DEATH SENTENCING IN BLACK AND WHITE: AN EMPIRICAL ANALYSIS OF THE ROLE OF JURORS' RACE AND JURY RACIAL COMPOSITION

William J. Bowers[*]
Benjamin D. Steiner[**]
Marla Sandys[***]

[*] Principal Research Scientist, College of Criminal Justice, Northeastern University, and the Principal Investigator of the National Science Foundation-sponsored Capital Jury Project underway in fifteen states. Professor Bowers received his Ph.D. in Sociology from Columbia University in 1966.

[**] Assistant Professor of Sociology and Criminal Justice at the University of Delaware. Professor Steiner received his Ph.D. in Sociology from Northeastern University in 2000.

[***] Associate Professor of Criminal Justice at Indiana University. Professor Sandys received her Ph.D. in Social Psychology from the University of Kentucky in 1990.

I. INTRODUCTION

Gail Lewis Daniels, the only African-American on a Georgia capital jury that sentenced William Henry Hance, a black defendant, to death in 1984, later said she never voted for death during deliberations.[1] According to Ms. Daniels, she voted for death when she was polled by the judge only because her fellow jurors had intimidated her into doing so.[2] Her account of the jury's sentencing decision was reported in *The New York Times* as follows:

> "We were all inclined to give a life sentence," she said. "However, the prosecutor had talked about how Mr. Hance might be dangerous in the future, and we were concerned that he might get out of jail in just a few years."
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> The jurors sent a note to the judge asking what a "life sentence" meant. The judge declined to answer. Ms. Daniels said the jurors were frustrated and a number of them "began advocating for a death penalty" as the only way to insure that Mr. Hance would never be released.
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> Several secret votes were taken and each time there were fewer votes for a life sentence. But Ms. Daniels did not change her mind. The other jurors reminded her that she had sworn in court that she "could" impose the death penalty and "implied that I could get in trouble if I continued to hold out. One of the jurors said that we needed to go ahead and get it over with because the next day was Mother's Day."
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> As the pressure against her mounted, Ms. Daniels stood up and said, "You do what you have to do, but I won't vote for a death sentence." She refused to participate in further votes.
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> The remaining jurors then came up with an astounding solution to the apparent deadlock. According to Ms. Daniels: "The other jurors decided to go and tell the judge that we had voted for a death sentence. The foreman told a bailiff that we had reached a verdict." All of the jurors, including Ms. Daniels, filed into the courtroom. "I was scared to death," Ms. Daniels said.
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> Afraid that she could be charged with perjury for having said that she could vote for a death sentence, and afraid that she would get in trouble for not participating in the jury's final votes, Ms. Daniels said yes - "just like all the others" - when the jurors were polled on their verdict.
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> That was how Mr. Hance was sentenced to death.[3]

A white juror in the Hance case confirmed Ms. Daniels's account and added that another Hance juror described the defendant as "just one more sorry nigger that no one would miss."[4]

How anomalous is the story of Gail Lewis Daniels? Do black jurors

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[1] Bob Herbert, *In America: Mr. Hance's 'Perfect Punishment,'* N.Y. TIMES, Mar. 27, 1994, § 4 (The Week in Review), at 17.

[2] *Id.*

[3] *Id.*

[4] Bob Herbert, *Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

view a crime or its appropriate punishment differently than their white counterparts? Are their perspectives influenced by the race of the defendant or victim? Are blacks on white-dominated capital juries intimidated or coerced into voting for the death penalty, as Ms. Daniels's account suggests? Is Ms. Daniels's experience a rare exception to generally equitable treatment of black jurors by their white counterparts in capital cases? Whatever the answers, they can provide no consolation to William Henry Hance, who was executed in 1994 shortly after Ms. Daniels's revelation.

A. Historical Background

Race has a nefarious history in capital punishment in the United States.[5] Under slavery, certain crimes against whites were punishable by death for black offenders but not for white ones,[6] and blacks were prohibited from testifying in their own defense and from serving on juries.[7] Since the Civil War, blacks have been executed for lesser crimes, at younger ages, and more often without appeals than whites;[8] and over this period they have been disproportionately executed for crimes against whites.[9] Most conspicuous in this respect is the use of the death penalty to punish rape. Even after World War II, the use of the death penalty against blacks convicted of raping whites was vastly disproportionate to its use against other offender-victim racial combinations in rape cases.[10] Virtually all juries that sentenced blacks to

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[5] *See generally* WILLIAM J. BOWERS, EXECUTIONS IN AMERICA 56-120 (1974) [hereinafter BOWERS, EXECUTIONS IN AMERICA] (documenting the disproportionate executions of blacks over the period 1864-1967 in the United States); WILLIAM J. BOWERS, LEGAL HOMICIDE 67-102 (1984) [hereinafter BOWERS, LEGAL HOMICIDE] (examining how offender race and victim race impact capital sentencing after 1972). For a general review of the role of American law in perpetuating the differential treatment of black and white defendants, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76-135 (1997); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 13-101 (1990).

[6] In Virginia, for example, over seventy crimes were punishable by death if the perpetrator was black, compared to only one for whites. BOWERS, LEGAL HOMICIDE, *supra* note 5, at 139-40; KENNEDY, *supra* note 5, at 77; *cf.* Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439 (1995) (citing Georgia law providing that "the rape of a white female by a black man 'shall be' punishable by death, while the rape of a white female by anyone else was punishable by a prison term").

[7] Colbert, *supra* note 5, at 13-32.

[8] *See* BOWERS, EXECUTIONS IN AMERICA, *supra* note 5, at 78-96.

[9] *See* Harold Garfinkel, *Research Note on Inter- and Intraracial Homicides*, 27 SOC. FORCES 369, 374-77 (1949) (showing at successive stages of the criminal justice process that black homicide suspects whose victims were white were more likely than other homicide suspects to advance to the next stage of the process); *see also* Guy B. Johnson, *The Negro and Crime*, 217 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 103-04 (1941) (concluding that black offenders were treated more severely than white offenders).

[10] *See, e.g.*, Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS 119, 125 (1973) (concluding that black men accused of raping white women were eighteen times more likely to be sentenced to death than white defendants); Marvin E. Wolf-

death throughout this period were all white and all male.[11]

During the Reconstruction Era, the Supreme Court recognized in *Strauder v. West Virginia*[12] that black defendants were entitled to protection from all-white juries and struck down a law excluding blacks from jury service as a violation of the Fourteenth Amendment's Equal Protection Clause.[13] Yet *Strauder*'s promise went unrealized. State legislatures devised various ways to prevent black citizens from serving on juries, using such means as poll taxes and highly subjective voter registration criteria.[14] Federal courts raised few objections during this period.[15] Even after the Supreme Court ruled against such measures in *Norris v. Alabama*,[16] prosecutors preserved the all-white jury by using peremptory challenges to eliminate blacks at jury selection.[17] The jurisprudence since *Strauder* has made it virtually impossible to success-

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gang, *Racial Discrimination in the Death Sentence for Rape*, *in* BOWERS, EXECUTIONS IN AMERICA, *supra* note 5, at 109, 117 tbls.4-2 (showing the disproportionate use of the death penalty for rape against black men convicted of raping white women in Arkansas, Florida, Georgia, Louisiana, South Carolina, and Tennessee, between 1945 and 1965); Marvin E. Wolfgang & Marc Riedel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658, 667 (1975) (analyzing rape convictions in Georgia between 1945 and 1965 and finding that the most significant variable in the differential imposition of the death penalty was the combination of a black defendant and white victim).

[11] *See generally* Colbert, *supra* note 5 (reviewing the history of all-white tribunals in the United States, describing the extensive efforts of state and local officials to exclude black citizens from jury service, and analyzing the use of racially discriminatory peremptory challenges).

[12] 100 U.S. 303 (1880).

[13] *Id.* at 308. The Court held that a defendant is entitled to a jury composed of persons having the same legal status that he holds in society—to a jury of his neighbors, fellows, and associates. *Id.* The Court declared that denying blacks the rights granted them in the Civil War Amendments, particularly the right to participate in the administration of laws, branded them as inferior and stimulated prejudice. *Id.* For a discussion of the Supreme Court's reasoning in *Strauder*, see 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, 333-50 (1994).

[14] *See* Coke, *supra* note 13, at 334 (discussing the pervasive use of various techniques to exclude blacks from participating in the administration of justice).

[15] *See id.* (noting that these methods went largely unchecked until the Civil Rights movement).

[16] 294 U.S. 587, 596-99 (1934) (holding that the longstanding practice of excluding blacks from jury service through the use of subjective juror qualifications violated the Fourteenth Amendment).

[17] *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1656-69 (1985) [hereinafter Johnson, *Black Innocence*] (reviewing the use of racially selective peremptory challenges); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75-100 (1993) (examining the impact of jury discrimination on jury verdicts); Coke, *supra* note 13. Evidence of jury discrimination has been gathered by numerous empirical studies. *See, e.g.*, HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 70 (1993) (noting that prosecutors are more likely than defense attorneys to direct peremptory challenges at racial minorities); Sheri L. Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 71 n.358 (1993) (identifying cases in which there was a pervasive use of peremptory challenges against black jurors); Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection: Prosecutors Routinely Bar Blacks, Study Finds*, DALLAS MORNING NEWS, Mar. 9, 1986, at A1 (reporting the results of newspaper's investigation of 100 Dallas County trials over a twelve-month period and revealing that prosecutors struck 405 of 467 black venire persons, five times the strike rate of white jurors).

fully challenge the strikes of black jurors.[18] Even now, following *Batson v. Kentucky*,[19] it is agreed that all but the most egregious race-based strikes of black jurors are unlikely to be reversed.[20]

In 1972 the Supreme Court held in *Furman v. Georgia*[21] that the imposition of capital punishment under existing statutes was so arbitrary and wanton as to violate the Eighth Amendment's prohibition against "cruel and unusual punishment." Racial discrimination or bias in the application of the death penalty was cited by some Justices in their concurring opinions,[22] but it was not common to the opinions of the five-Justice plurality. In the wake of *Furman*, states rewrote their capital statutes so as to curb arbitrary and discriminatory influences on the exercise of sentencing discretion. Yet, not long after the Supreme Court endorsed the "guided discretion" form of post-*Furman* capital statutes in *Gregg v. Georgia*[23] and companion cases, studies of the application of these rewritten statutes showed continued disparities in the use of the death penalty by race of defendant and especially by race of victim.[24] The most rigorous of these studies, conducted in Georgia by David Baldus and colleagues,[25] specifically

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[18] *See* Colbert, *supra* note 5, at 65-128 (reviewing in depth the Supreme Court's post-*Strauder* jurisprudence on jury composition, jury selection, and race).

[19] 476 U.S. 79 (1986) (requiring state attorneys to justify with a race-neutral reason their strikes of black jurors whenever a discriminatory pattern of exclusion appeared in an individual case). Ironically, the *Batson* decision represented a shift in the Court's analysis from guarding the defendant's right to equal protection to guarding the prospective juror's right to be represented on juries.

[20] *See* Coke, *supra* note 13, at 336-50 (describing the limitations of *Batson* and subsequent decisions).

[21] 408 U.S. 238, 239-40 (1972) (declaring that the imposition of the death penalty under Texas and Georgia statutes, which were typical of those in most states at the time, constituted cruel and unusual punishment in violation of the Eight and Fourteenth Amendments in part because these statutes permitted juries to administer the death penalty in an arbitrary and capricious manner).

[22] *Id.* at 250 n.15 (Douglas, J., concurring) (noting studies suggesting racial bias); *id.* at 364 (Marshall, J., concurring) (same). *But see id.* at 310 (Stewart, J., concurring) ("But racial discrimination has not been proved . . .").

[23] 428 U.S. 153, 206-07 (1976) (upholding state's new post-*Furman* capital statute because it included procedures intended to prevent the arbitrary imposition of the death penalty); Jurek v. Texas, 428 U.S. 262, 276 (1976) (same); Proffitt v. Florida, 428 U.S. 242, 259-60 (1976) (same).

[24] *See, e.g.*, William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 629-30 (1980) (finding continuing disparities in capital sentencing based on the race of offender and race of victim under the capital statutes approved by the Supreme Court in *Gregg*, *Proffitt*, and *Jurek*); SAMUEL R. GROSS & ROBERT MAURO, DEATH & DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 35-94 (1989) (examining sentencing under post-*Furman* death penalty laws in eight states from 1976 to 1989 and finding significant racial disparities). For a review and evaluation of this body of research, see U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), *reprinted in* THE DEATH PENALTY IN AMERICA, at 268 (Hugo Adam Bedau ed., 1997).

[25] *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 80-228 (1990) (using data collected during the 1970's to assess the effectiveness of Georgia's post-*Furman* capital statute in curbing the arbitrariness proscribed in *Fur-*

demonstrated that the decisions of jurors at the sentencing stage of the process make a sizable and statistically significant contribution to the overall racial disparities in the imposition of the death penalty.[26]

In 1986 the Court explicitly acknowledged the danger that racial attitudes might influence jurors' sentencing decisions in capital cases, especially when the defendant is black and the victim is white. In *Turner v. Murray*[27] the Court singled out black defendant/white victim cases as the ones in which jurors' racial sentiments are especially apt to confound the sentencing decision, and it ruled 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."[28] The Court declared that this judgment was "based on . . . the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case."[29] A year later, however, in *McCleskey v. Kemp*,[30] when the Court was confronted in a black defendant/white victim case with the Baldus study's strong evidence of racial bias, it narrowly affirmed (5-4) the constitutional acceptability of McCleskey's death sentence.[31]

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[26] Baldus has replicated these findings from Georgia in later studies conducted in New Jersey and Pennsylvania. For a discussion of these studies, see David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) [hereinafter Baldus et al., *Racial Discrimination and the Death Penalty*].

[27] 476 U.S. 28 (1986).

[28] *Id.* at 37.

[29] *Id.* at 37-38. *See infra* notes 194-200 and accompanying text for a further exposition of the Court's view of the danger that "subtle, less consciously held racial attitudes" might influence jurors' capital sentencing decisions.

[30] 481 U.S. 279 (1987).

[31] Perhaps the *McCleskey* Court believed that its decision in *Turner* would thereafter remedy the racial disparities demonstrated by Baldus. The special jury selection procedures required by *Turner* were supposed to ensure that jurors would no longer be racially biased in cases like McCleskey's.

B. Empirical Context

The public, and hence jurors, are often exposed to race-linked thinking about violent crime, especially from the popular media where the black criminal is often cast as an incorrigible and dangerous predator.[32] A substantial body of research demonstrates the influence of racial stereotypes in attributions of criminality,[33] and opinion polls show that the public identifies blacks as more prone to criminality than other racial groups.[34] Indeed, whites view certain violent offenses—muggings and assaults—as "black crimes."[35] This "racialization" of criminality appears to promote generalized mistrust of blacks on the part of whites,[36] and doubtless helped to foster the Charles Stuart and Susan Smith hoaxes in which white murderers first alleged that their victims had been killed by blacks.[37] Among whites, especially white males, racial stereotypes and mistrust are linked to punitiveness,[38] including support for the death penalty.[39]

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[32] For example, John M. Sloop, based on his analysis of over 600 articles published in popular magazines such as *U.S. News and World Report*, *The Nation*, and *Psychology Today*, has demonstrated the prevalence of racial stereotypes in American media coverage of prisoners and punishment. JOHN M. SLOOP, THE CULTURAL PRISON: DISCOURSE, PRISONERS, AND PUNISHMENT (1996). He found that, compared to white prisoners, black prisoners are more often depicted as "irrational, incorrigible, predatory, and dangerous criminals with warped personalities." *Id.* at 116. *See generally* JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL (1988) (describing the image of the dangerous black male as reproduced in street-level interactions).

[33] *See, e.g.*, JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 113-14 (1997) (discussing public opinion surveys and other empirical studies that have found widespread attribution of criminality to racial minorities).

[34] *See, e.g.*, *Racial Overtones Evident in Americans' Attitudes About Crime*, GALLUP POLL MONTHLY, Dec. 1993, at 37, 38 (showing that 37% of those surveyed perceive blacks as "more likely" than other groups to commit crimes, in contrast to 30% for Hispanics, 15% for Asian Americans, and 6% for whites).

[35] *See* Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1, 10 (1983) (finding strong evidence in a sample of college students of crime-related racial stereotyping, such as perceiving blacks as more likely than whites to commit assault, mugging, and assault of a police officer and perceiving whites as more likely to commit embezzlement, child molestation, counterfeiting, fraud, and rape).

[36] *See Racial Overtones Evident*, *supra* note 34, at 39 (finding, for example, that 55% of whites agree that a taxi driver should be permitted to deny service to an African-American customer and 42% agree that store owners should be permitted to deny African-Americans entry at night).

[37] For an inventory of such hoaxes, see KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 69-93 (1998).

[38] *See* S.F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?*, 38 SOC. PROBS. 287, 294 (1991) (concluding from data collected in the 1987 General Social Survey that whites' racial prejudice is related to their punitive attitudes toward criminals).

[39] Death penalty support, as reflected in public opinion polls, is far stronger among whites than blacks. A 1999 Harris poll shows 77% of whites and 39% of blacks support the death penalty. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 133 tbl.2.60 (2000), *available at* http://www.albany.edu/sourcebook/1995/pdf/t260.pdf. A 2000 Gallup poll found that 70% of whites and 43% of blacks favor the death

Unconsciously perhaps, whites as jurors carry into the jury box and the jury room this cultural baggage of the dangerous black male predator and the need for punitiveness. Prosecutors seek to take advantage of this cultural paraphernalia at the sentencing stage of death penalty trials by making arguments that embody negative racial imagery and stereotypes.[40]

Not surprisingly, the perspectives of blacks on crime and the criminal justice system diverge widely from those of whites. Blacks are more likely to believe that decisions to bring criminal charges, to convict on such charges, and to impose capital punishment are tainted with racial bias. Whites, on the other hand, are more likely to see the criminal justice system as excessively lenient and rigged in favor of defendants' rights.[41] Blacks have less confidence than whites in the courts[42] and are far less approving of the police.[43] Underlying blacks' mistrust of the police is their shared experience of discrimination in formal and informal law enforcement settings.[44] Furthermore, though discrimination frequently occurs at the hands of police and

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penalty. *Id.* at 136 tbl.2.63. White approval of capital punishment has been linked to racial stereotyping. Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RES. CRIME & DELINQ. 202, 206 (1994) (providing evidence based on the 1990 General Social Survey that white support for capital punishment is associated with prejudice against blacks). Enthusiasm for the death penalty is especially pronounced among white males who have experienced "vicarious victimization" (i.e., knowing someone who was a homicide victim within the past 12 months). Marjari J. Borg, *Vicarious Homicide Victimization and Support for Capital Punishment: A Test of Black's Theory of Law*, 36 CRIMINOLOGY 537, 562-63 (1998) (showing a greater support for the death penalty among white vicarious victims in general and white male vicarious victims in particular).

[40] *See, e.g.*, Austin Sarat, *Speaking of Death: Narratives of Violence in Capital Trials*, 27 LAW & SOC'Y REV. 19, 27-30 (1993) (examining the rhetorical strategies used by prosecutors in the capital trial of an African-American male to invoke negative racial stereotypes).

[41] *See* SHMUEL LOCK, CRIME, PUBLIC OPINION, AND CIVIL LIBERTIES 61 (1999) ("Since many in the black community believe that the courts are stacked against minority defendants, it is probable that blacks would not be as likely as whites to be in favor of a court system tougher on defendants."); *see also* John Hagan & C. Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. SOC. 329 (1982).

[42] *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 124 (1996); NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 22 (1999), *available at* http://www.ncsc.dni.us/PTC/results/results.pdf.

[43] *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, 32-33 (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).

[44] *See* Coke, *supra* note 13, at 354 n.149 ("[T]he single most dominant factor from today's urban black experience that sets him apart from his white counterpart is contact with the police . . . [which is] the chief complaint of all black communities, and resonant with overtones of brutality. This chief component of black experience, the white American, whether racist or not, does not and cannot share.").

security guards, it also occurs when blacks come into contact with storekeepers, landlords, and cab drivers. As Tanya Coke has observed, "rare is the African-American who cannot relate a tale of having been stopped by police in an affluent neighborhood or followed closely at the heels around a clothing store. As one black law professor recently put it, 'If I'm dressed in a knit cap and hooded jacket, I'm probable cause.'"[45]

The divergent experiences and perspectives of black and white Americans have implications for their service as jurors. Whites are apt to make pro-prosecution interpretations of evidence, especially when defendants are black and particularly on highly determinative issues such as eyewitness identification,[46] probable cause,[47] and resistance to arrest.[48] Blacks may be more critical in their interpretation of factual questions presented at trial,[49] particularly when police testimony is involved.[50] And in capital cases, blacks may be more sympathetic than white jurors to mitigating evidence presented by a black defendant with whom they may be better able to identify and empathize, and whose background and experiences they may feel they understand better than do their white counterparts.[51]

Indeed, studies of mock jurors in simulated cases show patterns of

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[45] Coke, *supra* note 13, at 354-55 (citing Ellen Goodman, *Simpson Case Divides Us by Race*, BOSTON GLOBE, July 10, 1994, at 73 (quoting Professor Charles Ogletree)).

[46] *See, e.g.*, Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 939-40 (1984) (observing that elderly white subjects in a 1979 study erred in identifying people of color at twice the mean recognition rate than when identifying whites).

[47] *See, e.g.*, Nancy Pennington & Reid Hastie, *Practical Implications of Psychological Research on Juror and Jury Decisionmaking*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 90, 97 (1990) (noting research that shows wealthier jurors inferred that a defendant who carried a knife had culpable intent, while jurors from poorer neighborhoods were more willing to infer the defendant carried the knife for protection).

[48] This was a central issue in the Rodney King beating trial. White jurors interviewed after the verdict explained that they believed the beating was justified because the officers reasonably perceived King's movements as menacing. *See, e.g.*, *Juror Defends Verdicts, Says King Was "In Control,"* ST. LOUIS POST-DISPATCH, May 1, 1992, at 5C (quoting one juror who defended the actions of the arresting officers).

[49] *See, e.g.*, JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 167 (1981) (noting that mock jury studies have revealed that both blacks and whites, but particularly blacks, who have experienced discrimination are less willing to convict defendants accused of rape).

[50] A survey of 800 former jurors found that 42% of whites, but only 25% of blacks, believed that, given conflicting testimony between a law enforcement officer and a defendant, the police officer should be believed. *See* Coke, *supra* note 13, at 355 (citing *Racial Divide Affects Black, White Panelists*, NAT'L L.J., Feb. 22, 1993, at S8, S8-S9). Coke observes: "In criminal cases, of course, it is often [the] shadowy gap between trust and skepticism of police testimony where reasonable doubt grows best." *Id.* at 356-57.

[51] *See* Martin L. Hoffman, *Interaction of Affect and Cognition in Empathy*, in EMOTIONS, COGNITION, AND BEHAVIOR 103, 114 (Carroll E. Izard et al. eds., 1984) (arguing that "empathy may be unlikely when the observer and the model are . . . from different cultures"); *id.* at 124 (observing that empathy "may apply only when the other's plight is [perceived as] beyond his or her control"). *See generally* SOCIAL IDENTITY AND INTERGROUP RELATIONS (Henri Tajfel ed., 1982) (discussing ingroup favoritism).

race-linked guilt and punishment decision making.[52] The research findings are far from consistent, but they appear to support the following generalizations. First, white mock jurors are more likely to judge black defendants than white defendants as guilty,[53] and to impose more severe punishment on black than on white defendants.[54] Second, white jurors are more likely to convict when the victim is white, and black jurors are more likely to convict when the victim is black, regardless of the defendant's race.[55] Third, race-linked dispari-

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[52] *See* Johnson, *Black Innocence*, *supra* note 17, at 1625-43 (reviewing this research from a legal perspective). For more recent reviews and commentaries on this research literature, again from a legal perspective, see King, *supra* note 17, at 75-76, and Coke, *supra* note 13, at 351. Most of this research on simulated or "mock" juries deals with the decision about guilt rather than about punishment and is not specific to the capital jury's life or death sentencing decision.

[53] *See, e.g.*, Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOL. 47, 49 (1982) (finding white mock jurors more likely to find a black defendant than a white defendant guilty); Samuel R. Sommers & Phoebe C. Ellsworth, *Race in the Courtroom: Perceptions of Guilt and Dispositional Attributions*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1367 (2000) [hereinafter Sommers & Ellsworth, *Race in the Courtroom*] (showing that white mock jurors more often convict black than white defendants when race of the defendant is known but not made salient in the experiment and that such differences of treatment are diminished and not statistically significant when the experimental manipulation makes race of defendant salient); Samuel R. Sommers & Phoebe C. Ellsworth, *White Jurors' Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, PSYCHOL. PUB. POL'Y & L. (forthcoming 2001) [hereinafter Sommers & Ellsworth, *White Jurors' Bias*] (same).

[54] *See, e.g.*, Brandon Applegate et al., *Victim-Offender Race and Support for Capital Punishment: A Factorial Design Approach*, 18 AM. J. CRIM. JUST. 95, 105-07 (1993) (showing that defendant race was most influential in mid-range cases (i.e., where the decision could go either way)); Hubert S. Feild, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261 (1979) (finding that jurors in rape trials generally treated a black defendant more harshly than a white defendant); Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337, 349 (2000) (finding white mock jurors more likely to impose the death penalty on a black defendant than on a white defendant); *cf.* Dolores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCHOL. 1249 (1993) (findings that white juries are more lenient in sentencing toward white defendants than toward Hispanic ones); *id.* at 1256 (finding that Hispanic mock jurors were no more likely to convict a white defendant than a Hispanic defendant). Studies have also found that in cases where both the victim and the defendant are black, black jurors are more predisposed than whites to convict. *See, e.g.*, Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent Are They Related to Jury Verdicts?*, 64 JUDICATURE 22, 27 (1980-81). Intolerance among minority group members of violence by minority perpetrators may be due to their greater victimization by perpetrators from their own minority group. Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC'Y REV. 777, 777 (1998) ("Contrary to received wisdom, we find that African Americans and Latinos are less tolerant of deviance—including violence—than whites."). Adelbert H. Jenkin notes that a black individual's evolution of identity in the black community may include identification with whites and "the tendency to see Blacks in the same stereotyped way that racist Whites do." Adelbert H. Jenkin, TURNING CORNERS: THE PSYCHOLOGY OF AFRICAN AMERICANS 177-81 (1994). In this connection, Justice Marshall observed that "members of minority groups frequently respond to discrimination and prejudice by attempting to distance themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." Castaneda v. Parteda, 430 U.S. 482, 503 (1977) (Marshall, J., concurring).

