aspects of mitigation as proved to his or her own personal satisfaction and as weighed against aggravation.⁵⁶ Better such decision making should be stormy and even inconclusive but made by a jury of the defendant's peers than a smooth and easy decision by a jury that includes only his victim's peers. A foolproof remedy to racial bias in interracial capital cases is unavailable, except, of course, for the abandonment of the death penalty in such cases. But, short of that, a remedy that enhances the likelihood that a black defendant can also have African Americans on his jury should at least help to reverse what is now an outrageous discrepancy in the treatment of defendants in such racial boundary-crossing cases.

56. See William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413 (James R. Acker et al. eds., 2003).

APPENDIX

COMPONENTS OF AGGRAVATION AND MITIGATION
RECEPTIVITY SCALES

Matching Pairs of Prosecution Arguments in Aggravation and Jury Sentencing Considerations

Prosecution Arguments	Juror Considerations
The pain and suffering of the victim	The pain and suffering of the victim
The brutal or savage character of the crime	The vicious or brutal manner of the killing
The punishment wanted by the victim's family	The punishment wanted by the victim's family
The death penalty will keep the defendant from killing again	Keeping the defendant from ever killing again
The death penalty will deter others from killing	Keeping other people from killing again
The past crimes or violence of the defendant	The defendant had a history of violent crime
The defendant would be a danger to the public if he ever escaped or was released from prison	The defendant's potential for dangerousness if ever released back in society

Matching Pairs of Defense Arguments in Mitigation and Jury Sentencing Considerations

Defense Arguments	Juror Considerations
The death penalty is not humane	The desire to avoid deliberately killing someone
The death penalty is not a superior deterrent	Keeping other people from killing ^a
The risk of mistakenly executing the wrong person	Lingering doubts about the defendant's guilt
The defendant's abuse or mistreatment as a child	The defendant had been seriously abused as a child
The influence of mental illness on the defendant	Defendant suffering from extreme mental or emotional disturbance
The influence of alcohol on the defendant	The defendant was under the influence of alcohol
Basic human qualities of the defendant	Feelings of mercy or compassion for the defendant
That the defendant was sorry or asked for mercy	Defendant did not express any remorse, regret, or sorrow for the crime ^a
The recklessness or provocation of the victim	The victim was a well-known troublemaker
The defendant had become a model prisoner	The defendant would be a hardworking, well behaved inmate

^a Reverse coded