[55] *See e.g.*, Marina Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOL. 159, 160 (1978). In this study, Miller and Hewitt presented

ties in sentencing are most pronounced when the defendant is black and the victim is white; in such cases the defendant is doubly disadvantaged.[56]

Among mock jury studies that focused specifically on capital sentencing, Mona Lynch and Craig Haney have found that white mock jurors were more likely to impose the death penalty on a black defendant than on a white defendant.[57] They showed that this tendency is fostered by white jurors' failing to give effect to mitigating circumstances when the defendant is black, and that the tendency increases in black-defendant cases as jurors' level of comprehension of the judicial instructions decreases.[58] The authors note that jurors mentioned "stereotype-consistent" reasons for their sentencing verdicts (i.e., negative qualities of the black defendants) and appeared less able or willing to empathize with black defendants (as manifested by the tendency to write significantly less overall in explaining their sentencing decision and significantly less about the black defendant specifically).[59] Related research has demonstrated that white mock jurors interpret aggravating and mitigating circumstances differently as a function of the defendant-victim racial character of the case.[60] Another experimental study of decision making by mock capital jurors showed that defendant race was most influential in mid-range cases (i.e., where the decision could go either way). In these mid-range cases, black defendants were more likely to be given death sentences

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black and white mock jurors with a rape case involving a black defendant. Some subjects were told the victim was white and others that she was black. For both black and white subjects, there was a greater tendency to vote for a conviction when the victim was racially similar to the mock juror. *Id.* White mock jurors reported that they would have voted to convict the black defendant of raping the black victim only 32% of the time, while black mock jurors would have convicted that defendant 80% percent of the time. *Id.*

[56] A meta-analysis of experimental studies on racial bias in criminal sentencing found that both the race of the defendant and that of the victim influenced white mock jurors' sentencing decisions across a range of cases, resulting in a pattern that most negatively affects black defendants whose victims are white. Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179 (1992).

[57] Lynch & Haney, *supra* note 54, at 349.

[58] *Id.* at 352.

[59] *Id.* at 341.

[60] *See, e.g.*, Graig Haney, *Commonsense Justice and Capital Punishment: Problematizing the Will of the People*, 3 PSYCHOL. PUB. POL'Y & L. 303, 331 (1997) (describing the results of a simulation study of race and death sentencing). Haney writes:

> we found that our participants (all of whom were non-Black college students) were significantly less willing or able to verbalize the reasons for the verdict choices in the condition in which both the defendant and the victim were Black. In addition, they made significantly more frequent and more positive references to the defendant and more references to mitigating circumstances in the conditions in which the defendant was White as opposed to those in which he was Black. They were also more likely to find the defendant's drug usage to be mitigating and to single out the lack of a past criminal record in reaching a life rather than death verdict in the case of a White, but not a Black defendant. This suggests the racially discriminatory pattern of death sentencing may be a function of jurors' inability to empathize with or enter the subjective world of victims and defendants who are racially different from them.

Id.

than were white defendants.[61] Generally, the studies of mock jury capital sentencing have shown that white mock jurors have the strongest tendency to impose death as punishment in cases where the defendant is black and the victim is white.

Other mock jury studies report only qualified race-linked findings. Racial disparities appear to be more pronounced when the crime is serious, such as murder or rape, and when guilt or acquittal is a close call.[62] Jury deliberations appear to have different effects on black and white mock jurors.[63] Experimental studies have also found that white mock jurors demonstrate racial prejudice only in the face of incriminating, inadmissible evidence against a black defendant[64] or primarily in the artificial setting of the psychology laboratory where judicial instructions[65] and deliberation[66] are typically omitted. Still other research reveals no evidence of white prejudice at all,[67] and this body of research has been faulted for inattention to black mock jurors.[68]

Critics have stressed the limitations of mock jury studies in generalizing about the influence of race on the decision making of real jurors. Such experiments, they argue, typically lack realism or similarity to real-life situations. These studies usually use written descriptions of the accused instead of permitting the jury to see the defendant as they would in a trial (e.g., trial transcripts vs. re-enactments).[69]

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[61] *See* Applegate et al., *supra* note 54.

[62] Professor Bodenhausen and his colleagues have shown that ethnic stereotypes exert a relatively stronger influence on the process when information processing demands are high and the decision-making task is complex. *See* Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCHOL. 267 (1985). Archival studies show a similar pattern, in which racial disparities are particularly pronounced for the least-aggravated to mid-range cases. *See, e.g.*, Jonathon R. Sorenson & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & LAW 61 (1995) ("[I]n less serious cases, extra-legal factors such as race of offender and victim are likely, albeit perhaps unconsciously, to enter into consideration.").

[63] *See* J.L. Bernard, *Interaction Between the Race of the Defendant and that of Jurors in Determining Verdicts*, 5 LAW & PSYCHOL. REV. 103, 109 (1979) (finding a "pronounced tendency" for mock jurors to shift their votes toward acquittal as a result of group discussion, but noting one exception: white jurors who found the black defendant guilty on their first ballot tended to hold to this decision and not be influenced by group discussion).

[64] *See, e.g.*, J.D. Johnson et al., *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893 (1995).

[65] *See, e.g.*, Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713 (1991).

[66] *See, e.g.*, N.L. Kerr et al., *Defendant-Juror Similarity and Mock Juror Judgments*, 19 LAW & HUM. BEHAV. 545 (1995).

[67] In their meta-analysis of twenty-nine studies, Mazzella and Feingold concluded that black defendants were no more likely than white defendants to be found guilty. R. Mazzella & A. Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315 (1994).

[68] *See, e.g.*, Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 53 ("[T]he few experiments that do include both white and black participants suffer from methodological and contextual difficulties.").

[69] In their review of mock jury studies, Sweeney and Haney established that jurors who could see rather than merely read about the race of the accused were particularly likely to succumb to

Moreover, mock jury studies typically use students as jurors instead of individuals who more accurately reflect the character and composition of real juries.[70]

Yet these are criticisms that suggest jury simulation studies may actually tend to underestimate the extent of racial bias in corresponding real-life settings. Since students are typically more lenient and more enlightened with regard to racial stereotyping than members of the community at large, their use as mock jurors should tend to underrepresent the degree to which race influences actual jurors' judgments. And, since simulations with more realistic enactments of trials show greater evidence of racial bias, shortcomings in verisimilitude should also tend to underestimate the influence of race in mock jury studies.

Moreover, recent research by Sommers and Ellsworth has demonstrated a tendency among white mock jurors to curb adverse treatment of black defendants when race is a salient or prominent feature of the experimental manipulation. Differential treatment of black and white defendants is evident, however, when the race of defendant and victim is known to mock jurors but is not prominent in the experiment.[71] If the "politically correct" suppression of racially biased judgments is unknowingly induced in many experimental situations, as this research suggests, then it, too, will cause the balance of evidence from mock jury studies to underestimate the influence of race in the real-world of juror decision making. We do not know for how long or to what extent this experimentally induced tendency to supress racial differences has been present in mock jury studies,[72] and more importantly, we do not know the extent to which it is an adaptation that jurors make in experiments but do not make in the real world of jury decision making.[73]

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the influence of race in their assessments of the defendant's guilt. Sweeney & Haney, *supra* note 56, at 191.

[70] *See* Pfeifer & Ogloff, *supra* note 65, at 1714, 1722.

[71] *See* Sommers & Ellsworth, *Race in the Courtroom*, *supra* note 53; Sommers & Ellsworth, *White Jurors' Bias*, *supra* note 53.

[72] *See* Sweeney & Haney, *supra* note 56, at 190-91 (finding no evidence that discrimination in mock jury studies has lessened over time).

[73] In its capital jurisprudence, the Supreme Court has resolved such ambiguities by discounting the findings of mock jury studies and affirming its faith in the trustworthiness of real jurors. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court asserted that the behavior of mock jurors is no substitute for knowing how real jurors will behave when deciding actual cases. The Court complained that the trouble with the empirical studies cited by the parties was that the study participants "were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. [The Court has] serious doubts about the value of these [mock jury] studies in predicting the behavior of actual jurors." *Id.* at 171. By contrast, in its jurisprudence on jury size in criminal cases, the Court in *Ballew v. Georgia*, 435 U.S. 223 (1978), relied on mock jury studies in declaring a five-person criminal jury unconstitutional. *Id.* at 235-39. The Court stated on the basis of the jury studies that smaller juries are less likely to engage in effective group deliberation or to produce accurate results. *Id.* at 232-34. For a critical view of the Court's stand on mock jury research in *Lockhart*, see Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77, 78-79 (1991);

How well do these patterns of racial bias in mock jury experiments hold for real jurors on real juries in real cases? Do they hold for the jurors who actually make the life or death sentencing decisions in capital cases? There is relatively little hard evidence about the experience or influence of black or white jurors on real, typically white-dominated juries. There are some accounts in the academic literature based on interviews with jurors[74] and survey data from trial judges;[75] and there are, of course, journalistic reports.[76] Of these, most conspicuous are news stories about jurors in high-profile trials such as the O.J. Simpson and Rodney King cases, where the racial makeup of the jury is thought to have been critical.[77]

Phoebe C. Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment, in* CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177 (Kenneth C. Haas & James A. Inciardi eds., 1988).

[74] *See, e.g.*, Dale W. Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 21-22 (1965). Broeder discusses interviews with jurors in four criminal trials that involved black defendants. The interviews reveal that racial prejudice influenced the jury deliberations in all four cases, including the one case in which the defendant was acquitted. Moreover, several jurors explicitly argued during deliberations that the defendant should be convicted simply because he was black. *Id.* at 23. Many other jurors expressed unsolicited derogatory views of blacks to the interviewer. *Id.* at 24. Broeder also reports that a black juror serving on a case with a black defendant became "the jury's expert on Negro culture."

> She provided the jury with information concerning the incidence of crime and juvenile delinquency among Negroes, Negro living conditions, the Negroes' attitude toward the law, and the probable fear that a young Negro like the defendant would entertain over the prospect of an arrest by white policemen (an important point since the defendant had fled when faced with apprehension).

Id. at 30.

[75] *See* HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY (1966). This classic study is based on data collected from a national sample of judges who reported on 1136 of their jury trials. The presiding judge was asked to explain the jury's behavior when he or she disagreed with the jury's verdict. In certain cases in which the jury voted to convict when the judge would have acquitted, the judge saw substantial evidentiary problems and explained the jury's verdict as prompted by the jurors' antagonism toward the defendant's involvement in interracial sex. *Id.* at 398. At least three of these cases involved a black defendant. *Id.* Judges also observed that juries tended to give undue leniency in black defendant/black victim assault cases. *Id.* at 340-41. Although judges thought that jurors often acquitted guilty defendants due to their sympathy for the defendant, black defendants were much less likely than white defendants to be the recipients of such leniency because they were viewed as extremely unsympathetic. *Id.* at 343-44.

[76] *See, e.g.*, Herbert, *supra* note 1 (describing one black juror's account of her experiences on a capital jury that sentenced a black defendant to death despite her voting for life imprisonment).

[77] O.J. Simpson's jury was composed of nine black jurors, two white jurors, and one Hispanic juror. Steven M. Warshawsky, Note, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 214 n.150 (1996) (Simpson's jury had nine blacks and one white); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 721 n.225 (1995) (Simpson's jury had two whites and one Hispanic). Mistrust of the police, in particular of officer Mark Fuhrman, apparently made its way into the jury room. *Id.* Black motorist Rodney King's jury, which was composed of ten white jurors, one Hispanic juror, one Asian juror, and no black jurors, acquitted four white police officers charged with using excessive force to restrain him. Warshawsky, *supra*, at 214 n.150 (King's jury had ten white jurors and no blacks). A year later, a federal jury with two black members convicted two of the four officers of intentionally violating Rodney King's constitutional rights. *See* Seth Mydans, *Verdict in Los Angeles; 2 of 4 Officers Found Guilty in Los Angeles Beating*, N.Y. TIMES, April 18, 1993,

The foremost systematic research on the role of race in the decision making of real jurors in noncapital cases was carried out by Gary LaFree and colleagues on Indianapolis rape trials.[78] They conducted courtroom observation and post-trial interviews with some 360 actual jurors (306 whites and 54 blacks) from 38 sexual assault trials.[79] The study revealed that the largely middle-class white jurors harbored stereotypes about female black victims. The jurors viewed such complainants as likely to have consented to sex or to be sexually experienced and therefore less likely to have suffered harm by the assault.[80] White jurors were also less willing than their black counterparts to believe the testimony of black complainants.[81]

Furthermore, Christy Visher's statistical analysis of the Indianapolis juror interview data revealed that the confidence of both black and white jurors about the guilt of a defendant decreased as the number of blacks on the jury increased, regardless of the strength of the evidence.[82] Visher also showed that individual black jurors were less likely than their white counterparts to find the defendant guilty, regardless of the defendant's race.[83] The study found further that black males were least, and white males most, likely to find the defendant guilty, with the females of both races falling in between. Visher concluded, "[t]hus the impact of the jury's racial composition on jurors' final judgments may be related to either the proportion of black jurors on the jury or possibly the influence of any black *males*."[84] She noted that black jurors "may be predisposed to support the defense and sympathize with the defendant.... These attitudes appear to influence other jurors as the proportion of black jurors on the jury in-

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§ 1, at 1.

[78] GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 154-55, 200-01 (1989).

[79] Christy Ann Visher, Jurors' Decisions in Criminal Trials: Individual and Group Influences (1982) (unpublished Ph.D. dissertation, Indiana University). Interviews were conducted with 331 different jurors. Twenty-nine jurors served on two of the thirty-eight sample trials and were interviewed twice, once about each case. Hence, the sample of 360 juror interviews was comprised of 302 jurors who served on one trial and twenty-nine who served on two trials.

[80] *Id.* at 220. For example, one juror argued for acquittal in a case involving the rape of a young African-American girl, on the grounds that a girl her age from "that kind of neighborhood probably wasn't a virgin anyway."

[81] *Id.* One white juror told researchers: "Negroes have a way of not telling the truth. They've a knack for coloring the story. So you know you can't believe everything they say."

[82] *Id.* at 180 tbl.5.5 (finding that the confidence of jurors in the guilt verdict was highest in juries with eleven or twelve whites, lower in juries with nine or ten whites, and lower still when only seven or eight of the jurors were white).

[83] *Id.* at 161. Visher observed: "The difference in jurors' judgments on juries with more or fewer blacks probably reflects racial differences in attitudes about crime, sexual-assault, and the criminal justice system. Black jurors are less likely to believe the victim (r = -.17), view rape as less serious (r = -.19), and believe that our criminal justice system is often too harsh on the defendant (r = -.14)." *Id.*

[84] *Id.* at 162 ("Unfortunately, these data do not allow a conclusive interpretation of the racial composition effect.").

creases."[85] Notably, the relatively small number of black jurors in the Indianapolis sample, and the fact that only two of the 38 trials involved interracial rapes,[86] meant that the investigators were not able to examine the influence of jury racial composition with respect to the especially volatile black-defendant/white-victim cases.

For capital sentencing, the influence of jurors' race has been studied by David Baldus and his colleagues with systematic data on Philadelphia capital juries. They examined some 252 defendants and 41 co-defendants in Philadelphia capital trials (62 B/W cases, 266 B/B cases, and 49 W/W cases) over the period 1984-1994. Baldus found, as in Indianapolis rape cases, that jury racial composition influences sentencing outcomes; in particular, death sentences are less likely when black jurors are more numerous.[87] He found further that the influence of jury racial composition was greater for black than for white defendants: "Preliminary findings from our analysis of jury racial composition in Philadelphia capital cases suggest that black defendants are treated less punitively vis-a-vis nonblack defendants as the proportion of blacks on the juries increases."[88] The further work of Baldus and associates, reported in this Issue,[89] shows that the tendency for black defendants to be treated more harshly than white ones as the number of whites on the jury increases holds especially for black-defendant/white-victim cases.[90] This research also indicates that the tendency for black defendants to be treated more harshly is curbed, especially when young black males and middle-aged black females are better represented on the jury.[91]

Both mock and real jury studies reveal race-linked guilt and punishment decision making, and there is reason to believe that mock jury studies tend to understate the extent of such racial differences.[92] The studies of real juries have dealt mostly with the effects of jury racial composition on jury-level decisions. Both the Indianapolis and

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[85] *Id.* Visher commented:

> Black jurors on juries with nine or more white jurors may feel intimidated by being in a racial minority and be convinced by the white jurors' arguments. Having few other blacks on the jury would offer black jurors little support for their opinions. But in juries where the racial composition is more balanced with four or five black jurors, the attitudes of black jurors may [sic] sufficient strength to influence other members of the jury, at least to the extent that they question of [sic] the majority's conclusions. Hence, all jurors express considerably more uncertainty about the defendant's guilt and are more likely to believe that the defendant is innocent.

Id. at 160-61.

[86] *Id.* at 110 n.2 (noting that two of the thirty-eight trials were black defendant/white victim cases).

[87] David C. 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) [hereinafter Baldus et al., *Use of Peremptory Challenges*].

[88] *See* Baldus et al., *Racial Discrimination and the Death Penalty*, *supra* note 26, at 1721 n.159.

[89] Baldus et al., *Use of Peremptory Challenges*, *supra* note 87.

[90] *Id.* at tbl.8.

[91] *Id.* at fig.10.

[92] *See supra* notes 69-73 and accompanying text.

Philadelphia studies of actual cases found that the likelihood of a favorable verdict for the defendant was influenced by the number of blacks and whites on the jury. The Indianapolis study collected data on individual jurors but had too few interracial rape trials and too few black jurors to explore differences in decision making between black and white jurors within cases of differing defendant-victim racial combinations. The Philadelphia study, with very limited data on individual jurors but sizable samples of B/W, B/B, and W/W trials, was able to establish that the influence of jury racial composition was most pronounced in black-defendant/white-victim capital cases—as the Turner Court might have supposed.

In this Article we assess the role of both juror race and jury racial composition in capital sentencing, and we do so separately for cases that represent the principal defendant-victim racial combinations: black defendant/white victim killings (B/W cases), white defendant/white victim killings (W/W cases), and black defendant/black victim killings (B/B cases). For this purpose, we draw upon the data of the Capital Jury Project (CJP) to examine the interview responses of a large sample of individual jurors, large enough to permit reliable comparisons of black and white jurors who have served on B/W, W/W, and B/B cases. The data are not confined to distinctively urban settings such as Indianapolis and Philadelphia but drawn to represent capital cases in fourteen states across the country.

C. The Capital Jury Project

Interviewers in the Capital Jury Project, a national study of capital jurors' decision making, have conducted interviews with 1,155 capital jurors from 340 trials in fourteen states, including 113 black capital jurors (9.8% of the entire sample) from eighty-three of these cases.[93] The interviews are designed to chronicle the jurors' experiences and decision making over the course of the trial, to identify points at which various influences may come into play, and to reveal the ways in which jurors reach their final sentencing decisions. Jurors are asked both structured questions with designated response options and open-ended questions seeking detailed narrative accounts of their experiences as capital jurors.[94]

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[93] The database employed here consists of all interviews conducted to date by CJP investigators. It includes some 239 interviews from eighty-three capital trials not available or not used in earlier analyses.

[94] Capital jurors were selected for interviews in a three-stage sampling procedure. First, states were chosen to reflect the principal variations in guided discretion capital statutes. Second, within each state, twenty to thirty full capital trials conducted since 1988 were selected to represent both life and death sentencing outcomes. Third, for each trial, a target sample of four jurors was systematically selected for three-to-four-hour personal interviews. For further details of the sampling design and data collection procedures, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1080 nn.200-03

To explore the role of jurors' race in capital sentencing, in Part II we examine statistical indications of how the racial composition of the jury and the race of the individual juror might affect the jury's decision-making process. We analyze the role of jurors' race in three distinct types of cases: B/W, W/W, and B/B cases. Our analysis considers (a) how the racial composition of the jury affects the jury's capital sentencing decision; (b) how the race of an individual juror influences the stands that he or she takes on the defendant's punishment over the course of the trial; (c) how a juror's race affects the considerations that he or she deems important in his or her punishment decision; and (d) how black and white jurors view the decision-making process and their roles in it. Our statistical analysis concludes with a closer look at the interracial B/W cases to see (e) how the combination of jurors' race, jurors' gender, and the racial composition of the jury influence the thinking and experience of capital jurors.

In Part III we turn to jurors' narrative accounts of the decision-making process for further insights about the influence of race. We present jurors' reports, in their own words, of how the jury reached its sentencing decision and of the role race played in that determination. In Part IV we summarize our principal findings and consider the implications of this research for capital jurisprudence.

II. STATISTICAL PATTERNS

The current CJP sample of 340 capital cases includes 165 (48.5%) white-defendant/white-victim (W/W) cases; 74 (21.8%) black-defendant/ white-victim (B/W) cases; and 60 (17.6%) black-defendant/black-victim (B/B) cases.[95] The remaining 41 (12.1%) cases include killings with white defendants and black victims, killings with Hispanic defendants or victims, or killings in which the race or ethnicity of the defendant and victim could not be determined.[96]

The defendant-victim racial combination of the crime is associated with the racial composition of the jury.[97] Blacks are more likely

(1995). The juror interviews obtained data on a core set of some 700 variables through structured questions used in all states. *See id.* at 1082 n.206 (further information on the interview questions and methods used).

[95] The race of defendants and victims was determined from jurors' responses to a question asking them to provide information on the defendants and victims. Such information was provided for up to four defendants and up to six victims. *See infra* App. A (further details on the classification of the sample cases in terms of defendant and victim race).

[96] For this determination we made a detailed examination of the responses of all jurors from the case in question. *See infra* Appendix A.

[97] The racial composition of the jury in a given case was determined by first asking all of the jurors interviewed from that case to indicate, to the best of their memory, how many of the twelve jurors were men and how many women. The interviewed jurors were then asked to identify, within each gender, how many of the jurors were white, black, Hispanic, or other (including jurors identified as Asians, Native Americans, etc.). Where the recollections or estimates of

to be jurors when the defendant is black and especially when both the defendant and the victim are black.[98] Two-thirds of the W/W cases (66.9%) had at least one black juror, as did four-fifths of the B/W cases (80.6%) and almost nine-tenths of the B/B cases (88.3%). The average (median) number of black jurors by type of case was one in W/W cases, two in B/W cases, and three in B/B cases.[99] Although blacks were represented on most capital juries, they were almost always in the minority. In only five cases were the majority of jurors black, and all five were black-defendant cases. In another fifteen cases, the number of black and white jurors was evenly divided.

A. Jury Composition and the Sentencing Decision

Does a jury's racial composition influence its decision-making process? Are all-white juries less sympathetic to black defendants than racially-mixed juries? Is this true across the board, or only when the victim is white? How do the number of black or white jurors and the number of male or female jurors of each race influence the sentencing outcome? Our data provide answers.

Table 1 shows the percentage of capital trials ending with a death sentence by the number of white males, white females, black males, and black females on the jury.[100] These percentages are shown sepa-

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the jurors from a given case did not agree, the mean of their estimates was used, unless its standard deviation exceeded 1.00. In such a case, the responses of all jurors from the case were examined for consistency, and typically the median of the estimates in question was adopted. The median was rounded up when it fell midway between two integers.

[98] The association between blacks as defendants and/or victims and the number of blacks on the jury surely reflects the location of these cases in places where blacks are more numerous.

[99] The full distribution of W/W, B/W, and B/B cases by number of black jurors appears below:

No. of Black Jurors	W/W Cases		B/W Cases		B/B Cases	
	#	%	#	%	#	%
Zero	53	33.1	14	19.4	7	11.7
One	40	25.0	20	27.7	9	15.0
Two	35	21.9	15	20.8	8	13.3
Three	16	9.7	3	4.1	19	31.7
Four	8	5.0	6	8.3	2	3.3
Five	6	3.8	7	9.7	4	6.7
Six+	2	1.3	7	9.7	11	18.3
(No. of cases)	(160)		(72)		(60)	
Missing Data	(5)		(2)		(0)	

[100] Because whites typically outnumbered blacks on these juries, the "No. of Jurors" breakdown is different for the two races in Table 1. For white males and females, the breakdown is 0-3, 4, 5, and 6+. For black males and females, the breakdown is 0, 1, 2, and 3+. Within these breakdowns, the median number of jurors for each race and gender fell into one of the two intermediate ("No. of Jurors") categories, with one exception: in W/W cases, the median number of black male and black female jurors was zero, and hence no intermediate category was available.

rately for W/W cases, B/W cases, and B/B cases, respectively, in Panels A, B, and C of Table 1.[101]

TABLE 1: Percent of capital trials in which jurors impose death by number of white male, white female, black male, and black female jurors for selected defendant/victim racial combinations: (a) white kills white, (b) black kills white, and (c) black kills black[102]

Defendant/Victim Racial Combinations

No. of Jurors	White Males	White Females	No. of Jurors	Black Males	Black Females
A. White Kills White (W/W)					
0-3	69.6 (23)	65.2 (23)	0	60.4 (91)	61.7 (81)
4	56.7 (30)	66.7 (24)	1	65.1 (43)	65.1 (43)
5	61.8 (23)	55.3 (47)	2	60.9 (23)	68.2 (22)
6+	61.0 (77)	62.3 (69)	3+	— (2/4)	35.7 (14)
B. Black Kills White (B/W)					
0-3	35.3 (17)	54.2 (24)	0	71.9 (32)	55.5 (27)
4	23.1 (13)	50.0 (10)	1	42.9 (21)	61.9 (21)
5	63.2 (19)	61.5 (13)	2	36.4 (11)	60.0 (10)
6+	78.3 (23)	52.0 (25)	3+	— (3/8)	35.7 (14)
C. Black Kills Black (B/B)					
0-3	62.5 (24)	64.3 (14)	0	66.7 (18)	64.3 (14)
4	— (0/4)	50.0 (22)	1	42.9 (21)	57.1 (14)
5	50.0 (14)	— (4/6)	2	42.9 (14)	50.0 (14)
6+	64.7 (17)	52.9 (17)	3+	— (6/7)	50.0 (18)

Jury composition had a pronounced two-fold impact on sentencing in the interracial B/W cases. We refer to these two patterns as a "white male dominance" effect and a "black male presence" effect. They appear in Table 1, Panel B, Columns 1 and 3. Both patterns

[101] A word of caution is in order about interpreting differences across defendant/victim racial combinations. The percentages of death sentences in corresponding categories of W/W, B/W, and B/B cases are not strictly comparable, because no effort was made in sampling to equate cases in terms of aggravation of the crime across defendant/victim racial categories. There is evidence, for example, that prosecutors tend to bring B/W killings to trial as capital offenses that are less aggravated than W/W killings that they do not bring to trial as capital offenses. *See, e.g.*, BALDUS ET AL., *supra* note 25, at 182.

[102] When the base figure for a percentage is below 10 cases, we treat it as too unreliable for comparisons. In these instances, we show (in parentheses) the number of death sentences and the base figure separated by a forward slash, "/".

were highly significant by statistical standards in this sample of 74 B/W cases.[103] Moreover, these patterns appear to reflect "thresholds" where changes in the number of black and white male jurors substantially altered the likelihood of a death sentence. These effects may be summarized as follows.

1. *The Dominance Of White Male Jurors was Strongly Associated with the Imposition of a Death Sentence in B/W Cases.*

The presence of five or more white males on the jury dramatically increased the likelihood of a death sentence in the B/W cases. There was a forty-point difference in the likelihood of a death sentence between cases with four and those with five white male jurors (23.1% vs. 63.2%). The difference rose only slightly, to forty-one points when the comparison was between four or fewer, and five or more, white male jurors (30% vs. 70.7%).

2. *The Presence of Black Male Jurors was Strongly Associated with the Imposition of a Life Sentence in B/W cases.*

The presence of black male jurors in these B/W cases, by contrast, substantially reduced the likelihood of a death sentence. The critical twenty-nine-point difference came between the absence and the presence of one black male juror. In the absence of black male jurors, death sentences were imposed in 71.9% of the cases,[104] as compared to 42.9% when one black male was on the jury. The difference rose to thirty-four points when the comparison was between none and one or more black male jurors (71.9% vs. 37.5%).

Moreover, white male dominance and black male presence appeared to be independent effects in B/W cases.[105] In the absence of

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[103] The two patterns of association between jury composition and sentencing outcomes were statistically significant well beyond the conventional p = .05 probability level. Indeed, the probability is less than one in one thousand (p = .0002) that the white male dominance effect might have occurred by chance, and less than one in one hundred (p = .0055) that the black male presence effect might be due to chance. The next lowest probability level for any of the other ten associations in Table 1 was p = .388. The probability levels associated with Kendall's tau b were used to test the significance of these patterns. *See* generally Alan Agresti, *The Effect of Category Choice on Some Ordinal Measures of Association*, 71 J. AM. STAT. ASS'N 49 (1976).

[104] Notably, all-white juries imposed a death sentence in 75% of B/W cases.

[105] The independence of these two effects is demonstrated in the following tabulation, which shows the percentage of death sentences according to the number of white male jurors (0-4, 5, 6 or more) and the number of black male jurors (0, 1, or 2 or more). (Most of the entries in this tabulation do not include percentages because the base figures fall below ten cases, the point we have set for omitting percentages as too unstable for comparisons.)

white male dominance (i.e., when there were four or fewer white male jurors), the presence of one black male juror yielded a death sentencing rate of 30%, and the presence of two or more black male jurors yielded a rate of 21.4%. Both rates were below the corresponding levels of 42.9% and 36.8% drawn from Table 1. Likewise, in the absence of black male jurors, the presence of six or more white males brought the percentage of death sentences (87.5%) above the level in Table 1 (78.3%).

In B/W cases, the death sentencing level was also lower in the presence of three or more black female jurors (Table 1, Panel B, column 4). Yet this apparent reduction in the likelihood of a death sentence is spurious. A closer examination of the data reveals that the 24.3-point difference in the likelihood of a death sentence between cases with two or fewer and those with three or more black female jurors disappeared when the presence or absence of black males was taken into account. In effect, juries in B/W cases with three or more black females were less likely to impose death sentences because they were also likely to have one or more black males.

In contrast with the B/W cases, jury composition had little discernable influence in the intraracial W/W or B/B cases. In fact, of the fifteen percentages for W/W cases in Table 1, Panel A, all but one fall within a fifteen-point range (between 69.6% and 55.3%): twelve of the percentages are in the sixties, two are in the fifties, and only the one for three or more black female jurors is substantially below the rest. The tendency for death sentences in W/W cases to be less common when there were three or more black female jurors, unlike the similar pattern in B/W cases, is not a spurious product of other components of jury composition.[106] However, the small number of these cases (n = 14) means that the 35.7% death outcomes is not statistically reliable as an estimate in these W/W cases.[107]

In the B/B cases, as compared to the W/W cases, there was

Percentage of cases ending in death sentences by number of white male and black male jurors in B/W cases.

# White Male Jurors	No Black Male Jurors	One Black Male Juror	Two or More Black Male Jurors
0-4	— (3/6)	30.0 (10)	21.4 (14)
5	— (5/9)	— (4/6)	— (2/5)
6+	87.5 (16)	— (3/4)	— (1/2)

The strong inverse association (gamma = -.639) between these two variables (each trichotomized as above) is of course responsible for the many cells of the table with too few cases for percentages.

[106] The lack of variation in percentage of death sentences by the number of white males, of white females, and of black males means that these variables cannot account for the variation in death sentencing exhibited by the number of black females.

[107] The probability associated with Kendall's tau b for this pattern is a statistically insignificant p = .388.

slightly more variation in death sentencing by jury composition. Again, most of the percentages (ten of thirteen) fall within a fifteen-point range (from 65% to 50%). Black males are the exception here. The presence of one or two black male jurors brought death sentencing outcomes down by twenty-four percentage points (from 66.7% to 42.9%), though including the small number of cases with three or more black males somewhat dampened the overall reduction. Although the presence of two or more black female jurors was associated with a modest reduction in death sentencing, this reduction appears, as in B/W cases, to reflect the greater presence of black males in such cases.[108]

In sum, these data indicate that the race and gender composition of juries had a decisive effect on capital sentencing in B/W cases. The presence of five or more white male jurors dramatically increased the likelihood of a death sentence in B/W cases, but not in W/W or B/B cases. Having a black male on the jury substantially reduced the likelihood of a death sentence in B/W cases, less so in B/B cases, and not at all in W/W cases. By contrast, the number of black or white female jurors was largely unrelated to sentencing outcomes. Only in the fourteen W/W cases with three or more black female jurors was death sentencing reduced. The number of white female jurors was unrelated to sentencing outcomes in all three defendant-victim categories of cases.

The fact that jury racial composition effects were concentrated in the B/W cases may come as no surprise. Recall that the Turner Court identified these particular cases as especially vulnerable to the conscious or unconscious racial biases of jurors and granted that during jury selection, prospective jurors in B/W cases could be explicitly questioned about their racial attitudes.[109] The historical legacy of such crimes is that they go beyond the fact of murder to the issue of racial boundary-crossing. It is apparently the boundary-crossing character of these crimes that releases or activates the race-linked punitive response not evident in B/B cases or among female jurors. Perhaps when the jury is dominated by white males, the interpersonal dynamics of decision making is distinctive.[110]

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[108] The overall reduction was only fourteen points, much of it dependent upon the tenuous 64.3% estimate (n = 14) for cases with no black female jurors. As in the B/W cases, when the presence or absence of black male jurors was taken into account, the modest reduction in death sentencing where there were two or more black female jurors in B/B cases proved illusory. When there were black male jurors but no black female jurors or only one black female juror, the percentage of cases that ended in a death sentence is 50% (n = 16). That percentage drops to 36.4% (n = 11) when the number of black female jurors increased to two, but the percentage rises to 60% (n = 15) with three or more black female jurors. There were too few B/B cases where there were no black male jurors (n = 18) for reliable comparisons of sentencing outcomes between numbers of black female jurors.

[109] Turner v. Murray, 476 U.S. 28 (1986).

[110] Research shows that in mixed gender groups men typically talk more than women, interrupt women, and use conversation to exercise control. The more numerous men are on a jury,

Black males, in turn, are the chief targets of the cultural narrative that sanctions death for boundary-crossing murder. Their presence as jurors in B/W cases is likely to bring with it a quite different perspective on this kind of crime and on the appropriate punishment. Whether their presence provided a distinctive perspective and voice against the imposition of the death penalty in such cases, or whether it simply inhibited the rhetoric or persuasiveness of those who may be advancing the boundary-crossing cultural narrative, black males appeared to be especially effective in opposing the sentencing stands of their white fellow jurors in these cases.[111] Why it is that the number of black women or white women on the jury did not appreciably affect the likelihood of a death sentence is uncertain at this point? There is ample evidence that women behave differently in group interaction and group decision settings and that they are more reserved and less confrontational than men.[112] But whatever female jurors add to the dynamics of jury deliberations, it did not appear to influence the sentencing outcomes significantly toward death or life.

As the racial composition of the jury so decisively influenced the sentencing outcomes of capital trials in B/W cases, we might expect to find that in these, as compared to W/W and B/B cases, black and white jurors differ most in how they think about the crime and the defendant, in the considerations they deem important in making their sentencing decisions, and indeed in how soon they take a stand on the punishment to be imposed. We turn next to the patterns of individual jurors' punishment decision making and to the factors that jurors take into consideration in making the punishment decision in W/W, B/W, and B/B cases.

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the more likely they may be to pursue gender-linked agendas that emphasize male role concerns. For evidence of greater male activity and control in mixed gender situations, groups, and juries, see John E. Baird, *Sex Differences in Group Communication: A Review of Relevant Research*, 62 Q.J. SPEECH 179, 181 (1976) ("Males used more words, talked more often, and, in mixed groups, interrupted females more frequently than females interrupted them."); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND 77 (1990) (arguing that men use conversation as a means of maintaining status in a "hierarchical social order," whereas women see conversation as a way of establishing rapport).

[111] For instance, some research indicates that people different in attitude and/or in other social characteristics may be either discounted or given special credence in group decision making. *See* generally Serge Moscovici, *Toward a Theory of Conversion Behavior*, 13 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 209 (1980). Thus, a black holdout on a largely white jury who argues that a black defendant's troubled childhood mitigates the defendant's responsibility may be discounted by the majority for lacking objectivity, or may be credited with unique insight.

[112] For research on the differences between men and women in these respects, see *supra* note 110.

B. Jurors' Race and Punishment Decision Making

Our focus now shifts from jury racial composition to the race of individual jurors. The procedure adopted by the CJP for sampling jurors within cases called for a randomly selected target sample of four jurors from each trial jury.[113] Because whites far outnumber blacks on most capital juries, the samples of jurors drawn for CJP interviews often include no black jurors even when blacks were on the jury. The chances of not selecting a black juror obviously increases as the number of blacks on the jury declines. Therefore, comparing white and black jurors in W/W, B/W, or B/B cases would mean comparing whites from cases with relatively few black jurors against blacks from cases with relatively many such jurors—cases with quite different decision making dynamics when the defendant is black and the victim is white, as shown in Table 1.

To minimize the possibility that the differences we observe in the responses of black and white jurors are due to differences in the cases on which they served, we confined this analysis to those cases from which both black and white jurors have been interviewed.[114] This yielded a sample of black and white jurors more nearly equal in numbers and matched in trial experience, albeit from cases with more than the average number of black jurors.[115] This sample of jurors from the same cases permitted us to avoid the fallacy of attributing observed differences between black and white jurors to the race of juror when they may actually be due to variations in the cases from

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[113] *See* Bowers, *supra* note 94, at 1081 n.205. Of the 1155 capital jurors interviewed by CJP investigators, 113 are black: forty-one of these jurors served on W/W cases, thirty-six on B/W cases, and twenty-three on B/B cases. The remaining thirteen black jurors served on cases that did not fall into the W/W, B/W, or B/B categories. *See infra* Appendix A.

[114] Restricting the analysis to cases with interviews from both black and white jurors yields the following distributions of W/W, B/W, and B/B cases:

Number of Black Jurors	W/W Cases		B/W Cases		B/B Cases	
	#	%	#	%	#	%
One	7	21.2	3	12.5	2	15.4
Two	9	27.3	5	20.8	–	0
Three	6	18.2	1	4.2	6	46.2
Four	4	12.1	6	25.0	–	0
Five	5	15.2	6	25.0	–	0
Six or more	2	6.1	3	12.5	5	38.5
Missing						
(Total # of cases)	(33)		(24)		(13)	

The requirement that both black and white jurors be interviewed eliminated only a small number of cases and relatively few black jurors: one W/W case represented by one black juror, one B/W case represented by two black jurors, and four B/B cases each represented by one black juror.

[115] In this subsample of cases, the median number of blacks on the jury rises from one to three in W/W cases and from two to four in B/W cases, but it remains at three in B/B cases. For more exacting comparisons, see the tabulations, *supra* notes 99 and 114.

which the samples of black and white jurors were drawn.[116] The data for this analysis thus came from black and white jurors who served on the same thirty-three W/W cases, twenty-four B/W cases, and thirteen B/B cases.[117]

To learn about the punishment decision making of individual jurors over the course of the penalty proceeding, we asked them what they thought the defendant's punishment should be at three points in the sentencing process, in addition to their final vote on the defendant's punishment. These questions chronicled each juror's stand on punishment (a) after the guilt decision but before the sentencing stage of the trial, (b) after the judge's sentencing instructions but before sentencing deliberations, (c) at the first jury vote on punishment, and (d) at the final punishment vote. At the first three points, jurors could answer that they thought the punishment should be "a death sentence" or "a life (or the alternative) sentence," or that they were "undecided."[118]

Do black and white jurors follow the same patterns of decision making on punishment? If not, do their stands on punishment over the course of the trial depend upon the race of the victim or the defendant? Table 2 provides answers to these questions. This table shows, for W/W, B/W, and B/B cases, the percentage of jurors who were for death, for life, and undecided at three points during the trial ((a)-(c) above), and the percentage of jurors whose final votes were for life or for death.

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[116] Restricting the analysis to cases from which both black and white jurors were interviewed greatly reduced, but did not altogether eliminate, differences in the trial experiences to which black and white jurors in this subsample of cases were exposed. Because blacks were more likely to be interviewed the greater their number on a jury, the black jurors even in this sample of cases with interviews from jurors of both races still came disproportionately from cases in which blacks were more numerous as members of the jury, and correspondingly, the whites in this subsample came disproportionately from cases with fewer black jurors. We tested for the possible effects of this disparity of representation on our findings of divisive punishment considerations between black and white jurors in Appendix B.

[117] *See supra* note 114.

[118] The precise wording of these three questions was:

(a) After the jury found [the defendant] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [the defendant] should be given . . . "a death sentence," "a life (or the alternative) sentence," or were you "undecided"?; (b) After hearing all the evidence and the judge's instructions to the jury for deciding on the punishment, but before you began deliberating with the other jurors, did you then think [the defendant] should be given . . . "a death sentence," "a life (or the alternative) sentence" or were you "undecided?"; (c) When the first jury vote was taken on the punishment to be imposed, did you vote for a . . . "death sentence," "life (or the alternative) sentence" or were you "undecided?"

TABLE 2: Stands on punishment of white and black jurors in capital murder cases[119] at four points in the trial process for selected defendant-victim racial combinations

	Defendant/Victim Racial Combinations						
	W/W		B/W		B/B		
	Jurors' Race		Jurors' Race		Jurors' Race		
	Wh.	Bl.	Wh.	Bl.	Wh.	Bl.	All Cases
Stand on Punishment							
A. At Guilt Phase of Trial							
Death	30.0	22.2	42.3	14.7	30.8	42.1	32.2
Undecided	5.0	58.3	42.3	52.9	50.0	21.1	44.9
Life	25.0	19.4	15.4	32.4	19.2	36.8	22.8
(No. of jurors)	(80)	(36)	(52)	(34)	(26)	(19)	(267)
B. At Sentencing Instructions							
Death	44.2	20.5	58.5	15.2	42.9	50.0	41.9
Undecided	32.6	43.6	20.8	45.5	28.6	16.7	31.0
Life	23.3	35.9	20.8	39.4	28.6	33.3	27.1
(No. of jurors)	(86)	(39)	(53)	(33)	(28)	(18)	(277)
C. At First Vote on Punishment							
Death	60.5	35.0	67.3	9.1	44.4	61.1	51.6
Undecided	7.0	30.0	5.8	21.2	18.5	—	12.7
Life	32.6	35.0	26.9	69.7	37.0	38.9	35.6
(No. of jurors)	(86)	(40)	(52)	(33)	(27)	(18)	(275)
D. At Final Punishment Vote							
Death	51.7	45.0	41.8	32.4	48.3	42.1	46.7
Life	48.3	55.0	58.2	67.6	51.7	57.9	53.3
(No. of jurors)	(87)	(40)	(55)	(34)	(29)	(19)	(285)

[119] These data are drawn from 83 of the 340 trials in which both white and black jurors were interviewed.

1. *In the B/W Cases, Black and White Jurors Became Polarized on Punishment: Whites for Death and Blacks for Life Over the Course of the Trial.*

A conspicuous pattern emerged in decision making in the B/W cases, reflecting progressive polarization between black and white jurors as the trial proceeded. Even before the punishment stage of the trial, black and white jurors' punishment stands diverged more in B/W than in W/W or B/B 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% vs. 14.7%), and after sentencing instructions they were four times more likely to do so (58.5% vs. 15.2%). By the first vote on punishment, the differential between white and black jurors on death reached more than seven to one (67.3% vs. 9.1%).[120]

In these B/W cases, the white jurors were quicker to take a stand on punishment than their black counterparts. Although well over half of the whites thought the punishment should be death at the time of sentencing instructions, it was not until the jury's first punishment vote that most black jurors believed the punishment should be life. By that time whites and blacks were far apart. Two out of three whites (67.3%) said their first vote was for death, and virtually as many blacks (69.7%) said their first vote was for life imprisonment. The stage was thus set for a showdown between black and white jurors over the final punishment verdict, a showdown that, according to the data in Table 1, turns out quite differently depending upon the composition of the jury.

[120] Much of this escalating polarization appears to reflect the successive movement of undecided white jurors to pro-death stands at each step of the decision-making process. The percentage of white jurors who were undecided dropped from 42.3% at the guilt phase to 20.8% at the sentencing instructions and to 5.8% at the first jury vote on punishment. Among black jurors the most sizable reduction in the percentage who were undecided came between sentencing instructions and the first jury vote on punishment (from 45.5% to 21.2%), when stands in favor of life imprisonment showed the greatest increase. There are, however, too few black and white jurors in this sample to examine the full complement of changes (turnover) from one point to the next in punishment stands between successive stages of the process. For an example of such a turnover analysis, see William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 657-58 tbl.4 (1999).

2. *In W/W and B/B Cases the Decision-Making Pattern was Quite Different: Jurors of the Same Race as the Defendant and Victim were More Likely to take a Pro-Death Stand on Punishment Over the Course of the Trial than were their Other-Race Counterparts.*

The decision-making patterns in W/W and B/B cases were similar to one another but different from that in B/W cases. In the W/W and B/B cases, jurors of the same race as the defendant and victim were more likely to take early stands on punishment, whether in favor of death or of life imprisonment.[121] Perhaps some jurors identified with the victim of their own race and felt the need for more severe punishment, while others identified with the defendant of their own race and believed that punishment should be less severe. In any case, when the perpetrator and victim were of the jurors' own race, jurors apparently came to believe more quickly that they understood the situation and that it called for one or the other punishment. Perhaps the killing fit a more familiar schema or scenario of crime causation and responsibility.[122]

Over the course of the trial, there were further similarities between jurors' decision-making processes in B/B and W/W cases. The greater tendency of same-race jurors to take a stand on punishment than their other-race counterparts at the guilt stage of the trial persisted through sentencing instructions and the first jury vote on punishment. Other-race jurors were more often undecided at each of these stages of the process. Same-race jurors were more likely, relative to their other-race counterparts, to take pro-death stands in W/W and B/B cases. By the first vote on punishment, black and white jurors diverged in pro-death stands by 25.5 points in W/W cases and by 16.7 points in B/B cases. But they diverged by less than three points in pro-life-imprisonment stands in both types of cases. Hence, contrary to the pattern in the B/W cases, jurors in these intraracial cases

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[121] The early decision making found in these cases with CJP interviews from both black and white jurors reflected patterns found in the entire sample. At least half of the jurors in each defendant/victim racial category (disregarding differences by jurors' race) believed that they knew what the punishment should be during the guilt stage of the trial, before hearing the evidence, arguments, and instructions for deciding punishment. Research based on the full sample demonstrates that most jurors who take such early stands professed to be "absolutely convinced" of their position on the defendant's punishment and tended to remain consistently committed to their stands over the course of the trial, contrary to the constitutional requirement, e.g., Morgan v. Illinois, 504 U.S. 719 (1992), that jurors remain open and give effect to aggravating and mitigating evidence presented at the penalty stage of the trial in making their sentencing decisions. *See* William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998).

[122] *See* Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals' Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333, 346-47 (1990) (arguing that jurors' prior experience with the substantive aspects of the evidence presented at trial, whether direct, through media portrayals, or from some other source, forms the lens through which they view such evidence).

may, over the course of the trial, have come to see defendants of their own race as more threatening to themselves and their community.[123]

Jurors' final punishment votes are often the product of accommodation during jury deliberations.[124] Since unanimity is required for a sentencing recommendation of death in all but one of our sample states,[125] these accommodations are typically changes from a first ballot vote for death to a final vote for life. Little such accommodation occurred in W/W cases, where the percentage of white jurors for death dropped only 8.8 points between the first and final votes on punishment. There was more accommodation in B/B cases, where the percentage for death among black jurors dropped 19.0 points.[126] The greatest change, however, came in B/W cases where the percentage of white jurors in favor of a death sentence dropped 25.5 points between the first and final punishment votes.[127] Thus, it was late in punishment deliberations, between the first and final ballots on punishment, that the greatest changes occurred in life and death stands in the turbulent B/W cases. White jurors often change to a final verdict in favor of life imprisonment in these cases, owing perhaps to steadfast opposition to a death sentence by one or more black male jurors. These changes may well have involved tension, conflict, and hostility across racial lines.

The progressive divergence in B/W cases of black and white jurors' stands on punishment raises the question of what it is that they may have seen differently in these cases, and how such differences may have become exacerbated over the course of the trial. We have observed in Table 1 that the dominance of white males and the pres-

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[123] *See supra* notes 53-54 (documenting mock jurors' greater likelihood of convicting an offender whose victim is of the same race as that of the mock juror and providing evidence of the tendency of minority jurors to be equally or more punitive toward offenders of their own race).

[124] The slight white-black differences in final punishment votes (6.7% in W/W, 9.4% in B/W, and 6.2% in B/B cases) may seem anomalous, because these are cases in which juries reached unanimous punishment decisions (except, as we note, in Florida cases where the jury's nonbinding sentencing recommendations need not be unanimous). These slight differences are consistent, however, with the fact that (a) even in this sample of cases (with interviews from both black and white jurors) the black jurors tend to come disproportionately from cases in which more blacks served as jurors and whites from cases with fewer black jurors, and that (b) death sentences tend to be less common in cases with larger numbers of black jurors (black males in B/W and B/B cases, and black females in W/W cases). *See supra* tbl.1.

[125] *See* FLA. STAT. ANN. § 921.141(2), (3) (West 2000) (stating that the sentencing jury renders an advisory opinion and that the judge considers the "recommendation of a majority of the jury").

[126] This reduction in the percentage of black jurors in favor of death between the first and final votes in B/B cases is a relatively unstable estimate for two reasons. First, this reduction reflects a shift in the votes of only three black jurors from eighteen cases. Second, one of the black jurors whose final vote was for life imprisonment did not answer the first ballot question.

[127] Votes for life imprisonment actually doubled among white jurors in B/W cases between the first and final votes with virtually no change among black jurors. (This is a change factor of 2.16 for whites and 0.96 for blacks). In the W/W and B/B cases, life votes increased only by about half among both whites and blacks. (Here the change factors are 1.48 for whites and 1.57 for blacks in W/W cases, and 1.39 for whites and 1.49 for blacks in B/B cases).

ence of black males on the jury had opposing effects on the imposition of the death penalty. But we have yet to learn about black and white jurors' perspectives on the crime, the defendant, and the punishment that should be imposed. We have yet to learn how these perspectives might have come into play as the trial advanced, or how these perspectives might have been affected by "white male dominance" and "black male presence." In the following section, therefore, we examine the different perspectives of black and white jurors that may shape their thinking about the punishment to be imposed.

C. Divisive Punishment Considerations

The CJP data reveal differences of perspective between black and white jurors in three kinds of punishment considerations: (1) the jurors' lingering doubt about the defendant's guilt, (2) their impressions of the defendant's remorsefulness, and (3) their perceptions of the defendant's future dangerousness. In Tables 3 through 5, we show the responses of black and white jurors to questions addressing these three kinds of considerations in W/W, B/W, and B/B cases where black and white jurors have been exposed to the same crime, defendant, evidence, and arguments.[128]

1. *Lingering Doubts About the Defendant's Guilt*

Lingering doubt about the defendant's guilt is not a constitutionally authorized mitigating consideration in capital sentencing,[129] but when it exists, it is perhaps the strongest "operative" impediment to capital jurors' imposition of a death sentence.[130] In this section we

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[128] This analysis of race of juror is based on a subsample of the CJP data. The separation of cases by defendant/victim racial combinations further subdivides the sample. As a consequence, the statistical patterns in the data are based on relatively small numbers of jurors, and for that reason are less statistically reliable than those based on the full sample of jurors. In particular, black jurors in B/B cases are consistently below twenty in number; hence, percentages vary by more than five points with the chance movement of a single juror from one response category to another. Moreover, black-white differences within W/W, B/W, or B/B cases may be the product of factors other than race—such as the jurors' education, income, or socioeconomic status (SES)—that are correlated with race. To evaluate the possibility of such confounding effects, we have conducted tests of the independent effects of juror race on measures of lingering doubt, impressions of remorse, and perceptions of dangerousness, which are presented in Appendix B.

[129] The Model Penal Code gives the trial judge the authority to deny the possibility of a capital sentence on the strength of residual doubt about the defendant's guilt. *See* MODEL PENAL CODE § 210.6(1)(f) (1985) (requiring the judge to refuse death eligibility if the evidence, although sufficient "to sustain the verdict, . . . does not foreclose all doubt respecting the defendant's guilt"). So far, however, the Supreme Court has failed to recognize the right of a capital defendant to ask the jurors to consider residual doubt in the calculus of their sentencing decisions: "This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such [residual] doubts considered as a mitigating factor." Franklin v. Lynaugh, 487 U.S. 164, 174 (1988) (opinion of White, J.).

[130] An earlier analysis of the CJP data identified lingering doubt, among some thirty-nine fac-

first examine the importance to black and white jurors of lingering doubt in their punishment decision making. We then consider the roots of such doubt at the guilt stage of the trial and the forms it takes during punishment deliberations (Table 3, Panels A-C).

tors, as the strongest barrier to a death vote that may make jurors more or less likely to vote for the death penalty. *See* Bowers et al., *supra* note 121, at 1533. Lingering doubt was also identified as the most significant "operative" factor in jurors' decisions to vote for life rather than death in a study based on interviews with fifty-four Florida capital jurors from five death and five life cases. *See* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operational Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28-34 (1988).

TABLE 3: Black and white jurors' (a) feelings of lingering doubts about the defendant's guilt, (b) doubts about the capital murder verdict, and (c) thoughts about guilt when considering punishment, for selected defendant victim racial combinations

	Defendant/Victim Racial Combinations						
	W/W		B/W		B/B		
	Jurors' Race		Jurors' Race		Jurors' Race		
	White	Black	White	Black	White	Black	All Cases
A. Feelings of Lingering Doubt about the Defendant's Guilt							
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punishment							
Very	4.7	12.8	5.7	23.5	0.0	16.7	8.9
Fairly	3.5	12.8	3.8	20.6	0.0	0.0	6.6
Not very	12.9	15.4	7.5	8.8	17.2	11.1	12.0
Not at all	78.8	59.0	83.0	47.1	82.8	72.2	72.5
(No. of jurors)	(85)	(39)	(53)	(34)	(29)	(18)	(258)
2. Importance of doubt that the defendant was the actual killer for you in deciding on punishment							
Very important	2.4	7.7	5.9	24.2	3.7	5.6	7.1
Fairly important	3.6	2.6	0.0	15.2	0.0	0.0	3.6
Not important	0.0	2.6	0.0	6.1	0.0	5.6	1.6
Not a factor	94.0	87.2	94.1	54.5	96.3	88.9	87.7
(No. of jurors)	(84)	(39)	(51)	(33)	(27)	(18)	(252)
B. Doubts about the Capital Murder Verdict at the Guilt Trial and Deliberations							
1. After the judge's guilt instructions, but before deliberations did you think [the defendant] was . . .							
Guilty/ Capital Murder	67.9	65.8	81.8	50.0	59.3	42.1	65.3
Guilty/ Lesser Charge	9.0	13.2	1.8	14.7	14.8	26.3	10.8
Not guilty	0.0	2.6	0.0	5.9	3.7	0.0	1.6
Undecided	23.1	18.4	16.4	29.4	22.2	31.6	22.3
(No. of jurors)	(78)	(38)	(55)	(34)	(27)	(19)	(251)

2. When the first jury vote was taken, how did you vote?

Guilty/ Capital Murder	94.4	81.6	90.6	57.6	76.0	88.9	84.1
Guilty/ Lesser Charge	2.8	10.5	5.7	12.1	12.0	11.1	7.5
Not guilty	1.4	0.0	1.9	9.1	0.0	0.0	2.1
Undecided	1.4	7.9	1.9	21.2	12.0	0.0	6.3
(No. of jurors)	(72)	(38)	(53)	(33)	(25)	(18)	(239)

3. During guilt deliberations, were you or any jurors reluctant to go along with the majority?

Yes	9.2	18.4	11.3	41.2	19.2	10.5	16.7
No	27.6	31.6	39.6	26.5	19.2	26.3	29.7
No reluctance	63.2	50.0	49.1	32.4	61.5	63.2	53.7
(No. of jurors)	(76)	(38)	(53)	(34)	(26)	(19)	(246)

C. Thoughts about Guilt when Considering Punishment

1. When considering punishment, did you think the defendant might be altogether innocent, a case of mistaken identity?

Yes	4.7	12.5	0.0	17.6	0.0	0.0	5.7
No	95.3	87.5	100.0	76.5	100.0	100.0	93.5
Not sure	0.0	0.0	0.0	5.9	0.0	0.0	0.8
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)

2. When considering punishment, did you think the defendant definitely had planned or intended to kill the victim, but might not be the one who did so?

Yes	11.6	10.0	5.6	23.5	6.9	16.7	11.5
No	88.4	80.0	94.4	67.6	93.1	83.3	85.8
Not sure	0.0	10.0	0.0	8.8	0.0	0.0	2.7
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)

3. When considering punishment, did you think the defendant definitely killed the victim, but might not have planned, intended, or wanted to do so?

Yes	48.8	52.5	46.3	73.5	41.4	61.1	52.1
No	50.0	47.5	48.1	17.6	58.6	38.9	45.2
Not sure	1.2	0.0	5.6	8.8	0.0	0.0	2.7
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)

4. When considering punishment, did you think the defendant might not be the one most responsible for the killing?

Yes	8.1	22.5	7.4	47.1	6.9	11.1	15.3
No	91.9	77.5	90.7	47.1	89.7	88.9	83.1
Not sure	0.0	0.0	1.9	5.9	3.4	0.0	1.5
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(18)	(261)

a. *Lingering Doubts*

i. Doubts about the capital murder verdict and doubts that the defendant was the actual killer were especially important as punishment considerations among black jurors in interracial B/W cases.

We asked jurors questions about the role of two types of doubts in their thinking about punishment. The first question encompassed lingering doubts of any kind about the defendant's guilt. We asked: "How important were the following considerations for you in deciding on what [the defendant's] punishment should be?" One of the responses from which jurors could chose was "lingering doubts about [the defendant's] guilt." The second question focused more narrowly on the possibility that the defendant was not the actual killer. We presented jurors with the following statement: "Although the evidence was sufficient for a capital murder conviction, did you have some lingering doubt that [the defendant] was the actual killer?" We then asked jurors whether this was a factor in the case, and if so, how important it was in their punishment decision.[131] Black and white jurors' responses to these questions in the W/W, B/W, and B/B cases appear in Table 3, Panel A.

Black jurors in B/W cases were far and away the most likely to have lingering doubts and to regard such doubts as important in making the punishment decision. More than half of them (52.9%) acknowledged at least some doubts about the capital murder verdict,[132] and almost half (45.5%) thought it was possible that the defendant might not be the actual killer (although they conceded that the evidence was sufficient for a capital murder conviction).[133] In fact, almost a quarter of the black jurors in these B/W cases regarded such doubts as "very important" in their punishment decisions

[131] This statement was included in a list of some thirty-nine factors that might have been important in making the sentencing decision. Jurors' responses to the two questions, asking whether this doubt was a factor and if so how important, were combined here to form a four-category variable indicating that lingering doubt was "very important," "fairly important," "not important," or "not a factor" in their punishment decision making. *See supra* tbl.3, Panel A.2.

[132] *See supra* tbl.3, Panel A.1 (stating the percentages answering "very important," "fairly important," and "not important").

[133] *See supra* tbl.3, Panel A.2 (stating the percentages answering "very important," "fairly important," or "not important").

(23.5% and 24.2%, respectively). White jurors in the same cases were much less likely to acknowledge such doubts (17% and 5.9%, respectively) or to say that they were very important in their decision making (5.7% and 5.9%, respectively).

Black jurors in B/B and W/W cases were also more likely than their white counterparts to have lingering doubts about the defendant's guilt, though not specifically about whether the defendant was the actual killer. The black-white differences in these cases were less pronounced than in the B/W cases. In other words, black jurors had more doubts than white jurors about the defendant's guilt not only in B/W cases and B/B cases, but even in W/W cases. Such doubts on the part of black jurors may reflect a more general or diffuse mistrust of the criminal justice process, a mistrust most prominent in, but not confined to, the B/W cases.[134]

b. *Roots of Doubt*

i. In the guilt stage of the trial, black jurors in B/W cases were the least likely to vote guilty of capital murder on the first ballot and the most reluctant to join the final capital murder verdict; white jurors in B/W cases were the most likely to favor a capital murder verdict before guilt deliberations.

Since lingering doubt has its roots in the guilt stage of the trial, misgivings about the defendant's guilt should be evident in the guilt decision making of those jurors who say lingering doubt was important in deciding on punishment. Early in the interviews, the questioning focused on how jurors made the decision about guilt. They were asked about (1) their stance on the defendant's guilt after the judge's instructions to the jury but before jury deliberations; (2) the votes they cast at the jury's first ballot on guilt; and (3) whether they were reluctant to go along with the final capital murder guilty verdict. Jurors' responses to these questions appear in Table 3, Panel B.

Reluctance at the guilt stage of the trial about a capital murder verdict was concentrated among black jurors in B/W cases, and this reluctance remained evident over the course of the jury's decision-making about guilt. Black jurors were far less inclined than their white counterparts to support a capital murder verdict after the judge's guilt instructions (by 31.8 points) and at the first jury vote on guilt (by 33.0 points), and they were more reluctant to go along with the capital murder verdict (by 29.9 points).[135] Before guilt deliberations, the black-white difference in B/W cases was due as much to

[134] *See supra* notes 41-45 and accompanying text.

[135] The black-white differences in readiness to reach a capital murder verdict in B/W cases are consistent with the findings of a large body of mock jury studies of the guilt decision. *See supra* note 53 and accompanying text.

white jurors' favoring a capital murder verdict as to black jurors' opposing it: the percentages diverged equally from the sample-wide figure.[136] During deliberations on guilt, this difference was due largely to the reservations of black jurors on the first jury ballot and to their reluctance to join the majority on the final capital conviction (their percentages departed the greatest from the sample-wide figure). Note in Table 3, Panel B.3, that whites in B/W cases were more likely than their black counterparts (by 16.7 points) to deny that jurors were reluctant to join the majority on the capital murder verdict. Apparently, black jurors who had misgivings about a capital murder verdict kept those doubts to themselves, or whites chose to discount or ignore the expressed misgivings of black jurors.[137]

[136] *See* Bowers et al., *supra* note 121, at 1516 tbl.10 (showing that the tendency to favor a capital murder verdict prior to deliberating about the defendant's guilt is symptomatic of taking a premature pro-death stand on punishment and results from a predisposition to favor the death penalty that citizens bring with them to jury service). The evidence in Table 2, *supra*, suggests that what activates white jurors' pro-death predisposition may differ depending on the defendant/victim racial character of the crime; the interracial nature of B/W cases may encourage white jurors to make a pre-deliberation "rush to guilt" as a precursor to taking a pro-death stand on punishment. The data in Table 2, Panel A, confirm that white jurors in B/W cases are among the ones most apt to take an early pro-death stand.

[137] Some of this black-white difference in perceived reluctance might also reflect bargaining in guilt deliberations for a capital murder verdict in exchange for a life sentence. *See* Bowers et al., *supra* note 121, at 1491. In such an exchange, what black jurors experience as reluctance, white jurors may interpret as conciliation.

ii. Misgivings about the defendant's motivation and involvement in the crime, especially the possibility that he was not the one most responsible for the killing, were most common among black jurors in B/W cases.

To learn more specifically what kinds of doubt might have influenced the punishment decision, we asked jurors whether they thought, when considering punishment: (1) that the defendant might be altogether innocent—a case of mistaken identity; (2) that he definitely had planned or intended to kill the victim, but might not be the one who did so; (3) that he definitely killed the victim, but might not have planned, intended, or wanted to do so; and (4) that he might not be the one most responsible for the killing. Most common overall (52.1%) were doubts about the defendant's intent or motivation for the killing (Table 3, Panel C.3); less frequent (15.3%) were doubts about the defendant's primary responsibility for the killing (Table 3, Panel C.4); and least common (11.5% and 5.7%, respectively) were questions about his actual involvement in the crime (Table 3, Panels C.2 and C.1, respectively).

All four of these thoughts about the defendant's guilt were most common among black jurors in B/W cases. Blacks and whites differed most over the possibility that the defendant was not the one most responsible for the killing (by 39.7 points), suggesting that, where relevant, blacks in B/W cases were especially leery about incriminating testimony of accomplices. There were also sizeable differences in black and white misgivings about the defendant's motivation or intent (27.2 points), his actual involvement apart from his motivation (17.9 points), and the possibility of mistaken identity (17.6 points). Expressed as ratios, in B/W cases, blacks were six times more likely than whites to think that the defendant might not be the one most responsible for the killing (Table 3, Panel C.4) and four times more likely to think that he might not have been involved despite his motivation (Table 3, Panel C.2). Six blacks, but no whites thought the defendant might be altogether innocent (Table 3, Panel C.1).

Black jurors' misgivings about guilt were not confined to the B/W cases. In W/W cases black jurors were several times more likely than their white counterparts to think the defendant might be altogether innocent or at least not the one most responsible for the killing. And, in B/B cases blacks, more than their white counterparts, thought the defendant might have planned or intended to kill without doing so or that he killed without planning or intending to do so. Thus, blacks were generally more likely than whites to harbor misgivings about a defendant's guilt, especially in B/W cases. The kinds of misgivings that most distinguished black from white jurors in B/W cases were those regarding the defendant's responsibility or motivation for the killing, rather than his actual involvement in the crime.

These doubts suggest that black jurors in these cases are wary when the felony murder rule may be used as a basis for a capital murder verdict.[138] In turn, these are the kinds of doubts that would appear to make the defendant's expressions of remorse credible with jurors.[139]

In sum, black jurors reported being generally less willing to believe that the capital sentencing process is free from error, and they were more concerned than their white counterparts about the possibility that the jury will make mistakes in the punishment decision. And they were far more wary of this possibility in interracial than in intraracial cases. These doubts arose during the guilt stage of the trial and were most strongly manifest in jurors' thinking about the defendant's responsibility and motivation for the crime when they were deciding his punishment in B/W cases. The overall pattern is consistent with other studies showing that blacks are far less likely than whites to trust the criminal justice system.[140] Given the sordid history in the United States of lynchings, sheriff's posses, and all-white juries associated with black-on-white killings, it is not surprising to find that B/W cases are the locus of the most concentrated black mistrust of the legal system.

2. *The Defendant's Remorsefulness*

The defendant's apparent remorsefulness or sorrow for the crime is seldom explicitly articulated as a mitigating consideration in capital sentencing,[141] but it has been linked in the CJP data and elsewhere with jurors' receptivity to arguments of mitigation and their willingness to grant mercy.[142] Apparent lack of remorse, on the other hand, may be taken as justification for condemning the defendant to death. We first examine the extent of black-white differences in the per-

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[138] Black jurors may be especially sensitive to the possibility that a black defendant whose victim is white might be singled out for a capital murder charge in a case where he had not intended or wanted to kill, or in a case where an accomplice may have been the triggerperson.

[139] An examination of the 152 California CJP jurors indicates that it is such doubts about the motivation or responsibility for the killing, rather than claims that the defendant was not present or took no part in the crime, that tended to make the defendant's expressions of remorse credible to jurors. More specifically, the analysis indicated that claiming the defendant was not the perpetrator when the evidence to the contrary is strong may well undermine a remorse defense. On the other hand, claiming that a conviction for capital, versus non-capital, murder is possibly mistaken appears to be a condition under which a penalty phase defense of remorse is especially effective. *See generally* Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

[140] *See supra* notes 41-45 and accompanying text.

[141] *See* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299 (1994) (finding no state in which the defendants remorse is explicitly included as a statutory mitigating considerations); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1604-05 & n.20 (1998) (reviewing case law on the role of remorse as mitigator).

[142] *See* Sundby, *supra* note 139; *see also* Eisenberg et al., *supra* note 141, at 1610 (arguing that jurors' belief that a defendant is remorseful noticeably lessens the sentence that he receives, provided that jurors do not think the crime in question was extremely vicious).

ceived remorsefulness of the defendant. We then explore sensitivity to remorsefulness in jurors' identification with the defendant and his situation and the implications of perceived remorsefulness for jurors' feelings that the defendant should be accorded mercy. These data are shown in Table 4, Panels A-C.

TABLE 4: Black and white jurors' (a) impressions of the defendant's remorsefulness, (b) identification with the defendant, (c) grounds for mercy; for selected defendant victim racial combinations

	Defendant/Victim Racial Combinations						
	W/W		B/W		B/B		
	Jurors' Race		Jurors' Race		Jurors' Race		
	White	Black	White	Black	White	Black	All Cases
A. Impressions of the Defendant's Remorsefulness							
1. How well does "Sorry for what s/he did" describe the defendant?							
Very well	11.9	25.6	13.5	38.2	3.8	31.6	18.4
Fairly well	21.4	12.8	3.8	26.5	7.7	5.3	14.5
Not so well	31.0	23.1	36.5	11.8	30.8	5.3	26.3
Not at all	35.7	38.5	46.2	23.5	57.7	57.9	40.4
(No. of jurors)	(84)	(39)	(52)	(34)	(26)	(19)	(255)
2. Did the defendant appear sorry for what s/he had done during the trial?							
Yes	27.6	44.4	14.8	52.9	7.4	26.3	28.4
No	72.4	55.6	85.2	47.1	92.6	73.7	71.6
(No. of jurors)	(87)	(36)	(54)	(34)	(27)	(19)	(257)
3. When you were considering the punishment, did you believe that [the defendant] was truly sorry for the crime?							
Yes, sure def. was sorry	8.4	17.5	3.9	14.7	3.6	11.1	9.4
Yes, think def. was sorry	13.3	15.0	3.9	29.4	3.6	5.6	12.2
Not sure, def. acted sorry, but may have been show	18.1	7.5	17.6	14.7	0.0	0.0	12.6
No, def. acted sorry, but was a show	8.4	12.5	13.7	5.9	7.1	16.7	10.2
No, def. didn't even pretend to be sorry	51.8	47.5	60.8	35.3	85.7	66.7	55.5
(No. of jurors)	(83)	(40)	(51)	(34)	(28)	(18)	(254)

B. Identification with the Defendant

1. Did the defendant remind you of someone or make you think about anyone?

Yes	17.4	22.5	7.3	29.4	6.9	15.8	16.7
No	82.6	77.5	92.7	70.6	93.1	84.2	83.3
Not Sure	1.1	0.0	0.0	0.0	0.0	0.0	0.0
(No. of jurors)	(87)	(40)	(55)	(34)	(29)	(19)	(264)

2. Did you imagine being like the defendant?

Yes	5.8	10.3	14.5	29.4	6.9	10.5	11.8
No	94.2	89.7	85.5	70.6	93.1	89.5	88.2
(No. of jurors)	(86)	(39)	(55)	(34)	(29)	(19)	(262)

3. Did you imagine yourself in the defendant's situation?

Yes	23.3	20.0	27.3	41.2	24.1	26.3	26.2
No	76.7	80.0	72.7	58.8	75.9	73.7	73.8
(No. of jurors)	(86)	(40)	(55)	(34)	(29)	(19)	(263)

C. Remorse and Other Grounds for Mercy

1. The defendant deserved mercy because he was sorry

Very true	3.7	5.1	1.9	15.6	0.0	6.3	4.8
Fairly true	7.4	12.8	1.9	15.6	0.0	0.0	6.8
Not very true	11.1	23.1	11.1	28.1	21.4	6.3	16.0
Not true	77.8	59.0	85.2	40.6	78.6	87.5	72.4
(No. of jurors)	(81)	(39)	(54)	(32)	(28)	(16)	(250)

2. The defendant deserved mercy because you felt s/he would try to make up for what s/he did

Very true	3.6	5.0	1.9	6.1	0.0	11.8	3.9
Fairly true	9.5	10.0	5.6	24.2	3.6	0.0	9.4
Not very true	15.5	15.0	11.1	18.2	10.7	0.0	13.3
Not true	71.4	70.0	81.5	51.5	85.7	88.2	73.4
(No. of jurors)	(84)	(40)	(54)	(33)	(28)	(17)	(256)

3. The defendant deserved mercy because other people wanted to see him/her have another chance

Very true	1.2	2.5	0.0	6.1	0.0	11.8	2.4
Fairly true	14.3	17.5	9.4	27.3	21.4	0.0	15.3
Not very true	19.0	25.0	20.8	15.2	17.9	17.6	19.6
Not true	65.5	55.0	69.8	51.5	60.7	70.6	62.7
(No. of jurors)	(84)	(40)	(53)	(33)	(28)	(17)	(255)

4. Did you imagine yourself in the defendant's family's situation?

Yes	57.5	52.5	38.2	61.8	48.3	42.1	51.1
No	41.4	47.5	54.5	32.4	51.7	57.9	46.2
Not sure	1.1	0.0	7.3	5.9	0.0	0.0	2.7
(No. of jurors)	(87)	(40)	(55)	(34)	(29)	(19)	(264)

a. *Remorse*

i. Beliefs that the defendant was remorseful for the crime were more common among black than white jurors and most common among black jurors in B/W cases; white jurors were least likely to see black defendants as remorseful.

We asked three questions about the defendant's remorse or sorrow for the crime. The first, posed early in the interview, asked for a personal characterization of the defendant: "In your mind, how well do the following words describe [the defendant]." Of interest would be a characterization by the juror of "Sorry for what s/he did." The second question asked about the defendant's appearance during the trial: "How did [the defendant] appear to you during the trial?" Again, of interest was the description, "Sorry for what s/he had done." The third question focused on the juror's impression when deciding on punishment: "When you were considering the punishment, did you believe that [the defendant] was truly sorry for the crime?" The responses of black and white jurors in W/W, B/W, and B/B cases to these three questions appear in Table 4, Panel A.

Jurors' responses to each of these questions told essentially the same story. Black jurors were more likely to believe that the defendant in B/W cases was remorseful, far more likely than white jurors in these cases. The differences on these questions were all approximately forty percentage points: 47.4 points on the characterization of the defendant as sorry (combining the "very" and "fairly well" responses); 38.1 points on the appearance of remorse during the trial; and 36.3 points when considering punishment (combining the two "yes" responses). Whites were much more likely than blacks to claim that the black defendant "didn't even pretend to be sorry," by a difference of 25.5 points. Evidently, black jurors in B/W cases were par-

ticularly sensitive to indications of remorse, perhaps because these kinds of cases are especially likely to evoke identification and empathy with the defendant. White jurors, on the other hand, were unlikely to see the defendant as remorseful or even as pretending to be sorry for the crime.

In the W/W and B/B cases, as well, more black than white jurors saw the defendant as remorseful in response to each of the three questions. In these cases, however, the black-white differences were not as pronounced and were largely confined to the categories expressing the strongest affirmation of sorrow (Table 4, Panels A.1 and A.3). Additionally, in black defendant cases (both B/W and B/B cases), as compared to white defendant cases (W/W cases), white jurors were especially likely to see the defendant as lacking remorse. At most, only about half as many whites in B/W and B/B as in W/W cases saw the defendant as remorseful in response to each question.[143] And in B/B as well as B/W cases, white jurors were especially likely to deny that the defendant even pretended to be sorry. Here the implications are twofold: black jurors are generally more likely than their white counterparts to see a defendant as remorseful, and white jurors are especially unlikely to see black defendants as remorseful. Perhaps white jurors are especially insensitive to the remorse of a black defendant because they do not identify with him or his situation and do not imagine themselves in the shoes of the defendant or his family.

b. *Identification and Empathy*

i. Identification with the defendant, his situation, and that of his family was most common among black jurors in B/W cases. White jurors in B/W cases were unlikely to be reminded of someone by the defendant and to identify with the situation of the defendant's family.

Early in the interviews, we asked jurors questions intended to detect whether they may have personally identified with the defendant or his family. Specifically, we asked them to characterize their thinking about the defendant in terms that included (1) whether the defendant reminded them of anyone; (2) whether they imagined being like the defendant; (3) whether they imagined themselves in the defendant's situation; and (4) whether they imagined themselves in the situation of the defendant's family. Half of the jurors (51.1%) imagined themselves in the situation of the defendant's family (Table 4, Panel B.4), a quarter (26.2%) imagined themselves in the defendant's situation (Table 4, Panel B.3), and fewer (11.8% and 16.7%, respectively) imagined themselves like the defendant or were re-

[143] Again, these comparisons of white jurors across W/W, B/W, and B/B cases are not as reliable as those between black and white jurors within W/W, B/W, and B/B cases in which blacks and whites were drawn from the same cases. *See supra* note 101.

minded of someone by the defendant (Table 4, Panels B.2 and B.1).

In the racially sensitive B/W cases, black jurors showed the highest level of identification according to each of the four indicators. More than whites in these cases, and more than blacks or whites in W/W and B/B cases, black jurors in B/W cases were reminded of someone by the defendant, were prompted to see themselves like the defendant, and tended to imagine themselves in the same situation as the defendant and his family. These black jurors were most distinctive in "defendant-specific identification;" that is, in imagining themselves like the defendant and in imagining themselves in the defendant's situation (17.6 and 15.0 points above the sample-wide percentages, respectively). For their part, whites in these B/W cases were unlikely to be reminded of someone by the defendant or to imagine themselves in the situation of the defendant's family (8.5 and 12.9 points below the sample-wide percentages, respectively).

Apart from the B/W cases, jurors' identification with the defendant was not race specific. That is, in the intraracial cases, white jurors did not identify more with white defendants and black jurors more with black defendants. In fact, in both the W/W and B/B cases, black and white jurors did not differ by even ten percentage points in response to any of the four identification questions. White jurors did seem less likely to be reminded of someone by black defendants than by white defendants. Only 7.3% of white jurors in B/W cases and 6.9% in B/B cases said that the defendant reminded them of someone; 17.4% of white jurors said this in W/W cases.[144] This failure of white jurors to be reminded of someone by black defendants may be an ingredient in the corresponding failure of white jurors to believe the defendant felt remorse in black defendant cases (Table 4, Panels A.1-A.3).

c. *Grounds for Mercy*

i. The defendant's remorse was the strongest rationale for mercy among black jurors and the weakest among white jurors in B/W cases. Other rationales for mercy, such as "the defendant would try to make up for what he did" and "other people wanted to see him have another chance," were also stronger among blacks than whites in B/W cases.

Jurors who believe that the defendant was sorry for what he has done may feel that he deserves to be spared execution. We asked jurors about the role of mercy in their capital sentencing decisions. Jurors were asked how true it was in their decision making that the de-

[144] Again, these comparisons across defendant-victim racial combinations are less reliable than those between black and white jurors within W/W, B/W, and B/B cases. *See supra* note 101.

fendant deserved mercy: (1) "because he was sorry," (2) "because you felt s/he would try to make up for what s/he did," and (3) "because other people wanted to see him/her have another chance." Few jurors accepted all of these rationales for mercy, and the defendant's remorse was no more widely accepted as a justification for mercy (27.6%) than his likely recompense (26.6%) or others' desires to give him another chance (37.3%).[145] Jurors' responses to these three items appear in Table 4, Panel C.

The defendant's remorse was the foremost grounds for mercy among black jurors in B/W cases. These jurors were two-and-a-half times more likely to say it was "very true" that "the defendant deserved mercy because he was sorry" than to endorse either of the other two rationales for mercy as emphatically (15.6% for Table 4, Panel C.1 versus 6.1% for Table 4, Panels C.2 and C.3). Moreover, the 44.6-point difference between black and white jurors in accepting sorrow, at least to some extent,[146] as grounds for mercy outstrips the corresponding differences of 29.9 and 18.4 points, respectively, for the other two rationales in B/W cases. Most decisive, perhaps, is that black jurors were eight times more likely than white jurors in B/W cases to say that it was "very" or "fairly" true that the defendant deserved mercy because he was sorry (31.2% compared with 3.8%).

All three of the rationales for mercy separated blacks and whites more in the B/W cases than in the B/B and W/W cases. The differences between blacks and whites in saying "true," at least to some extent, in the B/W cases were not rivaled in the W/W or B/B cases. Moreover, the differences are due chiefly to blacks in these cases rising above the levels in the rest of the sample saying the defendant deserves mercy.

Jurors' impressions of the defendant's remorsefulness, their personal identification with the defendant, and their feelings that the defendant deserved mercy were interrelated. Black jurors' greater identification with the defendant and his situation in B/W cases may make them sensitive to subtle indications of his sorrow or remorse. Believing that the defendant is sorry may, in turn, encourage black jurors to feel that the defendant deserves mercy. By contrast, the tendency of white jurors not to be reminded of someone by a black defendant and not to imagine themselves in the situation of a black defendant's family may make them less sensitive to such indications, and hence less willing to grant mercy to a black defendant on grounds of remorse.[147] These tendencies among black and white jurors in B/W cases might also be implicated in their perceptions of the defendant's dangerousness—the issue to which we now turn.

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[145] These percentages are based on responses other than "not true" (i.e., on combining "very true," "fairly true," and "not very true" responses).

[146] This percentage combines "very true," "fairly true," and "not very true" responses.

[147] *See supra* note 60.

3. *The Defendant's Future Dangerousness*

Jurors' judgments of the defendant's future dangerousness have become an integral part of the legally authorized grounds for imposing a death sentence in some states,[148] and a prerequisite for the death penalty in Texas[149] and Oregon.[150] Such judgments may be challenged as arbitrary on the grounds that they are unreliable,[151] and as discriminatory on the grounds that they incorporate racial stereotypes into the sentencing process.[152] In effect, culturally rooted racial stereotypes may tend to demonize and dehumanize blacks accused of lethal violence by portraying them as especially dangerous. In this section, we examine (a) jurors' impressions that the defendant is dangerous and their concern about his return to society; (b) jurors' reports of the role of dangerousness and the possibility of early release in sentencing deliberations; and (c) jurors' reported reliance on their perceptions of the defendant's future dangerousness in making the punishment decision. These data are presented in Table 5, Panels A-C.

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[148] *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 701.12(7) (West 1983); VA. CODE ANN. § 19.2-264.2 (Michie 1977); WYO. STAT. ANN. § 6-2-102(h)(xi) (Michie 1977); *cf.* James R. Acker & C. S. Lanier, *Parsing This Lexicon of Death: Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107, 118-19 (1994) (discussing the statutory variations in the definition of dangerousness in Idaho, Oklahoma, Oregon, Virginia, Texas, and Wyoming).

[149] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (Vernon Supp. 1998).

[150] *See* OR. REV. STAT. § 163.150 (1999).

[151] *See* Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 748-49 nn.45-49 (1990/1991) (collecting studies that discuss the unreliability of such predictions); *see also* JAMES W. MARQUART ET AL., THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, 175 (1994); James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449 (1989). On the objective dangerousness of murderers sentenced to death, see James W. Marquart & Jonathan R. Sorenson, *A National Study of the* Furman*-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5 (1989); and for their dangerousness relative to noncapital murderers, see Jonathan R. Sorenson & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251 (2000).

[152] For evidence that criminality, violence, and dangerousness are especially characteristic of the racial stereotypes of blacks held by whites, see Johnson, *supra* note 17, at 1645-1646. *See also supra* notes 41-48 and accompanying text.

TABLE 5: Black and white jurors' (a) perceptions of the defendant's dangerousness, and (b) reports of Dangerousness as topics of punishment deliberations, for selected defendant victim racial combinations

	Defendant/Victim Racial Combinations						
	W/W		B/W		B/B		
	Jurors' Race		Jurors' Race		Jurors' Race		
	White	Black	White	Black	White	Black	All Cases
A. Perceptions of the Defendant's Likely Dangerousness							
1. "Dangerous to Other People" describes the defendant . . .							
Very well	47.1	43.6	58.2	35.3	58.6	63.2	49.8
Fairly well	28.7	25.6	30.9	44.1	31.0	21.1	30.4
Not so well	14.9	10.3	5.5	5.9	10.3	10.5	10.3
Not at all	9.1	20.5	5.5	14.7	0.0	5.3	9.1
(No. of jurors)	(87)	(39)	(55)	(34)	(29)	(19)	(263)
2. The evidence proved that the defendant would be dangerous in the future							
Yes	72.1	67.5	85.2	67.6	86.2	82.4	75.8
No	22.1	25.0	3.7	20.6	10.3	17.6	16.9
Undecided	5.8	7.5	11.1	11.8	3.4	0.0	7.3
(No. of jurors)	(86)	(40)	(54)	(34)	(29)	(17)	(260)
3. When considering the punishment, you were concerned that [the defendant] might get back into society someday, if not given the death penalty							
Yes, greatly concerned	32.9	30.0	55.8	32.4	34.5	38.9	37.6
Yes, somewhat concerned	23.5	30.0	17.3	23.5	31.0	22.2	24.0
Yes, but only slightly concerned	8.2	12.5	5.8	8.8	10.3	5.6	8.5
No, not at all concerned	35.3	27.5	21.2	35.3	24.1	33.3	29.8
(No. of jurors)	(85)	(40)	(52)	(34)	(29)	(18)	(258)

4. How long do you think someone not given the death penalty for capital murder in this state usually spends in prison?

<10 years	14.9	21.9	24.3	7.4	36.4	8.3	18.8
10-19 years	44.8	46.9	40.5	44.4	27.3	41.7	42.1
20+ years	40.3	31.3	35.1	48.1	36.4	50.0	39.1
(No of jurors)	(67)	(32)	(37)	(27)	(22)	(12)	(197)

B. Focus of Punishment Deliberations

1. The need to prevent him/her from ever killing again

Great deal	36.5	25.6	61.1	57.6	35.7	66.7	44.7
Fair amount	29.4	30.8	20.4	15.2	32.1	11.1	24.9
Not much	9.4	25.6	9.3	12.1	25.0	5.6	13.6
Not at all	24.7	17.9	9.3	15.2	7.1	16.7	16.7
(No. of jurors)	(85)	(39)	(54)	(33)	(28)	(18)	(257)

2. The defendant's dangerousness if ever back in society

Great deal	28.2	35.9	56.6	48.5	35.7	61.1	41.0
Fair amount	36.5	30.8	26.4	36.4	28.6	16.7	31.3
Not much	20.0	12.8	11.3	3.0	25.0	5.6	14.5
Not at all	15.3	20.5	5.7	12.1	10.7	16.7	13.3
(No. of jurors)	(85)	(39)	(53)	(33)	(28)	(18)	(256)

C. Reliance on Dangerousness in the Punishment Decision

1. Did the possibility that defendant would be a danger to society in the future make you . . .

Much more likely to vote for death	36.1	25.8	42.9	8.0	22.2	41.7	31.5
Slightly more likely to vote for death	26.4	45.2	14.3	12.0	38.9	25.0	26.0
Slightly less likely to vote for death	1.4	0.0	2.4	8.0	0.0	0.0	2.0
Not more or less likely to vote fore death	36.1	29.0	40.5	72.0	38.9	33.3	40.5
(No. of jurors)	(72)	(31)	(42)	(25)	(18)	(12)	(200)

a. *Dangerousness and Release from Prison*

i. Belief that a defendant would be dangerous in the future and concern about his possible return to society divided black and white jurors in B/W cases. White jurors appeared to believe that black defendants are more dangerous than white defendants, and black jurors appeared to believe that defendants who kill blacks are more dangerous than those who kill whites.

We asked two types of questions pertaining to the defendant's perceived future dangerousness. The first type explicitly used the term "dangerous." One question asked, "How well do the following words describe the defendant?" and one of the responses from which jurors could choose was, "Dangerous to other people." The other question of this type asked, "After hearing all of the evidence [at the penalty trial], did you believe it proved that . . . the defendant would be dangerous in the future?"

The second type of question pertaining to the defendant's perceived future dangerousness addressed the defendant's possible return to society. One question asked, "When you were considering the punishment, were you concerned that [the defendant] might get back into society someday, if not given the death penalty?" The other question of this type asked, "How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?" Although dangerousness is not explicitly mentioned in these two questions, its implication is palpable.[153]

Jurors' explicit judgment of the defendant's dangerousness, as reflected in the first type of question, contrasted with their judgment of the defendant's remorsefulness and with their lingering doubt about guilt in two respects. First, a majority rather than a minority of capital jurors judged the defendant to be dangerous.[154] Second, white jurors were more likely than black jurors in B/W cases to make that judgment. Jurors' responses are shown in Table 5, Panel A.

In B/W cases, the defendant's "dangerousness" was the watchword of white jurors. More white jurors than black jurors saw the defendant as "dangerous" in B/W cases by about twenty percentage points (differences of 22.9% and 17.6% in Table 5, Panels A.1 and A.2, respectively). The two questions about release from prison

[153] *See* Bowers & Steiner, *supra* note 120, at 657 (reviewing CJP data demonstrating an association between jurors' estimates of how long a defendant would serve in prison if not sentenced to death and their punishment decision making).

[154] In this sample, five out of ten jurors (49.8%) said "dangerous to other people" described the defendant "very well," and another three in ten (30.4%) said "fairly well." *See supra* tbl.5, Panel A.1. Fully three quarters (75.8%) said that "the evidence proved that the defendant would be dangerous in the future." *See supra* tbl.5, Panel A.2. And six out of ten (61.6%) were "greatly" or "somewhat" concerned that the defendant might get back into society someday if not given the death penalty. *See supra* tbl.5, Panel A.3.

showed similar differences in B/W cases (differences of 23.4% points saying "greatly concerned" in Table 5, Panel A.3, and 16.9% saying released in "less than ten years" in Table 5, Panel A.4). On three of these indicators of dangerousness (A.1-A.3), the differences between black and white jurors' perceptions were essentially confined to the B/W cases. Overall, in the B/W cases, where blacks were more likely to perceive the defendant as remorseful and to have lingering doubts about his guilt, whites were more apt to see him as dangerous and to be concerned about his possible return to society.

It appeared further that white jurors saw black defendants as more dangerous than white defendants, and that black jurors saw defendants who killed blacks as more dangerous than those who killed whites.[155] In response to the two questions that explicitly asked about the defendant's "dangerousness" (Table 5, Panels A.1 and A.2), white jurors said that defendants are more dangerous in black defendant (B/W and B/B) than in white defendant (W/W) cases,[156] and black jurors said defendants are more dangerous in black victim (B/B) than in white victim (W/W and B/W) cases.[157] Responses to the question about the timing of release from prison (Table 5, Panel A.4) were consistent with the first of these patterns; white jurors said release would come sooner when the defendant was black, and black jurors said it would come sooner when the defendant was white. Jurors' concerns about the defendant's possible return to society (Table 5, Panel A.3) were not, however, fully consistent with these patterns. Regardless of race, jurors in B/B cases were among the most likely to see the defendant as dangerous and yet were among the least concerned about his return to society. Black jurors might have believed that the defendant would spend a relatively long time in prison; white jurors might have believed that the danger he posed, at least as indicated by the race of his victim, would not be to whites.

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[155] As noted above, these comparisons across type of case are not as reliable as those within cases of a given type. *See supra* note 101.

[156] Of white jurors, 58.2% and 58.6% perceived black defendants as "dangerous to other people," whereas only 47.1% of white jurors characterized white defendants as a danger to others. *See supra* tbl.5, Panel A.1. In comparison, 85.2% and 86.2% of white jurors believed black defendants would be dangerous in the future. However, only 72.1% of white jurors believed white defendants would be dangerous in the future. *See supra* tbl.5, Panel A.2.

[157] When black defendants killed black victims, 63.2% of black jurors characterized black defendants as "dangerous to other people." But when black defendants killed white victims, the percentage of black jurors who perceived the defendant as dangerous dropped to 35.3%. And when white defendants killed white victims, 43.6% of black jurors perceived the defendants as dangerous to others. *See supra* tbl.5, Panel A.1.

b. *Dangerousness as the Focus of Punishment Deliberations*

i. According to both black and white jurors, discussion during punishment deliberations of the defendant's dangerousness if he were ever released back into society and of the need to prevent him from ever killing again was most common in B/W cases.

When the interviews turned to the jury's punishment deliberations, we first asked jurors to tell us in their own words how the jury reached its punishment decision, including how its discussion began; what topics it discussed and in what order; whether there were any major disagreements; and how they were resolved. We then listed a number of topics and asked how much the discussion among the jurors focused on each topic. The following two topics of discussion bear on the defendant's dangerousness: (1) "the defendant's dangerousness if ever back in society" and (2) "the need to prevent him/her from ever killing again." Jurors' responses by defendant/victim racial combination appear in Table 5, Panel B.

Here we asked jurors about their common experiences rather than about their own personal views. We might, therefore, expect black and white jurors from W/W, B/W, and B/B cases to agree on how much discussion such topics received, regardless of how much their own views on such matters diverged. In fact, more jurors of each race indicated that dangerousness received a great deal more attention in B/W than in W/W cases. In response to both questions, the differences between W/W and B/W cases for jurors of each race were greater than the differences between black and white jurors within B/W and W/W cases.[158] In the B/B cases, however, there was disagreement between black and white jurors about the amount of discussion during deliberations that was dedicated to the defendant's dangerousness. Perhaps the fact that white jurors in these cases expressed their estimates of earlier release dates prompted black jurors to feel that dangerousness and release from prison received a great deal of attention in deliberations.[159]

Despite the greater discussion of dangerousness during jury deliberations on punishment in the B/W than in the W/W cases, black

[158] The differences between black and white jurors within B/W and W/W cases are 10.9 and 3.5 points, respectively, as contrasted with differences of 24.6 and 32.0 points between B/W and W/W cases for black and white jurors, respectively. *See supra* tbl.5, Panel B.1. The corresponding differences in Table 5, Panel B.2 are 7.7 and 8.1 between blacks and whites within B/W and W/W cases, as contrasted with differences of 28.4 and 12.6 between B/W and W/W cases for black and for white jurors. For a discussion of comparisons between black and white jurors from cases of a given defendant/victim racial combination versus comparisons between cases of different defendant/victim racial combinations for jurors of a given race, see *supra* note 101.

[159] This difference of perspective on the substance of jury deliberations occurred among the least well represented jurors in our study. The small number of jurors, especially black jurors, in the thirteen B/W cases makes the statistics based on their responses less reliable.

jurors in B/W cases were not persuaded of the defendant's dangerousness (as noted above, fewer blacks than whites in B/W cases saw the defendant as dangerous). Perhaps, instead, these juries discussed this topic heavily during deliberations as a result of black and white jurors' having divergent views of the defendant's dangerousness. That is, jurors' disputes over the defendant's dangerousness may have occurred in response to the white jurors' efforts to persuade black jurors of their view.

c. *Reliance on Dangerousness in the Punishment Decision*

i. In B/W cases, white jurors were the most likely, and black jurors the least likely, to report that the defendant's future dangerousness made them much more likely to vote for the death penalty in B/W cases.

We asked jurors a series of questions about the role of various factors in their punishment decisions. One question focused on the possibility of the defendant's future danger to society. Specifically, we presented jurors with the following statement: "There is a possibility that the defendant would be a danger to society in the future," and then we asked them whether this factor did (or would)[160] make them "much more likely," "slightly more likely," "slightly less likely," "much less likely," or "just as likely" to vote for death. Black and white jurors' responses to this question in the W/W, B/W, and B/B cases appear in Table 5, Panel C.

Jurors' perceptions of the defendant's dangerousness appear to have had a very different effect on the sentencing decisions of black and white jurors in B/W cases. Whites in these cases were the most likely of any group (42.9%) to say that dangerousness did or would make them "much more likely" to vote for death. Among black jurors, by contrast, fewer than one in ten (8%) answered that they were or would be "much more likely," and only one in five (20%) that they were or would be "much" or "somewhat" more likely to vote for death because they believed the defendant to be dangerous. Black jurors in these cases were far more likely than white jurors to reject dangerousness as a ground for making the punishment decision; 72% of blacks, as opposed to 40.5% of whites, said the defendant's possible dangerousness did or would make no difference in their punish-

[160] If, in response to an earlier question, jurors indicated that future dangerousness was not a factor in their decision making, they were asked, if it were a factor, would it have made them more or less likely to vote for death. In these cases, 73.8% of the jurors indicated that the defendant's likely dangerousness was a factor in the case; hence, the responses shown in Table 5, Panel C.1 are largely assessments of the role dangerousness actually did play in their punishment decisions. In this sample of jurors from cases with interviews from both black and white jurors, there were too few jurors who said it was not a factor to permit a comparison of those who answered this as a hypothetical question with those who reported on actual experience.

ment decisions.

The defendant's future dangerousness is one of the most uncertain and illusory judgments that jurors may be asked to make.[161] This perception is subject to mistaken claims and rhetorical arguments.[162] In B/W cases, in which white jurors were more likely than their black counterparts to see the defendant as dangerous, both black and white jurors reported that a great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness. It would appear that in B/W cases, white jurors were especially likely to stress the defendant's dangerousness as a reason for the death penalty. Perhaps this fact underscores white jurors' belief that in the absence of a death sentence, such defendants will usually be back on the streets far sooner than black jurors believe. For their part, black jurors were less willing to concede that the defendant was dangerous (Table 5, Panels A.1 and A.2), to believe that such offenders soon return to society if not given the death penalty (Table 5, Panel A.4), or, indeed, to be concerned about the defendant's release from prison (Table 5, Panel A.3). Black jurors were conspicuous in rejecting this consideration of a defendant's dangerousness in deciding to vote for life or death (Table 5, Panel C.1). Perhaps black jurors' renunciation of dangerousness as a ground for death is a reaction to the pressure that they feel from white jurors to make dangerousness the rationale for a final death verdict.

D. The Character of Jury Decision Making

The differences between black and white jurors in their lingering doubt, their perceptions of remorse, and their beliefs about future dangerousness are contrasts between jurors who typically differ greatly in their numbers or representation on the jury and quite possibly in their prominence or influence in jury decision making. Moreover, these differences of perspective were most pronounced in the B/W cases, where black and white jurors' initial stands on punishment were most divergent and became progressively more polarized over the course of the trial. For these reasons, black and white jurors may perceive jury deliberations on punishment quite differently, especially in the B/W cases. Such differences in jurors' experiences may be reflected in their responses to questions about (a) the

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[161] *See* Mark D. Cunningham & Thomas J. Reidy, *Integrating Base Rate Data in Violence Risk Assessments at Capital Sentencing*, 16 BEHAV. SCI. & L. 71 (1998).

[162] Research has shown that jurors grossly underestimate how long the defendant will usually spend in prison if not sentenced to death. *See* Bowers & Steiner, *supra* note 120, at 645; Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461, 472 (1999). In each of the eleven states studied, most jurors believed that the defendant would usually be out of prison even before the laws of those states made them eligible for parole if sentenced to a term in prison rather than the death penalty. *Id.* at 475 tbl.2.

character of jury deliberations on punishment, and (b) the juror's own experience as a member of the jury. Jurors' responses to such questions are shown in Table 6, Panels A and B, respectively.

TABLE 6: Black and white jurors (a) characterizations of the jury's decision making on punishment, and (b) personal experiences as a capital juror for selected defendant-victim racial combinations

	Defendant/Victim Racial Combinations						
	W/W		B/W		B/B		
	Jurors' Race		Jurors' Race		Jurors' Race		
	White	Black	White	Black	White	Black	All Cases
A. Characterizations of the Jury's Decision Making on Punishment							
1. Closeminded, intolerant of disagreement							
Very well	—	2.6	—	2.9	—	—	0.8
Fairly well	5.8	15.8	7.4	26.5	14.3	16.7	12.0
Not so well	27.9	23.7	25.9	32.4	25.0	33.3	27.5
Not at all	66.3	57.9	66.7	38.2	60.7	50.0	57.9
(No. of jurors)	(86)	(38)	(54)	(34)	(28)	(18)	(258)
2. Too quick to make a decision, in a hurry							
Very well	2.3	—	—	8.8	3.6	5.9	2.7
Fairly well	5.8	7.7	3.7	8.8	3.6	—	5.4
Not so well	23.3	23.1	16.7	23.5	25.0	11.8	21.3
Not at all	68.6	69.2	79.6	58.5	67.9	82.4	70.5
(No. of jurors)	(86)	(39)	(54)	(34)	(28)	(17)	(258)
3. Dominated by a few strong personalities							
Very well	10.6	5.3	5.6	26.5	11.1	22.2	11.7
Fairly well	31.8	18.4	16.7	20.6	14.8	16.7	22.3
Not so well	24.7	21.1	20.4	23.5	22.2	16.7	22.3
Not at all	32.9	55.3	57.4	29.4	51.9	44.4	43.8
(No. of jurors)	(85)	(38)	(54)	(34)	(27)	(18)	(256)
B. Personal Experience as a Capital Juror							
1. You felt like an outsider							
Very well	2.3	7.7	—	8.8	—	—	3.1
Fairly well	1.2	—	1.9	2.9	—	—	1.2
Not so well	1.2	5.1	1.9	8.8	7.1	—	3.5
Not at all	95.3	87.2	96.3	79.4	92.9	100.0	92.3
(No. of jurors)	(86)	(39)	(54)	(34)	(28)	(18)	(259)

2. Were you among . . .

Most talkative	48.8	52.5	44.4	20.6	25.9	33.3	41.3
Least talkative	4.7	17.5	7.4	11.8	18.5	22.2	10.8
In between	46.5	30.0	48.1	67.6	55.6	44.4	47.9
(No. of jurors)	(86)	(40)	(54)	(34)	(27)	(18)	(259)

3. Do you wish you had done anything different?

No	86.2	92.1	96.3	76.5	93.1	94.7	89.3
Yes	13.8	7.9	3.7	23.5	6.9	5.3	10.7
(No. of jurors)	(87)	(38)	(54)	(34)	(29)	(19)	(261)

1. *The Nature of Punishment Deliberations*

a. *Black jurors in the B/W cases were most likely to believe that the jury rushed to a verdict, was intolerant of disagreement, and was dominated by a few outspoken jurors.*

We asked jurors: "In your mind, how well do the following words describe the jury?" The responses from which jurors could choose included (1) "too quick to make a decision, in a hurry," (2) "closed-minded, intolerant of disagreement," and (3) "dominated by a few strong personalities." Most jurors were reluctant to apply these unfavorable descriptions. Indeed, a majority of the jurors denied that the jury was intolerant of disagreement (57.9%) or too quick to make its decision (70.5%). A majority reported that at least to some extent the jury was dominated by a few strong personalities (56.3%). Black and white jurors' responses to these three items appear in Table 6, Panel A.

Black jurors in B/W cases were the most likely to voice each of these complaints about the jury's decision making. They were several times more likely than their white counterparts in the same B/W cases to affirm these characterizations as a description that fit the jury "very" or "fairly" well. Black jurors were four times more likely than white jurors to say that the jury was "too quick to make a decision" (16.7% vs. 3.7%). Further, black jurors were almost four times more likely than whites to say the jury was "intolerant of disagreement" (29.4% vs. 7.4%). And blacks were more than twice as likely as whites to say that the jury was "dominated by a few strong personalities" (47.1% vs. 23.7%). In all three instances, the greatest divergence appeared between jurors who denied the characterization altogether (the "not at all" response) and those who gave it at least some credence (black-white differences of 28.5, 21.1, and 28.0 points, respectively).

In the intraracial cases, we found no consistent tendency for black jurors to voice these complaints. In fact, in B/B cases, whites were

more likely than blacks to say it was true, at least to some extent, that the jury was too quick to make a decision (32.2% vs. 17.7%). In W/W cases, whites were more likely to complain that the jury was dominated by a few strong personalities (67.1% vs. 44.86%). Therefore, only in the B/W cases did black jurors make stronger and more consistent claims than white jurors that the jury rushed to a verdict, was intolerant of disagreement, and was dominated by a few outspoken jurors. It is in these B/W cases that we have seen the greatest differences of perspective between black and white jurors on matters relevant to the sentencing decision.

2. *Personal Experience as a Capital Juror*

a. *Black jurors in B/W cases were least likely to be among the most talkative during jury deliberation, most apt to feel like an outsider, and most likely to wish they had said or done something differently.*

In addition to asking jurors to describe the jury, we asked them about their own experiences as, and feelings about, serving as a capital juror. These questions included (1) whether "you felt like an outsider," (2) whether during jury deliberations "you [were] among the most talkative, the least talkative, or in between," and (3) whether "there [is] anything you wish you had said or done differently when you think back about serving as a juror on the case." Jurors' responses appear in Table 6, Panel B.

In terms of these personal reactions or experiences, black jurors in B/W cases are conspicuous in their alienation. They were the most likely to have felt "like an outsider" on the jury: more than 20% of black jurors in B/W cases, as compared to less than 5% of white jurors, felt like an outsider, at least to some extent (20.5% vs. 3.8%). Black jurors were least likely to say that they were among the most talkative jurors—only half as many blacks as whites in B/W cases said that they were among the most talkative during jury deliberations (44.4% vs. 20.6%). Black jurors were the most likely to say that they wished they had said or done things differently—six times as many black as white jurors in B/W cases were haunted by the failure to have said or done something differently (23.5% vs. 3.7%).

In the intraracial cases, the black-white differences were slight or erratic. In feeling like an outsider and in wishing they had said or done something differently, there was little variation between black and white jurors. Blacks were more likely than whites to say they were among the most talkative in B/B cases; in W/W cases, blacks reported being both most and least talkative and the least likely to say they fell "in between."

Jurors' responses to these questions about the jury's decision-making process and their role in that process indicate a failure of the jury to function properly from the perspective of many black jurors in

B/W cases. This is hardly surprising in view of their minority stands on lingering doubt and the defendant's remorsefulness, their departure from the white majority in their assessments of the defendant's dangerousness, and especially their reluctance to make dangerousness a ground for imposing the death penalty. These are fundamental judgments that black jurors bring to bear on the profound choice between a punishment of life imprisonment or death. Their failure to be among the most outspoken where they see the jury as rushing to a decision and not tolerating differences of opinion is consistent with feeling like an outsider and with wishing, in retrospect, to have said or done things differently.

E. A Closer Look at the B/W Cases

The analysis thus far shows the greatest differences between black and white jurors in cases in which they have convicted a black defendant of murdering a white victim. It is these B/W cases in which black and white jurors differed most in their stands on the defendant's punishment over the course of the trial (Table 2), in their lingering doubt about the defendant's guilt (Table 3), in their impressions of the defendant's remorsefulness (Table 4), in their perceptions of his dangerousness (Table 5), and in their experiences serving as capital jurors (Table 6). These are also the cases in which jury composition, particularly the dominance of white males and the presence of black males, strongly influenced whether the jury would impose the death penalty or a life sentence (Table 1, Panel B). In light of these findings, we now concentrate in more detail on the B/W cases to the exclusion of their W/W and B/B counterparts. In this closer look at the B/W cases, we examine first how jurors' race and gender together affect considerations of lingering doubt, remorsefulness, and dangerousness. We then consider the joint effect of jurors' race and the racial composition of the jury with respect to some of the factors we have examined. When the data were broken down by jurors' race and gender or by jurors' race and jury composition, the number of jurors was small enough that only the most sizeable and consistent percentage differences would be statistically reliable. This was particularly true for black jurors, who accounted for fewer of this study's subjects than white jurors. Therefore, we present only those data that showed sizeable and consistent patterns in connection with jurors' race and gender (Table 7) and with jurors' race and jury composition (Table 8).

1. *Jurors' Race and Gender in B/W Cases*

The evidence that the sentencing outcomes of B/W cases were strongly affected by the numbers of black and white males on the jury (Table 1, Panel B) suggests that the observed differences in lingering doubt, impressions of remorse, and perceptions of dangerousness between black and white jurors in these cases may result primarily from differences between the males of the two races. Perhaps the males of each race tended to take more extreme positions than the females and/or were more effective in making their positions felt in the give-and-take of jury deliberations and in the final punishment decisions. In this section we return to the issues of lingering doubt, remorsefulness, and dangerousness to consider their relation to both race and gender (Table 7, Panels A-C).

TABLE 7: Elements of (a) lingering doubts (b) the defendant's remorse and identification, and (c) dangerousness and early release by jurors' race and gender in black defendant-white victim cases

	Jurors' Race and Gender			
	White Males	White Females	Black Males	Black Females
A. Lingering Doubts				
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punishment				
Very	—	12.5	26.7	21.1
Fairly	6.9	—	26.7	15.8
Not very	6.9	8.3	—	15.8
Not at all	86.2	79.2	46.7	47.4
(No. of jurors)	(29)	(24)	(15)	(19)
2. When considering punishment, did you think the defendant might not be the one most responsible for the killing?				
Yes	10.3	4.0	60.0	36.8
No	86.2	96.0	40.0	52.6
Not sure	3.4	—	—	10.5
(No. of jurors)	(29)	(25)	(15)	(19)
B. Remorse and Identification				
1. How well does "Sorry for what s/he did" describe the defendant?				
Very well	7.4	20.0	46.7	31.6
Fairly well	7.4	—	33.3	21.1
Not so well	33.3	40.0	6.7	15.8
Not at all	51.9	40.0	13.3	31.6
(No. of jurors)	(27)	(25)	(15)	(19)
2. Did you imagine yourself in the defendant's situation?				
Yes	26.7	28.0	53.3	31.6
No	73.3	72.0	46.7	68.4
(No. of jurors)	(30)	(25)	(15)	(19)

3. Did you imagine yourself in the defendant's family's situation?

Yes	30.0	48.0	80.0	47.4
No	60.0	48.0	13.3	47.4
Not sure	10.0	4.0	6.7	5.3
(No. of jurors)	(30)	(25)	(15)	(19)

C. Dangerousness and Early Release

1. "Dangerous to Other People" describes the defendant . . .

Very well	63.3	52.0	26.7	42.1
Fairly well	30.0	32.0	53.3	36.8
Not so well	3.3	8.0	—	10.5
Not at all	3.3	8.0	20.0	10.5
(No. of jurors)	(30)	(25)	(15)	(19)

2. How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?

0-9 years	30.0	17.6	7.7	7.1
10-19 years	30.0	52.9	30.8	57.1
20+ years	40.0	29.4	61.5	35.7
(No. of jurors)	(20)	(17)	(13)	(14)

a. *Black males were most likely to have lingering doubt about the defendant's guilt, followed by black females. Whites of both genders had little residual or lingering doubt.*

We observed in Table 3 that in B/W cases black jurors were far more likely than their white counterparts to have lingering doubts about the defendant's guilt. When we examined lingering doubt by jurors' gender as well as by race (Table 7, Panel A), it was evident that more black males than females had lingering doubts about the defendant's guilt (Table 7, Panel A.1) and that their doubts were chiefly about the extent of the defendant's involvement or responsibility for the crime (Table 7, Panel A.2). Indeed, 53.4% of black males, as compared to 36.9% of black females, indicated that doubts about the defendant's guilt were "very" or "fairly" important considerations for them in selecting his punishment (Table 7, Panel A.1). (The corresponding figures for white males and white females were 6.9% and 12.5%, respectively.) Consistent with this pattern, more black males (60%) than black females (36.8%) said that they thought the defendant might not be the one most responsible for the killing (Table 7, Panel A.2).

b. *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 or his family's situation.*

The greatest difference in jurors' impressions of the defendant's remorsefulness was between those of black and white male jurors. The same was true of the difference in jurors' identification with the defendants' situation and with that of his family. Black males exceeded all other race and gender groupings in the percentage who answered that "sorry" described the defendant very well (46.7%), and to an even greater extent, in the percentage who answered very or fairly well (80%). White males were the least likely, falling below white females, to see the defendant as sorry: few white males (14.8%) said "sorry" described the defendant very or fairly well (Table 7, Panel B.1). Black males were also by far the most likely to imagine themselves in the defendant's situation (53.3%, Table 7, Panel B.2) and in his family's situation (80%, Table 7, Panel B.3). These figures were well above those for the other race and gender categories. White males identified with the situation of the defendant's family less often than any other race-gender group (30%, Table 7, Panel B.3).

c. *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.*

In perceived dangerousness, like remorsefulness, males of the two races were at the extremes, but their positions were reversed. White males were the most likely, and black males the least likely, to see the defendant as dangerous to others (Table 7, Panel C.1). White males and black males differed by a substantial gulf of 36.6 points in their responses to the issue of dangerousness (63.3% and 26.7%, respectively). Moreover, white males were well above the other race and gender categories in believing that the defendant would be back in society in less than ten years. White males were almost twice as likely as white females to believe that there would be an early prison release (30% and 17.6%, respectively) and four times as likely as black males or females to believe this (30% vs. 7.7% and 7.1%, respectively). For their part, black males were the most likely to believe that such defendants usually spend at least twenty years in prison (a difference of 21.5 points compared to white males). Perceptions of dangerousness and estimates of time before release are a compound prescription for a death sentence that grossly separated black and white male jurors.

The chief contrasts in these areas were between white males and black males, especially in the critical areas of impressions of remorse and perceptions of dangerousness. That is, the black-white differences in B/W cases shown in Tables 3-5 were even more pronounced when the comparisons were between males of the respective races.

Finding the males of each race at the extremes in these punishment-related considerations is reminiscent of the revelation in Table 1 that it is the number of males of each race on the jury that most substantially affected the sentencing outcomes in the B/W cases. This finding sets the stage for a closer look at the effects of jury composition in conjunction with juror's race, to which we now turn.

2. *Jurors' Race and Jury Composition in B/W Cases*

The effects of white male dominance and black male presence in B/W cases, shown in Table 1, Panel B, suggest something more than the simple aggregation of individual perspectives on lingering doubt, remorse, and dangerousness. The abrupt changes in sentencing outcomes at distinct points in the numbers of black and white male jurors is due to more than an additive increase in individual jurors' pro-life sentence or pro-death sentence inclinations. The existence of such abrupt changes suggests that jury composition alters the dynamics of decision making and that the perspectives of jurors, both black and white, may be affected by the numbers of white males and black males on the jury.

In this section, we look at the impact of jury composition on the thinking and experience of individual black and white jurors where white male dominance is present (juries with five or more white males) and where it is absent (juries with four or fewer white males).[163] There was an insufficient number of cases where there were no black male jurors to permit a comparison of cases with and without the presence of black males.[164] Black and white jurors' responses to selected questions (a) in the areas of lingering doubt, remorsefulness, and dangerousness and (b) in their thinking and experience as capital jurors on cases with and without white male dominance appear in Table 8, Panels A and B.[165]

[163] The twenty-four B/W cases divided evenly between those with and without white male dominance: twelve B/W cases had five or more white male jurors and twelve had four or fewer.

[164] In all but four of these twenty-four B/W cases there was at least one black male juror.

[165] With black males present in twenty of these twenty-four B/W cases, any differences between juries with and without white male dominance are largely characteristic of cases with a black male present and, therefore, relatively independent of variation in black male presence.

TABLE 8: Elements of (a) lingering doubts, remorsefulness, and dangerousness; (b) jury decision making on punishment; and (c) experience as a capital juror by jurors' race in black defendant-white victim cases

	Dominated by White Males		Undominated by White Males	
	White Jurors	Black Jurors	White Jurors	Black Jurors
A. Elements of Lingering Doubt, Remorsefulness, and Dangerousness				
1. During guilt deliberations, were you or any jurors reluctant to go along with the majority?				
Yes	7.7	50.0	14.8	33.3
No	38.5	31.3	40.7	22.2
No reluctance	53.8	18.8	44.4	44.4
(No. of jurors)	(26)	(16)	(27)	(18)
2. When you were considering the punishment, did you believe that [the defendant] was truly sorry for the crime?				
Yes, sure defendant was sorry	—	12.5	7.1	16.7
Yes, I think defendant was sorry	—	12.5	7.1	44.4
Not sure, def. acted sorry but it may have been just a show	17.4	18.8	17.9	11.1
No, def. acted sorry but it was a show	4.3	12.5	21.4	—
No, def. didn't even pretend to be sorry	78.3	43.8	46.4	27.8
(No. of jurors)	(23)	(16)	(28)	(18)

3. Did you imagine yourself in the defendant's situation?

Yes	25.9	43.8	28.6	38.9
No	74.1	56.3	71.4	61.1
(No. of jurors)	(27)	(16)	(28)	(18)

4. Did the possibility that defendant would be a danger to society in the future make you more or less likely to vote for death?

Much more likely	60.0	7.1	27.3	9.1
Slightly more likely	10.0	14.3	18.2	9.1
Not more or less likely	30.0	64.3	50.0	81.8
Slightly less likely	—	14.3	4.5	—
(No. of jurors)	(20)	(14)	(22)	(11)

5. How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?

0-9 years	33.3	6.7	15.8	8.3
10-19 years	27.8	46.7	52.6	41.7
20+ years	38.9	46.7	31.6	50.0
(No. of jurors)	(18)	(15)	(19)	(12)

B. Jury Decision Making

1. Closed minded, intolerant of disagreement

Very well	—	6.3	—	—
Fairly well	7.7	31.3	7.1	22.2
Not so well	34.6	37.5	17.9	27.8
Not at all	57.7	25.0	75.0	50.0
(No. of jurors)	(26)	(16)	(28)	(18)

2. Dominated by a few strong personalities

Very well	3.8	37.5	7.1	16.7
Fairly well	15.4	18.8	17.9	22.2
Not so well	15.4	18.8	25.0	27.8
Not at all	65.4	25.0	50.0	33.3
(No. of jurors)	(26)	(16)	(28)	(18)

3. You felt like an outsider

Very well	—	12.5	—	5.6
Fairly well	3.8	6.3	—	—
Not so well	—	12.5	3.6	5.6
Not at all	96.2	68.8	96.4	88.9
(No. of jurors)	(26)	(16)	(28)	(18)

4. Do you wish you had done anything different?

No	96.3	56.3	96.3	94.4
Yes	3.7	43.8	3.7	5.6
(No. of jurors)	(27)	(16)	(27)	(18)

a. *On white-male-dominated juries, white jurors, as compared to black jurors, were far less reluctant to join the capital murder verdict, much more willing to reject indications of the defendant's remorsefulness, and far more likely to say that the defendant's possible dangerousness made them much more likely to vote for death.*

The responses of black and white jurors to selected questions about lingering doubt, impressions of the defendant's remorsefulness, and perceptions of his dangerousness in B/W cases with and without white male dominance appear in Table 8, Panel A.

White-male-dominated juries showed a stark racial divide in doubt about guilt, as reflected in the reluctance of black jurors to join the capital murder verdict (Table 8, Panel A.1). On such juries, few white jurors (7.7%) but fully half of the black jurors (50%) said that they, themselves, were reluctant to vote guilty of capital murder. The difference between the races was far smaller in cases with four or fewer white male jurors (14.8% of whites vs. 33.3% of blacks).

On white-male-dominated juries, white jurors were especially likely to deny the black defendant's remorsefulness by saying that "the defendant didn't even pretend to be sorry" (Table 8, Panel A.2). Three out of four whites (78.3%) on such juries, as compared to only two-fifths of the blacks (43.8%), characterized the defendant as not even pretending to be sorry, a 34.5-point gap. On juries with no more than four white males, the difference between black and white jurors in interpreting the defendant's courtroom behavior this way was only 18.6 points (46.4% vs. 27.8%, respectively). Identification with the defendant's situation was also least common among white jurors on white-male-dominated juries and most common among black jurors on such juries (Table 8, Panel A.3).

It was white jurors on white-male-dominated juries who were conspicuous in saying that the defendant's dangerousness was a major sentencing consideration (Table 8, Panel A.4). Six out of ten whites (60%), in contrast to few blacks (7.1%), on such juries indicated that

the possibility that the defendant would be a danger to society in the future did or would make them "much more likely to vote for death." Compared to this 50-point gap between white and black jurors on white-male-dominated juries, juries with four or fewer white males showed less than a 20-point difference between white and black jurors who said the defendant's dangerousness did or would make them much more likely to vote for death (27.3% vs. 9.1%). Furthermore, the critical role of dangerousness in the decision making of white jurors on these white-male-dominated juries appeared to have been compounded by their estimates of the time the defendant would serve if he were not given a death sentence: whites in these cases were five times as likely as blacks to believe that such defendants would be back on the streets in less than ten years.

Finally, we turn to the effect of white male dominance on capital juries, and particularly on black jurors' perspectives of the jury's decision-making process and their own experiences as capital jurors (Table 8, Panel B).

b. *On white-male-dominated juries in B/W cases, black jurors were critical of the jury's decision-making process and especially discontented with their own experiences as capital jurors.*

We have seen that black jurors, compared to their white counterparts, believed that the jury was intolerant of disagreement and dominated by a few strong personalities. These black jurors felt like outsiders and wished they had said or done things differently (Table 6). We now see in Table 8, Panel B, that these views of black jurors are foremost the result of serving on white-male-dominated juries.

The concentration of dissatisfaction and alienation among black jurors on white-male-dominated juries was reflected in their responses to each of these characterizations of the jury and in their expressions of personal discontent. Black jurors on white-male-dominated juries were the most likely to say "intolerant of disagreement" characterized the jury very well or fairly well (37.6%) and to say that "dominated by a few strong personalities" fit the jury very well (37.5%). White jurors on white-male-dominated juries were far less likely to voice such criticisms (the corresponding figures were all less than 10%).

Equally pronounced were the personal reactions to jury service that distinguished these black jurors on white-male-dominated juries from the other categories of jurors. Eight times as many of these jurors, as compared to both categories of white jurors, felt "like an outsider" on the jury at least to some extent (combining the responses very well, fairly well, and not so well, 31.3%, as compared to 3.8% and 3.6% of white jurors). Ten times as many black jurors as white jurors on white-male-dominated juries wished they had said or done something differently when they recalled serving as a juror (43.8% as

compared to 3.7% among both categories of white jurors).

Across the board, white male dominance appeared to encourage intolerance of disagreement; both white and black jurors saw more such intolerance in juries dominated by white men (differences of 17.3 and 25.1 points, respectively). Moreover, it was particularly the black jurors on these white-male-dominated juries who reported regretting that they did not say or do something differently (43.8% compared to a high of 5.6%). While the far greater regret of black jurors on white-male-dominated juries was surely encouraged by feeling "like an outsider" and being confronted with intolerance of disagreement, it is also likely due to the much more frequent imposition of death sentences by such juries.

F. Overview of Statistical Patterns

Heretofore, where system-wide racial bias in sentencing outcomes has been demonstrated, such bias has been most pronounced in B/W cases.[166] We now see that both the racial composition of the jury and the race of the individual juror are implicated in this story. The defendant in a B/W case who draws an all-white jury is much more likely to receive a death sentence than the defendant who draws a jury with one or more black males. Juries with five or more white males are especially likely to impose the death penalty in B/W cases. We have labeled these opposing influences of jury racial composition the "black male presence" effect and the "white male dominance" effect.

Race also distinguishes the decision-making patterns of individual jurors. In B/W cases, black and white jurors differ early in the trial about what the punishment should be and become further polarized as the trial proceeds. The white jurors are quicker to take a stand on punishment than their black counterparts. At the time of sentencing instructions, well over half of white jurors think the punishment should be death. By the time of the jury's first vote on punishment, most black jurors think the punishment should be life imprisonment. This progressive divergence in jurors' stands on punishment in essentially the same cases demonstrates that black and white jurors make different, apparently race-linked interpretations of the same evidence.

Specifically, these differences of interpretation include the future dangerousness of the defendant, the defendant's remorsefulness over the crime, and even the possibility that the defendant is not guilty of capital murder. Black and white jurors are sharply divided on these matters in B/W cases. White jurors are particularly likely to see the defendant as a danger to society, and black jurors are especially likely

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[166] *See supra* notes 24-26.

to see the black defendant as remorseful or to have lingering doubts about his guilt. In effect, black and white jurors in B/W cases have different concerns and focus on different considerations, with opposing implications for the defendant's punishment.

The black jurors' lingering doubts in B/W cases encompass questions of the defendant's motivation and responsibility for the crime, as well as his actual involvement in the killing. Their doubts are not simply afterthoughts but concerns that they manifest in their stands on guilt prior to the jury's guilt deliberations, at the jury's first vote on guilt, and in reaching the final guilt determination. Nor are black jurors' misgivings about guilt confined to the B/W cases. In both W/W and B/B cases, lingering doubts about the defendant's guilt are also more common among black than white jurors. Black jurors' lingering doubts appear to reflect a more general mistrust of the criminal justice process.

Black jurors' greater sense than their white counterparts of the defendant's remorsefulness in B/W cases appears to be rooted foremost in their ability to identify with the defendant or to imagine themselves to be like him and to see themselves in his situation. White jurors, in contrast, are especially unlikely to be reminded of someone by the defendant or to place themselves in the situation of the defendant's family in such cases. In turn, blacks are most, and whites least, likely to believe that the defendant deserved mercy on the grounds of his remorsefulness. In W/W and B/B cases, as well, more black than white jurors see the defendant as remorseful. In black defendant cases (i.e., in both B/W and B/B cases), white jurors are especially likely to see the defendant as lacking remorse and to deny that the defendant even pretended to be sorry.

The tables turn when it comes to dangerousness. White jurors in B/W cases are the ones most likely to see the defendant as dangerous. Compounding their concern about dangerousness, they are also the ones most likely to believe that he will serve a relatively short term in prison if not given a death sentence. Both black and white jurors in these cases agree that the defendant's dangerousness and his possible return to society were discussed a great deal in jury deliberations; however, only white jurors are much more likely to vote for death as a result of their perception of the defendant's dangerousness. Jurors' responses from all three defendant/victim racial combinations suggest that white jurors believe black defendants are more dangerous than white defendants, and that black jurors believe defendants who killed blacks are more dangerous than those who killed whites.

The races also differ most in the B/W cases on what they think about the functioning of the jury and how they experience capital jury service. Black jurors on these cases are the ones most likely to see the jury as rushing to judgment, as intolerant of disagreement, and as dominated by a few strong personalities. They are also the

most likely to feel like outsiders on the jury and to wish they had said or done things differently during punishment deliberations. Black jurors' discontent with the jury and their alienation from their fellow jurors in B/W cases undoubtedly result from the divergence of their perspectives from those of the white majority on the issues of lingering doubt, remorse, and dangerousness; issues that are fundamental to jurors' punishment decision.

Introducing gender into the analysis of the B/W cases reveals further that it is the males of both races who are most at odds in perceptions of the defendant's remorsefulness and dangerousness. Black males, to a greater extent than black females, exceed whites of both genders in lingering doubts about the defendant's guilt. The numbers of jurors are small when broken down by both race and gender, but the differences between white and black males are larger than those between white and black females on a number of important issues. These issues include jurors' misgivings about the defendant's primary responsibility for the murder, the importance of lingering doubt as a sentencing consideration, jurors' impressions of the defendant's remorse, jurors' identification with the defendant and his family, jurors' perception of the defendant's dangerousness, and jurors' estimates of the alternatives to a death sentence.

The racial composition of the jury adds a further dimension to the story of disparities between white and black jurors in B/W cases. On juries dominated by white males, black-white differences are accentuated. Indeed, such dominance may promote or provoke disparities between black and white jurors. Blacks and whites on white-male-dominated juries differ greatly in their perspectives on lingering doubt, remorsefulness, and dangerousness. On white-male-dominated juries, white jurors are especially likely to say that the defendant did not even pretend to be sorry, to see him as dangerous in the future, to think that he would get out of prison relatively soon if not given death, and to say that his future dangerousness made them much more likely to vote for death. Black jurors in these cases are the most likely to say that the jury was intolerant of disagreement and, not surprisingly, to say that they felt like outsiders on the jury and wished that they had said or done things differently.

These data leave open questions about the dynamics of jury decision making. Do the race-linked perspectives on lingering doubt, remorse, and dangerousness improve understanding and insights or breed conflict and turmoil? Do these differences encourage or discourage premature stands on punishment? Do black and white jurors collaborate to reach a reasoned moral judgment about punishment, as the Supreme Court supposes,[167] or does the white majority

[167] *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (agreeing with defendant's argument that the jury must be allowed to express its "reasoned moral response" in determining whether death was the appropriate punishment); Franklin v. Lynaugh, 487 U.S. 164, 184 (1988)

deceive, intimidate, or manipulate minority jurors, as Ms. Daniels recounts in the Hance case?[168] Answers may be gleaned from jurors' narrative accounts of the decision making in their cases, to which we now turn.

III. NARRATIVE ACCOUNTS

To provide an alternative examination of black and white jurors' perspectives of the jury's decision-making process and of their roles in it, we now turn to jurors' narrative accounts of how the jury reached its sentencing decision. We have selected excerpts from jurors' accounts that illustrate how black and white jurors viewed the evidence, the defendant, and one another. These excerpts are drawn largely from black defendant cases in which both black and white jurors were interviewed.[169]

We have selected narrative accounts from nine cases for presentation and arranged them in four groupings to illustrate: (a) black jurors' perceptions of racism in the thinking and behavior of white jurors; (b) the differences between black and white jurors' interpretations of mitigating circumstances in the same cases; (c) the steps white jurors took to persuade black holdouts for life sentences; and (d) the characteristics of successful black holdouts. For each of these themes we present jurors' accounts from at least two different cases.[170]

A. Black Jurors Saw Their White Counterparts as Harboring Racial Animus, Predisposed Toward a Death Sentence, Impatient with Dissent, and Indifferent to Mitigating Evidence.

CASE 1: A Florida Jury Recommended the Death Penalty for a Black Man Who, with One Black and One White Co-Perpetrator, Killed a Police Officer.

The only black male juror on a Florida jury that included six white male jurors saw the white jurors as bent on the death penalty from the very beginning. He felt that the white-male-dominated jury wanted the death penalty because the defendant was a black man and the victim was white.

(O'Connor, J., concurring) ("[T]he sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))).

[168] *See supra* text accompanying note 1.

[169] A search was conducted of transcribed interviews with jurors from all cases on which blacks served as jurors to identify jurors whose comments in response to open-ended questions reflected racial themes.

[170] In the following excerpts from transcribed interviews, "Q" indicates a question from the interview instrument, "J" identifies a juror's response, and "I" indicates an interviewer's words in an exchange with a juror.

Q: In deciding guilt, did jurors think about whether or not the defendant would or should get the death penalty? If yes, what did they say?

J: At first they felt he should have got the death penalty also. They wanted to burn both of them black boys. I'm serious, that's the impression I got. I felt like, I was the only black male on the jury. There was one other black woman. I felt like they didn't give a shit one way or the other. They wanted to go to the football game and they wanted to go home to their husbands and all this type of stuff, and not worry about whether these people were gonna die or not. They felt like hell, these two black boys took a white man's life: "We're going to burn them." That's the impression I got from a lot of the jurors .... I really felt like they wanted to burn both those guys because they were black, well because the white guy in the case [had a plea bargain], and we didn't even hear his testimony. He was there just as much as the other black guy was.

Q: Can you think of anything more about the jury that helps to explain how or why it reached its decision?

J: .... What I'm saying is that they had no respect for a black male and they didn't know how to really judge him. They wanted the death penalty, give him the death penalty 'cause he killed a white man. Boom, that was it.

This black juror had lingering doubt that the defendant on trial was the one most responsible for the killing.

Q: Can you think of anything more we haven't talked about yet that was important in understanding the jury's guilt decision?

J: I felt that two people did not pull the trigger, only one did. I think it's wrong to try somebody for something somebody else done. I think it was unjust that he was charged with a capital crime for this .... He tried to keep this other guy from killing, but he was too late; the other guy had already shot before he could say anything .... Every man should pay his own [dues]—'cause [the defendant] was not holding that guy by the hand saying you pull [the] trigger or you don't pull [the] trigger.

The words of a white female juror tend to confirm the black juror's belief that at least some white jurors made the punishment decision before the sentencing stage of the trial, that they ignored or discounted sentencing evidence and arguments, and that they were in a hurry to be done with the sentencing decision.

I: When did you first think [the defendant] should be given the death penalty?

J: I think when we went in for [guilt] deliberations and we got the instructions.

I: So before guilt deliberations, but after you got the judge's instructions. And at the same time you decided he was guilty of capital murder?

J: Agreed.

Q: What prosecution evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: Can't remember. [At this point, the interviewer noted, the juror] was

impatient for the penalty phase to be over. [She] did not know until after the guilty verdict was announced that [she] would have to sit through a penalty phase. [They] were sequestered.

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: [The] defendant had received a certificate from the PTL [Praise The Lord] Club. We all thought that was hysterical. It was very difficult not to laugh.

Q: In your own words, can you tell me what the jury did to reach its decision about 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: [We] did not spend a lot of time on it because we were told it was only a recommendation. [We] wanted to go home. That was the feeling of most jurors.

Florida is the only state in our sample in which a jury's vote for the death penalty need not be unanimous.[171] In this case the jury recommended the death penalty, despite the black male juror's vote for a life sentence.

CASE 2: A Pennsylvania Jury was Hung on the Punishment Verdict, and as a Result, a Black Man Received a Life Sentence for the Murder of Four Restaurant Employees Killed by Him and Three Black Accomplices.

A black male juror in a Pennsylvania case recounted that, owing to what he called "racial overtones," most of the white jurors had already decided on the death penalty at the guilt stage of the trial. According to this juror, the white jurors were insensitive to aspects of the defendant's background and upbringing.

Q: Can you think of anything more we haven't talked about yet that was important in understanding the jury's guilt decision?

J: Racial overtones. Because he's black, it was "automatic." . . . Some of the jury had already made up their minds. I think the white jury [members] had definitely made up their minds.

I: [What topics] did the discussion among the jurors [at guilt] focus on?

J: Basically his background, his upbringing. We dwelled on that, the black jurors did .... They figured he deserved a break, because of his background, where he grew up.

Q: In deciding guilt, did jurors think about whether or not defendant would or should get the death penalty?

J: Half of them said he should get it. Half of them said he shouldn't get it because of his environment. He came up living in drug houses, crack houses, and things like that. He had no guidance, no education.

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[171] *See supra* note 125.

In the portion of the interview devoted to the punishment stage of the trial, the black male juror was asked about the effect of evidence on the jury.

Q: What prosecution evidence or witness at the punishment stage of the trial was most important or influential?

J: I think when the prosecutor staged a dramatic reenactment of the crime, how the victims were, how they were shot. He got on his knees in dramatic fashion, and he started crying and talked about how the guy had two seconds to live and what do "you" think if you only had two seconds to live and "you" had a gun pointed to the back of your head. That played a big part on everybody. His presentation during his closing argument. That went over big.

This juror sensed the bleakness of the defendant's upbringing and was receptive to the mitigating evidence.

Q: [What] thoughts or feelings [did you have] about defendant's family?

J: The mother was a sorry woman, the father was even sorrier. When I say sorry I'm talking about in respects that she abandoned him. The mother abandoned him. The father took over and raised him, saying that they lived in abandoned homes and crack houses and places like that. And the father was supposed to have been an abusive father toward the mother, and the mother was a drug addict along with the father .... When the attorney for [the defendant] brought his father into the court, in fact they had just brought him from the penitentiary in his prison clothing. To let everybody know how rotten he was, and how bad he was.

When asked about the penalty phase of the trial, this juror explained that, because of the race-linked way that the white jurors thought about the inner city, black people, and crime, the death penalty in this case was automatic. According to this juror, the white jurors did not give serious consideration to the alternative of a life sentence.

Q: Can you think of anything more we haven't talked about yet that was important in understanding the jury's punishment decision?

J: People got their opinion before the trial actually starts. And it is a shame to say that, but they have their opinions. Like this guy I told you of earlier from North Philly had a total different perspective of what happens in the inner city compared to the guy out in the suburb who thinks anything about blacks, if it's a black thing, automatic guilty. The white woman says the same thing. The white woman from Center City. She gets on the elevator with me, she got a problem. If something went down, the first thing that's gonna come out of her mouth, "It was a black guy." It's an automatic thing. And it's a shame to think that way, and when these jurors hooked up, they were so disinterested, they were more concerned about what we were gonna have for lunch and how long was lunch and when we were gonna get out of here.

Q: Can you think of anything more about the jury that helps to explain how or why it reached its decision?

J: They were impatient and wanted to leave early to go home to their

families, I guess. Not very understanding, and a hint of racism.

This juror was disappointed and felt alienated by the racism and the superficiality that he witnessed.

I: You said "racism." Do you mind elaborating?

J: Most of the whites that were there never was exposed to black folks, probably not even on their jobs, and they felt very uncomfortable .... They were very, like they didn't want to be there. Me, personally, I was disappointed. After it was over with, the DA came in the back, along with the [defendant's] lawyer. They came in the back and made a little game about it .... I thought that was unprofessional, and I left. I really didn't want to hear it. And the DA was telling us that he wished he could have told us that [the defendant] had killed another person .... I left. I didn't want to have any contact with any of them. I am out of here. I'll pick up my money whenever. And they were still anxious to run down and get their little cash.

B. Interpreting the Same Mitigating Evidence, Black Jurors saw a Disadvantaged Upbringing, Remorse, and Sincerity, While White Jurors saw Incorrigibility, a Lack of Emotion, and Deceptive Behavior.

CASE 3: A South Carolina Jury with Five White Males and One Black Male Sentenced a Black Man to Death for the Murder of a White Woman.

In a South Carolina B/W case, white and black jurors made diametrically opposed interpretations of the defendant's human qualities and remorsefulness. A white male juror perceived the defendant as emotionless and said the jury was afraid that he would be dangerous in the future.

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: His mother, really his reaction to his mother's testimony, he was very unemotional through the whole trial and when his mother got on the stand and pleaded for his life he didn't bat an eye, not a tear, no emotion at all, that pretty much put him in the electric chair .... The point was brought up that our friends and neighbors were expecting us to do the right thing and if this guy were to ever get out, he was so violent, his episodes of violence, we were really afraid of what might happen if he is ever allowed out into society again.

A white female juror echoed and elaborated upon the "coldness of the man," despite his responsiveness to his girlfriend, and upon his pretense of being sorry.

Q: Did any of the testimony by defense witnesses at the punishment stage of the trial "backfire," or actually hurt their case?

J: Well I would have to say the one was putting the girlfriend on the stand, because she followed the mother .... The girlfriend told about how good he was with her two children although they were not his children, and how, what a good person he was. It was all well and good to

hear that, but he perked up when the girlfriend got the stand, and even when she walked off the stand he looked at her and gave her this grin and winked at her, and I mean he had no response for his mother who was up there shedding all these tears for him and yet had this response for his girlfriend, to me it really showed the coldness of the man.

Q: Did defendant testify or make a closing statement at the punishment stage of the trial?

J: It was poor .... One reason was because he came up to this podium that they had set up in front of us, very nicely dressed with a legal, long, legal pad and a Bible in his hand, and he stood up there, and he read a statement that was obviously prepared by his lawyer where he said how sorry he was for this family and the other people that had survived, the trauma that they had to go through, the families of the victim herself, and he expressed appreciation for his family members and friends and all that had come out and supported him, but they were not his words. I mean it was so obvious that they were not his words.

This juror took the paternalistic view that the death penalty was probably a good thing for the defendant's mother.

Q: What were the strongest factors for and against a life [or death] sentence?

J: His manner in the courtroom, and I think the fact that I really believe the justice system does not have a very good rehabilitation record .... I tell you I also think ... about this boy's mother at that time, to watch her son behind bars for 30 years, I don't know whether that would have been any less merciful or any more merciful I should say for her than to have the boy executed and then his life is over with. Time does a healing for people and their grief, not that she wouldn't have more grief at the time [of his execution, but it would not] burden her with this boy being behind prison [bars] and what he would go through.

Note that this juror began referring to the defendant as "boy" in her patronizing explanation of why his execution would probably be good for his mother. She later interrupted the flow of the interview to say that she was insulted at being asked whether she could be racially unbiased as a juror.

J: I want to tell you in the sentencing, excuse me, in the choosing of the jury, they, his lawyer asked me if it mattered to me that the defendant sitting here was a black man and the victim was a white woman, would that make a difference to me that that was the facts in the case. And I thought that was an insulting question for that man to ask. Apparently he asked that of everybody, but I just, a life is a life, and if the man committed a crime I don't think that those things ought to weigh into it. And I told him so, I said, I mean, the person that died, whether the person was white or black or male or female just should not bear into this. And I don't think it would in my case, and I was insulted.

The black male juror saw the defendant in a very different light than did the white jurors. He was opposed to the death penalty until the final jury vote, when he seems to have become convinced that the law required a death sentence.

I: In your mind, how [would you] describe the killing?

J: Accidental.[172]

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

J: Psychotic, dual personality . . . and a drug addict.

Q: In deciding guilt, did jurors talk about whether or not [the defendant] would, or should, get the death penalty?

J: One person [apparently referring to himself] didn't think he should get it.

Q: Was there any discussion among the jurors about the meaning of proof beyond a reasonable doubt?

J: Defendant would get the death penalty if this was found.

When the questioning turned to the punishment stage of the trial, he was asked:

Q: Did [the defendant's] mood or attitude change after the guilty verdict was handed down and the focus of the trial shifted to what the punishment should be?

J: [He] seemed sorry and pled for [his] life.

I. Did [the defendant] testify or make a closing statement at the punishment stage of the trial?

J: [He] told the jury that he had good qualities and could change.

Q: What did the defense attorney stress most as the reason why [the defendant] should not get the death penalty?

J: Because he was human, not an animal.

According to this lone black juror, the defendant's dangerousness and the impression that the death penalty was required by law influenced the jury's death penalty recommendation. In retrospect he wished that he had not been "so vicious" and gone along with the death penalty.

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

J: What would defendant do if set free? Would [the defendant] kill again? The law said the defendant must get death . . . . The prosecutor explained that this was required by law.

Q: When you think back about serving as a juror on [this] case, is there anything you wish you had said or done differently?

J: Yes.

I: What was it?

J: [I] wouldn't have been so vicious, [I] may not have given death.

[172] Because this juror was unwilling to have the interview tape recorded, his responses are relatively brief, as recorded on site by the interviewer.

CASE 4: A Georgia Jury Imposed a Life Sentence on a Black Man for the Murder of a Black Man and Woman.

A minority female juror[173] in a Georgia case described how white jurors misread evidence of mitigating circumstances because they were unfamiliar with the kind of background and home environment that the black defendant experienced as a youth. She expressed frustration at not having communicated better with the white jurors and at there not being more blacks on the jury.

Q: Can you think of anything more about the jury that helps to explain how or why it reached its decision?

J: The main problem I had with the jury as a whole was that they were not considering what background this kid came out of. They were looking at it from a white middle-class point of view. Let me give you an example. There was one testimony where they said [the defendant] stayed out until eleven o'clock at night. Okay, they deliberated this back and forth for about two hours. To me that was a waste of time, because maybe in the lifestyle where they come from, kids don't stay out until eleven o'clock at night. But we're looking at a different kid here. This kid came from a broken home where there was no structure, no authority figures, no, uh, authority . . . . Ya know, he just came as he went; of course he's going to stay out until eleven o'clock at night! He's going to stay up beyond that. And they were arguing, "Well, my kid comes in at such 'n such." And I was frustrated because I felt look, that's why I felt there had to be more blacks on that jury. Because I think that was a big factor for me of frustration. Because they were looking at this thing from a white middle-class perspective, and you have to put yourself into that black lifestyle . . . this kid came out of. That particular lifestyle. And I'm not saying by any means that blacks live like that, that's not what I'm saying. I'm just saying that that particular lower socioeconomic black lifestyle, that this kid came out of, where there was not a good home, no supervision, everybody was not there, there were no, there were no, there were no authority figures for this kid. So he would probably stay up all night even. So why waste time on talking about, my god, what time the kid comes in the house. There were a lot of little instances like that. That's why I felt like an outsider at times because I felt I should have been more forceful at trying to get these people to understand. We had to look at it like the lifestyle he came out of, the background he came out of. But nobody wanted to listen. They all wanted to talk. I'm not a strong-willed, I'm not forceful enough, that's why I felt like an outsider. So, rather than get into it, I didn't say much. I mean, I deliberated, but I didn't say much about those types of things. So that was a biggie, and it didn't make me happy. And I felt there should have been more blacks on the jury to balance that out.

[173] The juror identified herself as other than white, black, Hispanic, or Asian.

C. White Jurors Who Form a Majority Sometimes Took Extreme Steps to Break Black Jurors Who Held Out: Ostracism, Deception, Coaching.

CASE 5: A Louisiana Jury with a Black Female Holdout Imposed a Life Sentence in a White-on-White Murder.

Differences between black and white jurors sometimes reached beyond misunderstandings to become mistreatment. One form of such mistreatment is illustrated in a Louisiana case where a black juror and a white juror who held out for a life sentence were ostracized by the other jurors who refused to talk to them or allow them to join the deliberations. The black juror was not interviewed, but her white associate told the story.

Q: In your own words, can you tell me what the jury did to reach its decision about 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: Well, let me tell ya how it happened. There were . . . ten of 'em over here, two of 'em over here. And they would not even let us in the circle. And they were deciding, and they were going to put the death penalty. And I said, "I will not."

I: The ten were deciding the . . . ?

J: Death penalty. And I said you can have—sit here until doomsday, and I'm not voting the death penalty. And the black girl says, "I'm not either."

I: So let me ask you this, so when those ten jurors, you know, were in the circle without you all, you didn't discuss anything with them then? Do you know?

J: We have no idea what they discussed, they left us out. They left us completely out, the two of us.

I: So they went off and discussed it without you?

J: They went and sat on over in the little corner and discussed it all without, without us. I remember it very well because we were isolated, the black girl and I were not even allowed to sit with them. We weren't, the ten of them went off to themselves and got in their little circles, and she and I sit over here, and I told her, I said, "Well, there's one thing for sure, I'm not going to vote for the death penalty." And so about three days and three nights of that, of isolating themselves from us and we was not going to have anything to do with it. She kind of broke down, and then I broke down, and I said, "Well, what the heck, I'm not going to sit up here and send myself to the hospital." And, uh, she got sick to her stomach about the whole thing and went into the bathroom and was vomiting. And I went in there to help her, you know, and got a rag and was washing her face. And they came in and told us to get out of the bathroom.

I: Oh, you were in there together?

J: Yes, I said, she is sick, she is vomiting, and she is sick of this whole mess and I'm sick of it. And I said, if you don't watch yourself we both gonna walk out of here. It would've been a mistrial, and that's what we planned on doing.

I: A lot of pressure you were under!

J: Oh, terrible, terrible. You don't know what we went through.

CASE 6: Another Louisiana Jury with a Black Female Holdout Imposed the Death Penalty for a Black-on-Black Killing.

The account of a black juror who held out in another Louisiana case bears a strong similarity to the experience of Ms. Daniels.[174] After telling her that she would not be responsible for the defendant's death because it was not her who would pull the switch, the other jurors said he would get the death penalty whether or not she went along with them.

Q: In deciding guilt, did jurors think about whether or not defendant would, or should get the death penalty? If yes, what did they say?

J: [They said] if he gets out, he may do [kill] someone else. I didn't think so .... They said he should get it [the chair] because [of] ... what he did, he didn't have to do it .... Because if he get out, he may do somebody else like that.

I: And you didn't believe that?

J: No.

I: So, it sounds like some of the people felt like he was a danger to society. And you didn't feel that way?

J: No, I didn't. I didn't want to let him out, but then I didn't figure that they should give him the chair.

I: But eventually the whole jury voted for death. I guess what I'm wondering is how you came around to see it their way. How did that happen?

J: Well, let's see now, I, when I was talking they said you got to, because when you sign up, you and the district attorney, one of them asked you, could you stand for the, sending a person to the chair if they was guilty.

I: So, during jury selection they asked you if you could do it?

J: Yes, they asked all of us. Yeah, right.

I: And at that time, you said yes.

J: Yeah, sure, if a person's guilty, sure.

I: But in this case ... you didn't feel like it was?

J: I didn't feel like, no. It was the right thing? No.

I: So, what happened that you changed your mind?

J: Then everybody else, they said the chair, so I said why not life, why not

[174] *See supra* notes 1-4 and accompanying text.

life in prison?

I: So they tried to convince you?

J: Yeah, yeah, . . . they said, oh yeah . . . you're not doing it, you're not pulling it [the electrocution switch].

I: So they said you're not responsible for his death.

J: Yeah, right. Well, they said that I'm not responsible for it, no. They [also] said, whether you go along with us or not, that's what he's gonna get.

I: They said that no matter which way you voted, he was going to get the death penalty?

J: Yes, they said he's gonna get that.

I: Who said that?

J: The jurors, all of them, you know.

I: And so for a while, you did not want it, but then they convinced you?

J: No, I didn't want it, for him to get the chair. We went around a couple times . . . . They say, you said you could give him the chair, give a person the chair if he was guilty, and they said he is guilty.

This juror also felt that the white jurors wrongly saw black witnesses' mitigation testimony as deceptive and as a "put on."

Q: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

J: Well, there was, I mean, his sister and brother, then his mother too because I felt for her, because, well, she didn't say nothing, she couldn't say nothing because the hurting, but I felt for her, she crying, you know. And the brother, he went to crying.

I: So, the brother was crying also, and that had a big effect on you. Do you think it had a big effect on the other jurors also?

J: Yeah, we talked about that. But they didn't believe it was real, they believed it was put on, they believed it was puttin' on. They believed that old lady was faking, you know, her chest pain. They believed that, but I didn't believe it, I believed it was real, myself . . . especially for the mother.

CASE 7: A Georgia Jury Imposed the Death Sentence in a White-on-White Murder After "Coaching" a Reluctant Black Male Juror.

The jury foreman from a different Georgia capital case gave yet another account reminiscent of Ms. Daniels's. This white jury foreman described how the jury prepared a reluctant black male juror to respond when the judge polled the jury.

Q: In your own words, can you tell me what the jury did to reach its decision about 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: We talked for quite a while about the fact of the problems some of the jurors had with being responsible for putting somebody to death .... Everybody finally decided, with the exception of the older black gentleman, he was still very unsure until the last, I would say up until the last 30 minutes. He was very upset about saying "yes" to the death penalty. And I was afraid that when we went back out and the judge asked each one of us how we, how we pleaded, I was afraid he was gonna say "not sure" or "no," but he did say.... I told him when the judge talks to you, just say "yaassir".... I don't want to use the word we coached him into saying "yes," but I guess in reality we did.

The reluctant black juror was not among the four jurors interviewed by the CJP investigator, so we do not know how he perceived what the white foreman characterized as "coaching."

D. Successful Black Male Holdouts for Life Sentences Exhibited Exceptional Characteristics: Resoluteness, Charisma.

CASE 8: A South Carolina Jury Imposed a Life Sentence in a Black-on-Black Murder.

A staunch black holdout who "stonewalled" for life blocked a death sentence, but not without hostility. He evoked antagonism from pro-death white jurors and attracted one white juror to a vote for life imprisonment. This white juror said that he would not have been able to vote for life if he had not had the cover of the black holdout. A pro-death white male juror was asked:

Q: In your own words, can you tell me what the jury did to reach its decision about 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: We just decided we'd go around the table and throw up something to discuss—any ideas for or against or whatever. The one guy, the dude, the black dude in beginning wouldn't open his mouth. He wouldn't discuss nothing. He knew what he was gonna do. We sent it around, it was like eight and four the first time. We knew he wasn't going nowhere. That was when we started freakin'. This guy wouldn't even discuss it.

I: The guy said he wouldn't give the death penalty under any circumstances?

J: He wouldn't talk, he wouldn't say nothing. He wouldn't discuss it. He just sat there, the whole second part.

I: This is the guy you thought was really dumb first off?

J: Yeah, if he couldn't make a decision about how he felt. Yeah, because he should... if... if he couldn't make a decision about how he felt, I mean because of earlier something he said, he was sayin' about he'd already decided. Why even go to the sentencing—we shouldn't even went there because he couldn't make an impartial, impartial judgment anyway. He wasn't going to. He was gonna say "no" the whole time. He

wasn't going to be the guy [who would] give the death penalty no matter what. You couldn't sway him. And he wasn't even gonna discuss it. I mean you could have hung it up from there; if they had any sense they would have just [kept their] mouth[s] shut and left there because this guy wasn't going to change his mind.

I: How did he get people to come around to his side to decide then? Why was it that you went from thinking of giving him the death penalty into going to giving him a life sentence?

J: Because they would hem and haw. You have a bunch of older ladies in there. They all would have said [death] at any other time, but they didn't want to take responsibility of doing it themselves .... The majority wanted the death penalty, then there was a couple that could have been swung, one guy wasn't gonna move.

I: So because he didn't move, everyone decided to go with him?

J: It was either that or stay there forever or call a hung jury. So we sent out to find how long the guy would be in jail and if he would have no parole. They said he wouldn't get out of jail until [age] sixty-five and would never get to be paroled—to ease everybody's conscience. And this black dude, like I said, wouldn't [discuss anything]. That's when [the foreman] freaked, he was P.O.'d. We stayed in there forever; it seemed so long. We spent more time in the second stage then we did in the first. But it was getting late—dark, dark.

The black male holdout was not interviewed, but a white juror who joined him explained that he would not have stood up for a life sentence without the black holdout's resolute stand.

Q: In your own words, can you tell me what the jury did to reach its decision about 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: I can't tell you all this, but what I do remember is the biggest majority wanted to give him the death sentence to begin with. But I was one of them that was not in the majority to begin with. I was in the minority.

I: You wanted to give him [a] life sentence to begin with, you wanted to go for mercy?

J: I wanted to go for mercy in the sentencing phase of it, on account of his mother. When they presented her and explained that all the other sons had been killed, that change[d] my mind from the death sentence to a life sentence .... Now, I wasn't going to be a lone holdout. In other words, I wouldn't have caused another trial [to] come about. But we had a Negro, black, or whatever you want to call it, that was on the jury, and he would have been a holdout, and he did hold out, and he said [there was]no way he could consider a death sentence. And I don't know if he explained his reason for feeling that way or not, but I believe he did. But I went along with him on it mainly because of the boy's mother.

CASE 9: A California Jury Sentenced a Black Man to Life Imprisonment for the Murder of a White Man.

An exceptional black juror may be able not only to block a death sentence, but actually to convert the majority to a life sentence. One "charismatic" black juror won the consent, rather than simply the acquiescence, of his white fellow jurors, as the self-described last white holdout for death explained.

> Q: In your own words, can you tell me what the jury did to reach its decision about 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: I was the final person [to vote for life].
>
> I: What persuaded you?
>
> J: Another black juror.
>
> I: And he/she persuaded you?
>
> J: His manner and charisma, his compassion and his articulation did move me so much .... Here's a black man who was almost in the same situation [as the defendant] without the atrocities and the abuse and everything but black, poor, lower middle class from the South. [He] lead a very compassionate [life in the] army .... Finally, I guess after nothing more than a benefit of the doubt and compassion, I agreed it would be life without parole. (Inaudible). He's a wonderful guy, have you met him? He's wonderful. He's a wonderful, wonderful soul, such a person.

E. Overview of Themes in Jurors' Narratives

Black jurors believe that their white counterparts come to the trial of black defendants having already made up their minds in favor of the death penalty. Black jurors see evidence of this predisposition in white jurors' advocacy for the death penalty even at the guilt stage of the trial. They see it in white jurors' indifference to mitigating evidence, in their impatience to get the penalty stage over with, and in what they see as white jurors' often unconscious preconceptions about black people and the circumstances of their lives. For their part, white jurors mistrust black defendants' professions of remorse or sorrow: they do not believe black witnesses who they see as "putting on."

Black and white jurors' difference of perspective is manifest in their accounts of how they interpret evidence and testimony offered in mitigation at the penalty stage of the same trial. Where a white juror sees black witnesses as faking or "putting on," a black juror sees them as sincere. Where a white female juror interprets the black defendant's demeanor as hard and cold, a black male juror sees him as sorry. Where a white female juror sympathizes with the anguish of the black defendant's mother, she blames the defendant for it and

rationalizes that his execution will be in his mother's best interest. The black juror in the same case sees the defendant as genuinely sorry and wishes he had stood up for life.

Black jurors see mitigation where whites see aggravation. Black jurors have doubts about the defendant's responsibility for the killing and believe he is remorseful despite his impassive demeanor. White jurors see him as dangerous and use this to persuade blacks to vote for death. Black jurors feel that the white jurors do not understand black defendants' background and the environment in which they live; they believe their white counterparts therefore render judgments on the basis of racial preconceptions or stereotypes.[175] These differences in perspective are sources of resentment for black jurors and grounds for believing that the deck is stacked against a black defendant.

The white majority on a jury sometimes takes extraordinary steps to "encourage" black pro-life sentence jurors to vote for death. In some cases such persuasion includes manipulation and intimidation. This type of persuasion takes the form of isolating a holdout juror, claiming that the law requires a death sentence for the defendant's crime, asserting that the holdout will not be responsible for the defendant's execution, and telling the holdout that the death sentence will be imposed even if he or she does not vote for it. The white jurors in the majority may even "coach" initially pro-life sentence black jurors about how to respond to the judge's question when he or she polls the jurors about their punishment votes.

These tactics notwithstanding, some black holdouts exhibit a resolute commitment to a life sentence. This resolve may frustrate pro-death sentence white jurors, but it also may liberate outnumbered pro-life sentence white jurors who would not otherwise speak out or vote for life. In addition, some "charismatic" black holdouts convince initially pro-death sentence white jurors that a life sentence is the right punishment.

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[175] In some instances jurors are conscious of their racism. For instance, a white female juror in a North Carolina black-on-black case says her attitude would have been different if the defendant and victim had been white people:

> Q: Were any of the questions you were asked during the jury selection especially hard for you to answer? If yes, which question(s); why were they hard; who asked them?
>
> J: [If] they had asked me if I was prejudice, that would've been hard for me to answer.
>
> I: Did they ask?
>
> J: No. But if they had, I would've had to say yes. Anybody that was born and raised in the South when I was born and raised in the South and says they're not prejudice is a liar. I try very, very hard to get over it. Every time I get somewhere I meet a nigger, and I don't like white ones any more than I do black ones. That's the way it is. And what difference between me and anybody else is I admit it . . . . I mean, like, when I heard about the killing, I thought, well, they're just wiping each other out again. You know, if they'd been white people, I would've had a different attitude.

IV. IMPLICATIONS OF THESE FINDINGS

The CJP data from capital jurors themselves unmistakably demonstrate the influence of race in capital sentencing. As we have seen, this influence is felt foremost in the B/W cases, where the death penalty has long served to reinforce the color line.[176] Historical analysis suggests that these are the kinds of crimes that have been lightning rods for the expression of white rage over the crossing of racial boundaries. The death penalty in these cases has been the vehicle for demonstrating white racial dominance.[177] These cases most poignantly represent what Gunnar Myrdal, in his epochal examination of America's race problem, identified as the "American Dilemma."[178]

The make-up of the jury, we now see, is integral to this racial influence. When juries were all-white and all-male, as they were for most of our nation's history, it was impossible to see this bias through the lens of jury racial composition. Now that the racial and gender composition of juries varies, we can see what difference it makes to have (and not to have) blacks or women on a capital jury. In fact, we have seen that the chances of a death sentence for a black defendant whose victim is white are dramatically affected by the race and gender of his jurors.[179] The death penalty is three times as likely for the defendant in a B/W case who draws five or more white male jurors as for the one who draws fewer. A life sentence is twice as likely for the defendant who draws a black male juror than for the one who fails to do so.[180] These are far from trivial odds in this sizeable sample of seventy-four B/W cases from fourteen different states. Indeed, the role that a juror's race plays in this sample of cases is significant well beyond a chance occurrence in a sample of this size.[181]

Why jury composition matters in these B/W cases becomes apparent in the decision-making patterns of individual jurors. In such cases, black and white jurors grow farther apart in their thinking about what the punishment should be as the trial proceeds. Com-

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[176] Darnell Hawkins, *Beyond Anomalies: Rethinking the Conflict Perspective on Race and Criminal Punishment*, 65 SOC. FORCES 719, 726-27 (1987) (arguing that black-on-white crime represents a threat to white authority, that lesser punishment for whites who kill blacks conforms to a value system that allows whites to injure blacks, and that whites may believe that whites and their property are more valued than blacks and their property).

[177] For general discussions of the death penalty's function in "majority group protection," "minority group oppression," and "repressive response," see BOWERS, LEGAL HOMICIDE, *supra* note 5, and BOWERS, EXECUTIONS IN AMERICA, *supra* note 5.

[178] 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA 550-57 (1944).

[179] This association between jury racial composition and sentencing outcomes for cases with various defendant/victim racial combinations is also demonstrated by Baldus in this Issue. *See, e.g.*, Baldus et al., *Use of Peremptory Challenges*, *supra* note 87, at figs.8-9

[180] In effect, the luck of the draw has now replaced the injustice of an all-white, all-male jury. The black defendant's chance of being condemned to death in such a case is akin to his luck in drawing from a deck of race and gender cards, as stacked by the prosecution and the defense.

[181] Both the white male dominance and the black male presence effects are significant beyond the .01 probability level in B/W cases. *See supra* note 103.

pared to the decision patterns of black and white jurors in the W/W and B/B cases, the progressive polarization of jurors' punishment stands in B/W cases is unique. By the time of the jury's first vote on punishment, two out of three whites believe the punishment should be death and two out of three blacks believe it should be life imprisonment.[182] With black and white jurors this far apart at the jury's first vote on punishment, it goes without saying that the final punishment verdict will be strongly influenced by their respective numbers on the jury.

Why black and white jurors follow divergent decision-making paths in B/W cases is explained by the fact that they see the same defendants, the same evidence, and the same arguments in the same cases quite differently. In the twenty-four B/W cases where we have interviews from both black and white jurors, whites more often than blacks see the defendant as likely to be dangerous to society in the future and as likely to get back on the streets if not sentenced to death. Blacks in these cases more often see the defendant as remorseful and therefore deserving of mercy, and even wonder whether the defendant was the actual killer or at least whether the killing was a capital murder.[183] Furthermore, on these matters of doubt, remorse, and dangerousness, the males of each race take more extreme stands than do the females.[184] In these twenty-four B/W cases, black-white differences in opinion concerning lingering doubt, remorse, and dangerousness are independent of variation between cases and of jurors' socioeconomic status; these differences are consistent, sizable, and statistically significant.[185]

Beyond these statistical patterns, jurors' narrative accounts yield further insights into their decision making. They reveal a lack of receptivity to mitigating evidence among white jurors when the defendant is black. White jurors often appear unable or unwilling to consider the defendant's background and upbringing in context. As one minority juror put it: "they [the white jurors] were not considering what background this kid [the defendant] came out of. They were looking at it from a white middle-class point of view .... We had to look at it like the lifestyle he came out of, the background he came out of. But nobody wanted to listen."[186] Another black juror said, "[t]hey [the white jurors] had no respect for a black male, and they didn't know how to judge him. They wanted the death penalty, give him the death penalty, because he killed a white man. That was it."[187] Indeed, what black jurors see as mitigating circumstances, white ju-

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[182] *See supra* tbl.2.
[183] *See supra* tbls.3-5.
[184] *See supra* tbl.7.
[185] *See infra* Appendix B.
[186] *See supra* Part III.B, Case 4.
[187] *See supra* Part III.A, Case 1.

rors often see in a contrary light. Where a black juror said the defendant "seemed sorry and pled for his life," a white juror saw "the coldness of the man."[188] Evidently, a predilection of whites to see black defendants as arrogant, frightening, or dangerous, blunts or blocks their receptivity to mitigating evidence and arguments, especially their willingness to see the defendant as remorseful. The failure of jurors to give effect to mitigating evidence in their decision making on punishment runs contrary to the Supreme Court's conception of the role of mitigating circumstances in the sentencing decision as expressed in *Lockett v. Ohio*[189] and to its rulings concerning qualifications for capital jury service as articulated in *Morgan v. Illinois*.[190]

What is more, these data paint a picture at odds with the notion of a "deliberative jury"[191] that scrupulously weighs aggravating and mitigating considerations to arrive at what the Supreme Court has extolled as "a reasoned moral response."[192] In their narrative accounts, black jurors report that their white fellow jurors came to the trial with their minds made up about punishment and that they treated evidence of mitigation as trivial or ignored it. According to the statistical data, black jurors feel that the jury was in a rush to reach a verdict and intolerant of disagreement; and they feel more emphatically so in cases with five or more white male jurors. Further, these white-male-dominated juries appear to exacerbate the fissures between black and white jurors in lingering doubt, remorse, and dangerousness. Uniquely, jurors' narrative accounts reveal tactics of ostracism, deception, and intimidation in the B/W cases. The white jurors ostracize blacks, tell them their votes won't matter, and "coach" them, reminiscent of the treatment of Ms. Daniels. These decision-making dynamics appear to be driven by a determination to impose a particular verdict, not by a commitment to reach consensus by reviewing and deliberating about the evidence.[193] Jurors' accounts reflect tension, hostility, mistrust, and misunderstanding between black and white jurors. The decision-making process is evidently far from the necessary reasoned moral judgment.

The Supreme Court acknowledged in *Turner v. Murray*[194] that in

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[188] *See supra* Part III.B, Case 3.

[189] 438 U.S. 586, 597-609 (1978) (plurality opinion) (holding that the Eighth and Fourteenth Amendments require the consideration of mitigating factors in capital cases); *see also* Eddings v. Oklahoma, 455 U.S. 104 (1982) (vacating a death sentence imposed without consideration of mitigating factors as required by *Lockett*).

[190] 504 U.S. 719, 728-39 (1992) (holding that a capital defendant is entitled to an impartial jury and that a juror who fails to take into account mitigating circumstances does not meet this impartiality requirement).

[191] *See generally* JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994).

[192] *See supra* note 167.

[193] What jurors describe corresponds more to a "verdict driven" than an "evidence driven" decision process.

[194] 476 U.S. 28 (1986).

B/W cases, jurors' racial sentiments are likely to confound the capital sentencing decision, and the Court ruled 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."[195] This judgment, the Court declared, was "based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case."[196] Notably, the Court's thinking in *Turner* about how racial sentiments might come to bear in the sentencing decision of capital jurors in B/W cases foreshadowed the present findings.

> 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.[197]

The Court emphasized that the sentencing determination is especially vulnerable to the influence of racial attitudes and prejudices because "[i]n 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."[198] The Court explained, "we are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to factfinding."[199] It continued, "[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."[200]

Yet, the present research shows that reliance on voir dire questioning to detect such deeply ingrained and often unconscious racial

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[195] *Id.* at 36-37.

[196] *Id.* at 37-38.

[197] *Id.* at 35.

[198] *Id.* at 33-34 (citing Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)) (internal quotation marks omitted)).

[199] *Id.* at 36 n.8. With respect to factfinding, Justice O'Connor has also recognized the likelihood that "conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence." Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting).

[200] *Turner*, 476 U.S. at 38 n.12.

attitudes was wishful thinking. The failure of *Turner* to purge sentencing decisions of race-linked attitudes and their consequences is demonstrated in this research by the fact that virtually all of the cases examined in the statistical and qualitative analyses of the CJP data were tried after *Turner* became effective.[201]

Other remedies may be advocated, such as jury selection procedures to counter the biasing effects of peremptory strikes on jury composition or instructions to the jury to recognize and to overcome the influence of racial bias in sentencing. Critics have advocated various affirmative selection schemes designed to improve the chances that minority jurors will be represented on trial juries.[202] Although affirmative jury selection could be expected to ensure the presence of minority jurors, including for instance black males, within the limits set by the composition of the venire, such procedures are largely irrelevant to the pro-death penalty bias owing to white male dominance on the capital jury.[203] Indeed, the ability of these schemes to ensure a place for designated venirepersons on the jury would enable the prosecution in some cases to see that a white-male-dominated jury is seated. But even effective improvements in jury selection fail to grapple with the more fundamental roots of the problem: race-linked differences in how jurors think about the crime, the defendant, the victim, and even about the other jurors with whom they are trying to make the life or death decision. That is to say, strictures on jury composition alone are not designed to neutralize the stark differences of perspective between individual black and white jurors that appear to block receptivity to mitigating evidence on the part of whites and to render the punishment decision a matter of conflict and wrangling between the races, quite short of a reasoned moral judgment.

Instructing jurors to confront and suspend their own racial attitudes, stereotypes, and hostilities, and to openly address and overcome their own and other jurors' racial prejudices during jury delib-

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[201] The sample includes cases tried on or after January 1, 1988, in all states except Kentucky, where one case was tried in 1986 and one in 1987. Bowers, *supra* note 94, at 1079 n.198.

[202] *See* Hans Zeisel, *Affirmative Peremptory Juror Selection*, 39 STAN. L. REV. 1165 (1987). Other authors have advocated abandoning peremptories in favor of more affirmative techniques. *See, e.g.*, Coke, *supra* note 13, at 277; 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, 195-96 (1989); Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U. L. REV. 777 (1994).

[203] In this Issue Baldus and his colleagues compare the effectiveness of affirmative jury selection with the effectiveness of eliminating peremptory strikes, which are often used in a discriminatory manner by opposing counsel. *See* Baldus et al., *Use of Peremptory Challenges*, *supra* note 87 at 107-16. Their study finds (using Philadelphia data) that for the purposes of creating more representative juries, the abolition of peremptory strikes would be superior to affirmative selection. While doing away with peremptory challenges would eliminate the jockeying for advantage in jury selection, it would also make the final composition of the jury—and hence the character of racial influence on the thinking and decision making of jurors—solely dependent on the luck of the draw of the venire.

erations, is a laudable proposal for neutralizing racial conflict between black and white jurors.[204] However, because much racism is ingrained, unconscious, and denied, this form of jury instruction would likely prove inadequate. Jurors who are conscious of racism in themselves or recognize that race shapes their thinking about crime and punishment are likely to reveal that it is too ingrained simply to be set aside.[205] Jurors whose racism is unconscious and denied are likely to take offense at the suggestion that race has any influence on their decision making, as did a juror who thought it was "insulting" to be asked whether "it mattered to [her] that the defendant sitting here was a black man and the victim was a white woman."[206] Instructions from the bench may be attractive as a judicial remedy, perhaps because they are simple to apply and appeal to the ideal of an obedient, dispassionate, and highly rational jury.[207] Yet, the empirical evidence on the effectiveness of such judicial instructions is mixed, even indicating in some instances that alerting jurors to concerns they must disregard or ignore actually backfires.[208]

The distinctive perspectives of black and white jurors are, no doubt, shaped by their personal experiences and lead black and white jurors to hold fundamentally different assumptions about the causes of crime and about the trustworthiness of the criminal justice process. These perspectives are manifested in black and white jurors' different attributions of levels of dangerousness and remorsefulness to the black defendant, and in their holding different degrees of lingering doubt about his guilt. Beyond these differences in black and white jurors' experiences and in their perspectives on crime and the criminal justice process, there are also race-linked stereotypes that are likely to poison the deliberative process with mistrust and to undercut relations between black and white jurors. The deliberation process

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[204] *Cf.* Carol S. Steiker, *Proposed Instruction*, 3 U. PA. J. CONST. L. 276 (2001) (proposing such an instruction).

[205] *See, e.g., supra* note 175.

[206] *See supra* Part III.B, Case 3.

[207] Instructions may also be attractive because they reinforce the judge's authority and dominance as the source of whatever correctives may be needed for the conduct of a "fair trial." *See* Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL. & L. 589 (1997) (reviewing the research literature on the effects of judicial instructions and concluding that "the bulk of empirical research indicates that jurors do not adhere to limiting instructions").

[208] *See, e.g.*, Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973). Studies have found that inadmissible evidence accompanied by a strong judicial admonitions to ignore the evidence will often cause jurors to accentuate the prohibited considerations. *Id.* at 602. Kassin and Studebaker attribute this "paradoxical boomerang effect" to the fact that people not only find it difficult to actively suppress salient information upon instruction, but also to a reactance effect that makes people react against efforts to restrict their decision-making freedom. Saul M. Kassin & Christina A. Studebaker, *Instructions to Disregard and the Jury: Curative and Paradoxical Effects*, *in* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES 413, 424 (Jonathan M. Golding & Colin M. MacLeod 1998).

itself will then be contaminated with race-linked hostility and invective. Deliberations will take on the character of a struggle to subdue opposition by means such as the intimidation and deception exercised upon Ms. Daniels by the other members of the Hance jury.[209] Improved jury selection and sentencing instructions, while constructive, are, we submit, patchwork remedies that will fail to counter the deep-seated and enduring character of the malady.

The evidence of racial influence in the CJP data goes a critical step beyond what Baldus and his colleagues were able to show.[210] They demonstrated that the likelihood of juries imposing the death penalty differed depending upon the race of defendant and victim; in particular, they showed that jurors were most likely to impose death sentences when the defendant was black and the victim was white, as in *McCleskey v. Kemp*.[211] Further, Baldus showed that the greater use of the death penalty in such cases could not be accounted for by any one or all of a vast and comprehensive set of legally relevant considerations. He thus established that the race of defendant and victim were implicated in the sentencing decisions of jurors. He did this, however, without being able to show how jurors' race or race-linked attitudes figured into their decision-making process. The majority in *McCleskey* complained that the Baldus data linking defendant and victim race to sentencing outcome did not impeach the exercise of sentencing discretion by capital jurors,[212] and that statistical patterns of sentencing outcomes were no substitute for knowing how individual jurors focus their collective judgment.[213]

That is precisely what we have here—data not merely on the race of the defendants and their victims, but on real black and white ju-

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[209] Judgments on the part of black jurors that the jury is rushing to a verdict intolerant of disagreement are symptomatic of something beyond a deliberative process. That these differences are exaggerated between males of both races and on juries with a large number of white male jurors adds to the suggestion that something more than rational deliberation toward a reasoned moral judgment is at work.

[210] Baldus showed, controlling for some thirty-nine other legally relevant and statistically significant factors contributing to the imposition of the death penalty, that death sentences were 4.3 times more likely to be imposed in B/W cases. *See* BALDUS ET AL., *supra* note 25, at 395-419.

[211] McCleskey v. Kemp, 481 U.S 279 (1987).

[212] *Id.* at 291 n.7 ("Our assumption that the Baldus study is statistically valid does not include the assumption that the study shows that racial considerations actually enter into any sentencing decisions in Georgia."); *id.* at 312 ("At most, the Baldus study indicates a discrepancy that appears to correlate with race.").

[213] *Id.* at 292-97 (explaining why statistical evidence was not sufficient to show purposeful discrimination in that case). The Court's reluctance to impeach jury decision making on the strength of statistical data without evidence on real jurors in actual cases was manifest a year earlier in *Lockhart v. McCree*, when the Court asserted that the behavior of mock jurors is no substitute for knowing how real jurors will behave when deciding actual cases. *See* Lockhart v McCree, 476 U.S. 162, 171 (1986). The trouble with the empirical studies, the Court complained, was that the study participants "were not actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant. [The Court has] serious doubts about the value of these [mock-jury] studies in predicting the behavior of actual jurors." *Id.*

rors in actual cases who have made the life or death sentencing decision. These data flesh out the ways in which the race of individual jurors and the racial composition of the jury, in connection with the race of defendant and victim, figure into the capital sentencing decision. These data show that the races differ substantially and significantly in how they view the crimes and the defendants when the defendant is black and the victim is white. These are differences of the kind that the Court in *Turner* said would constitute an unacceptable risk of race-linked arbitrariness in the sentencing decisions of capital jurors.[214] Perhaps the Court in *McCleskey* held that the evidence of racial bias, though significant, did not impeach the decision making of capital jurors because it imagined that its decision a year earlier in *Turner* had remedied the risk of racial bias precisely where the Baldus data in *McCleskey* showed it to be most exacerbated—in the sentencing decisions in B/W cases. Yet the evidence here shows that gross race-linked differences in the basic sentencing considerations of lingering doubt, remorse, and dangerousness are most manifest and egregious precisely in the cases where the Court in *Turner* said they would be found. The consequence is that the decision-making process is an egregious departure from the Court's "repeated recognition that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.'"[215]

Clearly, the differences in sentencing outcomes by race of defendant and victim that Baldus and his colleagues were able to show in *McCleskey* are far from the full story of racism and arbitrariness in the sentencing of capital defendants.[216] We now see that the race of individual jurors, as well as the race of defendant and victim, infects the capital-sentencing process. The evidence of race-linked arbitrariness now goes well beyond what the 5-4 majority in *McCleskey* ruled was insufficient. The time has come to rethink *McCleskey* in light of *Furman*'s mandate that arbitrariness in sentencing is fatal to the death penalty.

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[214] *Turner*, 476 U.S. at 35-38 (discussing racial prejudice in capital sentencing cases).

[215] Zant v. Stephens, 462 U.S. 862, 888 (1983) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (opinion of Burger, C.J.)).

[216] *See supra* notes 210-213.

APPENDIX A: CLASSIFICATION OF CASES BY RACE OF DEFENDANT AND VICTIM

In the CJP interviews, jurors were asked to provide information (race, sex, age, education, occupation, marital status, etc.) for each defendant and each victim of the crime. With respect to race, they were asked to indicate race in four categories (white = 1, black = 2, Hispanic = 3, other = 4). Jurors' responses to the race question were used as the basis for classifying cases in terms of the race of defendant(s) and victim(s). The classification of cases by defendant and victim race has proceeded in two steps. First, the information was consolidated in cases of three or more defendants or victims. Second, the resulting forty defendant/victim racial combinations were reduced into a classification scheme that distinguished white-on-white killings (W/W cases), black-on-white killings (B/W cases), black-on-black killings (B/B cases), and a residual category of killings not subsumed under these categories.

The consolidation of information in cases with three or more defendants or victims is shown in Table A.1. We represent the cases by a one- or two-character racial designation. The first character indicates the race of the first-named defendant or victim, and the second character indicates the race of additional defendants or victims, if any. Where additional defendants or victims are all of the same race as the first named, the second character is the same as the first. Where any of the additional defendants or victims are of a different race than the first named, the second character indicates this different race. In one instance we have needed three characters to represent the race of additional victims. The distribution of the capital cases in the sample in terms of the forty distinct defendant/victim racial combinations identified in step one appears in Table A.1 below.

TABLE A.1: Distribution of cases by defendant-victim racial combinations[217]

Single defendant, single victim killings

Race of: def./vic.	#	%	Race of: def./vic.	#	%
Intra-racial cases			**Inter-racial cases**		
W W	98	29.5	W B	4	1.2
B B	27	8.1	W O	3	.9
O O	5	1.5	B W	48	14.5
Subtotal	130	39.1	B O	2	.6
			O W	4	1.2
			O B	1	.3
			Subtotal	62	18.7

Multiple same race defendants and/or victims killings

Intra-racial cases	#	%	**Inter-racial cases**	#	%
W WW	39	11.7	WW B	1	.3
WW W	12	3.6	B WW	9	2.7
WW WW	9	2.7	B OO	1	.3
B BB	21	6.3	BB W	7	2.1
BB B	4	1.2	BB WW	2	.6
BB BB	2	.6	BB O	1	.3
O OO	3	.9	BB OO	1	.3
OO O	1	.3	O WW	1	.3
Subtotal	91	27.3	OO BB	1	.3
			Subtotal	24	7.2

[217] Key to abbreviations: "W" = white, "B" = black, "O" = other, including Hispanic (grouped in this tabulation), "NA" = not available, unknown. In multiple defendant or victim cases, the first W, B, or O indicates the race of the first identified defendant or victim; the second indicates the race of additional defendants or victims. Where the race of additional defendants or victims differs from that of the first named, this race is indicated whether or not there were also additional defendants or victims of the same race as the first named.

Multiple mixed race defendants and/or victims killings

Same race defendant(s), mixed race victims	#	%
W BW	1	.3
B WB	2	.6
B WO	3	.9
B BW	3	.9
B BWO	1	.3
B OW	1	.3
BB BO	1	.3
O OW	1	.3
Subtotal	13	3.9

Mixed race defendants, same race victim(s)	#	%
WB W	4	1.2
WB WW	2	.6
BW O	1	.3
OW W	1	.3
OB W	1	.3
OB B	1	.3
Subtotal	10	3.0

Missing data on race of victim(s)

	#	%
W NA	1	.3
B NA	1	.3
Subtotal	2	.6

Nearly three out of five cases were one-on-one killings (57.8%). Of these, the ratio of intraracial to interracial killings was two to one (39.1% vs. 18.7%); half of the one-on-one killings were W/W and a quarter were B/B crimes (29.5% and 14.5%, respectively). Of cases involving more than one defendant or victim (42%), again almost two out of three were strictly intraracial, involving only defendants and victims of the same race (27.3%); and most of these (18%) were white-on-white killings (W/WW 11.7%; WW/W 3.6%; WW/WW 2.7%). Far fewer of the killings with same-race defendant(s) and/or victim(s) crossed racial lines (7.2%). Cases with mixed-race victims (3.9%) and mixed-race defendants (3%) were relatively rare. There were no cases in which both defendants and victims were multi-racial. The race of the defendant(s) was determined in all cases, and that of the victim(s) was determined in all but two cases (.6%).

The second step was to collapse these forty distinctions into four categories representing W/W, B/W, and B/B killings, and a residual group of cases. Except in a few instances of mixed race victims or defendants, this was a straightforward process. We based the classifications on the race of the first-named defendant and victim in all cases where the first-named was white (W) or black (B). In effect, we assumed that in cases with both black and white defendants or victims, the first-named defendant or victim was the one who figured most prominently in the case and in jurors' minds. It was possible for the jurors in a given case to list the victims in different orders, but that usually happened only when there were three or more victims and typically among the last-named rather than first-named victims. In the few cases with mixed-race defendants or victims, where Hispanic

or other was named first, we took the later-named black or white as the basis for classification.[218]

[218] This occurred in the following four cases: OW/W = W/W; B/OW = B/W; OB/W = B/W; OB/B = B/B. All cases involving exclusively Hispanic or other defendants or victims were treated as a residual category, and therefore excluded from the analyses presented in the text of the article.

APPENDIX B: INDEPENDENCE AND SIGNIFICANCE OF RACIAL DIFFERENCES IN LINGERING DOUBT, IMPRESSIONS OF REMORSE, AND PERCEPTIONS OF DANGEROUSNESS

Our statistical comparisons of white and black jurors in Tables 3-5 could conceivably misrepresent the true differences between the races, because the samples on which they were based may not be adequate to support a statistically significant inference of racial differences, or because race is associated with other factors that may actually be responsible for the observed differences. Race is, of course, associated with other conditions in society, such as wealth, income, education, and occupational status, which might account for the observed black-white differences. Despite our restriction of the analysis to cases from which we have interviewed jurors of both races, the black jurors in these samples tended to come disproportionately from cases for which there were more black jurors and, likewise, the white jurors from cases with more whites. Hence, even within these restricted samples, the white and black jurors could, on average, have been exposed to different kinds of trial and deliberation experiences.

We thus tested the observed racial differences in Tables 3-5 against these challenges. To assess the statistical significance of black-white differences in Table 3-5 in light of these possibly confounding sources of variation, we conducted a set of four regressions for each variable listed in these tables treated as the dependent or predicted variable. The four regressions for each item in Tables 3-5 consist of the following independent or predictor variables: (a) jurors' race alone (without controls for SES or case variation); (b) jurors' race controlling for case variation; (c) jurors' race controlling for SES; and (d) jurors' race controlling for both SES and case variation. The measure of SES was a nine-category additive combination of education and income (each in five categories). The control for case variation was the introduction of dummy variables for the cases from which jurors were interviewed.[219] For each of the three defendant/victim racial combinations, Table B.1 shows the significance of race (i.e., the p-values from the t-test) in the four regressions (a-d) conducted with each of the variables from Tables 3 through 5.

[219] This adjusts statistically for variations in the types of murder, trial, and deliberation experiences to which jurors were exposed.

TABLE B.1: Regression tests of the statistical independence and significance of race effects (black-white differences) in Tables 3-5 for selected defendant-victim racial combinations

Statistical significance (T test) of race in regressions with the following predictors:

(A) race* alone
(B) race and case dummies**
(C) race and SES*** (socio-economic status)
(D) race, SES, and case dummies

	A	B	C	D	A	B	C	D	A	B	C	D
Table 3 Variables												
A.1	.009	.024	.011	.055	.000	.000	.002	.005	.062	.106	.174	.102
A.2	.215	.376	.247	.513	.000	.000	.002	.002	.573	.807	.761	.419
B.1	.413	.557	.442	.928	.000	.000	.001	.010	.415	.165	.769	.275
B.2	.110	.126	.111	.214	.002	.000	.009	.001	.514	.908	.298	.641
B.3	.111	.161	.115	.177	.006	.011	.019	.067	.656	.981	.601	.786
C.1	.113	.068	.118	.082	.000	.000	.000	.001	—	—	—	—
C.2	.586	.870	.502	.643	.002	.003	.009	.021	.301	.777	.065	.533
C.3	.748	.302	.653	.309	.004	.006	.001	.012	.196	.119	.539	.308
C.4	.024	.048	.028	.076	.000	.000	.000	.000	.776	.479	.591	.423
Table 4 Variables												
A.1	.448	.262	.355	.346	.000	.000	.000	.002	.119	.042	.295	.091
A.2	.070	.015	.041	.044	.000	.000	.000	.001	.082	.048	.291	.028
A.3	.392	.137	.245	.188	.000	.000	.001	.001	.192	.091	.537	.166
B.1	.504	.656	.443	.786	.004	.004	.005	.016	.334	.508	.435	.497
B.2	.377	.399	.373	.375	.091	.085	.133	.183	.664	.656	.999	.539
B.3	.685	.744	.736	.711	.177	.136	.359	.324	.868	.478	.580	.630
B.4	.560	.586	.424	.410	.029	.016	.039	.028	.682	.837	.875	.872
C.1	.094	.088	.032	.038	.000	.000	.000	.000	.842	.419	.157	.449
C.2	.766	.698	.639	.517	.001	.000	.006	.005	.432	.333	.969	.395
C.3	.295	.238	.223	.257	.009	.003	.024	.037	.780	.891	.467	.811

* race (white = 1; black = 2)

** case dummies (unique values assigned to all jurors from each of the respective cases in our sample)

*** SES (an additive combination of education and income, each in five categories)

— regressions could not be computed because the variable T-3, C.1 is a constant in the B/B sample.

Table 5 Variables

A.1	.233 .175 .155 .112	.037 .024 .103 .128	.789 .773 .254 .712
A.2	.645 .844 .471 .665	.015 .032 .089 .287	.601 .667 .681 .562
A.3	.727 .348 .779 .357	.049 .052 .065 .015	.806 .677 .424 .810
A.4	.299 .178 .539 .923	.084 .371 .444 .183	.160 .185 .705 .740
B.1	.544 .994 .512 .838	.436 .541 .567 .529	.328 .309 .573 .330
B.2	.831 .360 .848 .360	.540 .499 .827 .427	.320 .326 .868 .600
C.1	.980 .655 .809 .439	.000 .000 .001 .000	.427 .999 .687 .718

The racial differences in B/W cases were statistically significant ($p < .05$) in most instances where we identified and discussed such differences in our tabular analysis, and they typically remain so with the controls for SES and case variation. With respect to lingering doubt and related variables (Table 3), in only one instance (Table 3, Panel B.3) does the black-white difference lose statistical significance at the conventional $p < .05$ level: in the presence of both SES variables and case dummy variables, the p-value was .067.[220] Regarding remorse and related variables (Table 4), the significance value was less than .05 for race alone and under the various controls, except in two instances (Table 4, Panels B.2 and B.3) that reflected identification with the defendant ("imagined yourself like the defendant" and "imagined yourself in the defendant's situation"). In these instances, blacks exceeded whites in identification with the defendant, but by less than fifteen points (in Table 4): the p-values failed to reach the .05 level in any of the four equations for either variable.

Concerning the defendant's perceived dangerousness and release from prison in B/W cases, the initial (uncontrolled) black-white differences were significant ($p < .05$) for three of the four measures (Table 5, Panels A.1-A.3), and not far off for the fourth ($p = .084$, Table 5, Panel A.4). The two items that explicitly used the phrase "danger in the future" (Table 5, Panels A.1 and A.2) failed to reach the .05 probability level in the presence of the SES index (equations C and D). Although differences in social class standing as reflected in the SES index of education and income did marginally weaken the effects of race as a predictor of the defendant's dangerousness, by no means did they substitute for the effects of race.[221] Although estimates of the death penalty alternative (Table 5, Panel A.4) were sub-

[220] Technically this variable is the combination of two linked but separate questions: (1) was anyone reluctant to go along with the majority vote on the defendant's guilt, and (2) if so, were you at all reluctant to do so? As such, this questioning sequence with a contingent question does not strictly represent an ordered set of response categories. For the regression runs conducted here, the variable was coded: no one was reluctant = 1; someone was reluctant, but not the respondent = 2; the respondent was reluctant = 3.

[221] The p-values for SES in equations C and D are, respectively, .360 and .713 for variable A.1, and .322 and .744 for variable A.2. These values are well above both the critical .05 probability level and the corresponding p-values for race in these equations.

stantively consistent with concerns about the defendant's release from prison (Table 5, Panel A.3), unlike such concerns, they were not sufficiently associated with race to be predicted by that variable at a statistically significant level in this sample of B/W cases.

As expected, black-white differences in jurors' reports of dangerousness as a subject of punishment deliberations (Table 5, Panels B.1 and B.2) were not statistically significant. These data served to establish that the level of discussion of dangerousness and related matters was greater in the B/W than in the W/W or B/B cases. However, they did not show that there was a difference in what black and white jurors in the same kinds of cases reported about the role of dangerousness in punishment deliberations. Finally, the black-white difference in the likelihood that the defendant's dangerousness would or did make jurors more apt to vote for death (Table 5, Panel C.1) is a highly significant and independent racial difference in B/W cases.

In the W/W sample, none of the black-white differences with respect to lingering doubt were significant at the .05 level when we controlled for both SES and case variations. In three instances, however, the greater tendency of blacks than whites to have lingering doubt approached significance: Table 3, A.1, having doubt about the capital murder verdict ($p = .055$); Table 3, C.1, thinking about the possibility of mistaken identity during punishment deliberations ($p = .082$); and Table 3, C.4, thinking that the defendant might not be the one most responsible for the killing, again during punishment deliberations ($p = .076$). In perceptions of the defendant's remorse, black-white differences were significant with controls for SES and case variation in two instances: Table 4, A.2, the defendant appearing remorseful during the trial ($p = .044$) and Table 4, C.1, seeing remorse as a grounds for mercy ($p = .038$). Concerning dangerousness, no black-white differences reach the .05 level of significance, with or without controls for SES and case variation.

In B/B cases, despite some sizeable black-white differences, very few were statistically significant, owing to the small sample, especially the small number of black jurors (ranging from 19 to 16 in Tables 3-5). In fact, none of the black-white differences alone (equation A) reached the $p < .05$ probability level in B/B cases. The observed differences were simply not large enough to be statistically significant with black and white samples of this size. In only one instance, that the defendant appeared remorseful during the trial (Table 4, A.2), did the p-value drop below .05 (to $p = .028$), with controls for SES and case variation (equation D). Notably, with both controls this variable significantly separated black and white jurors in cases of all three defendant/victim racial combinations.