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RACE AND THE VICTIM: AN EXAMINATION OF CAPITAL SENTENCING AND GUILT ATTRIBUTION STUDIES

CYNTHIA K.Y. LEE*

I. INTRODUCTION

In the 1990s, two criminal cases captured the attention of the American public. Both cases involved interracial violence. Both resulted in verdicts that outraged a sizable percentage of the American populace. In both cases, public attention focused on the racial similarity between the jurors and the defendants.

On October 3, 1995, O.J. Simpson, an African-American football celebrity, was found not guilty of murdering his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman, both White, by a predominantly African-American jury. Many people expressed disbelief and outrage at the verdict. In large part, this outrage arose out of the belief that the verdict was the product of a predominantly Black jury acquitting one of its own.¹ Many criticized Los Angeles District Attorney Gil Garcetti for not trying the case in Santa Monica, where the jury pool would have been different than the jury pool in downtown Los Angeles, because they felt that a jury composed of more Whites (or fewer Blacks)² would have viewed the evidence more impartially and then convicted Simpson.³ For those unwilling to admit publicly that they thought the Simpson jurors were racially biased in favor of Simpson, the shortness of the deliberation process became the pub-

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1. See Richard A. Boswell, *Crossing the Racial Divide: Challenging Stereotypes About Black Jurors*, 6 HASTINGS WOMEN'S L.J. 233 (1995) (criticizing the widely held perception that a jury composed mostly of Blacks would be unable to find a Black defendant guilty).

2. I capitalize "Black" and "White" in this essay to highlight the fact that Blacks and Whites, like Asian Americans and Latinos, are members of socially constructed racial groups in American society. See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1995); cf. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 n.6 (1991) (explaining her decision to capitalize "Black" but not "white" because "Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun" whereas whites do not constitute a specific cultural group).

3. See Martin Berg, *DA Defends Simpson Call*, L.A. DAILY J., Oct. 17, 1995, at 2.

licly stated reason for dismay over the verdict.⁴ Racial stereotypes about Blacks being less intelligent and less competent than non-Blacks constituted the subtext underlying much of the criticism of the verdict and subsequent cries for reform of the jury system.⁵

On April 29, 1992, four White Los Angeles police officers were acquitted by a predominantly White jury of charges of excessive force, assault, and falsifying police reports, stemming from the brutal beating of Rodney King, an African-American male, captured on home video.⁶ The officers claimed the beating was justified because they "reasonably" feared King was on PCP and posed an imminent threat of danger.⁷ Following the verdict of acquittal, angry groups took to the streets and rioted.⁸ Even those who did not riot were shocked at the verdict because it was widely believed that the predominantly White jury with no Black representation was racially biased in favor of the White police officer defendants.⁹ When the case was retried in federal court before a jury with at least two African Americans, two of the officers were convicted of violating King's civil rights.¹⁰

The not guilty verdicts in the Simpson and Rodney King beating cases often are explained by reference to the presence of juror-defendant racial similarity. The verdicts might also be explained by the races of the victims and the absence (or notable lack) of juror-victim racial similarity.¹¹ This essay examines race-of-the-victim effects in

4. See Robert A. Jordan, *No Victory, No Defeat, Only an Angry Racial Divide*, BOSTON GLOBE, Oct. 8, 1995, at A35.

5. See *id.*

6. See Tom Dresslar, *State Civil Rights Law Is Weighed As Possible Remedy in King Case*, L.A. DAILY J., May 6, 1992, at 3 (noting that the four police officers were acquitted on April 29, 1992 of charges of excessive force, assault, and falsifying police reports in the March 3, 1991 beating of Rodney King); see also Richard A. Serrano & Tracy Wilkinson, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A1 ("The not guilty verdicts by a Ventura County Superior Court jury—which included no blacks—were reached after seven days of deliberations.").

7. See Claire Spiegel, *Dangers of PCP May Play Part in L.A. Beating Trial*, S.F. CHRONICLE, June 18, 1991, at A7; Claire Spiegel, *Effects of PCP: Myth v. Reality*, L.A. TIMES, June 17, 1991, at 1.

8. See Serrano & Wilkinson, *supra* note 6.

9. For a critique of the common perception that the Simi Valley verdict was an act of jury nullification, see Kimberlé Crenshaw & Gary Peller, *Reel Time/Real Justice*, in READING RODNEY KING/READING URBAN UPRISING 56 (1993), which explains how seemingly neutral and objective concepts like "reasonable force" are mediated through racial narratives.

10. See Jim Newton, *Racially Mixed Jury Selected for King Trial*, L.A. TIMES, Feb. 23, 1993, at A1 (noting that the jury selected for the federal trial included "two African-Americans and one Latino—in contrast to last year's state trial of the same four defendants, when the jury included no blacks"); Ted Rohrlick, *Tempers Flared, Emotions Ran High for King Jury*, L.A. TIMES, Apr. 23, 1993, at A1 (reporting that the jury in the federal civil rights trial found defendants Laurence M. Powell and Stacey C. Koon guilty of violating King's civil rights, but returned not guilty verdicts for defendants Timothy E. Wind and Theodore J. Briseno).

11. In the Simpson case, only two of the jurors shared racial affinity with the victims, Nicole Brown Simpson and Ronald Goldman. Nine of the twelve jurors were Black, two were Cauca-

capital and non-capital cases from a positive, rather than a normative, perspective.¹² A large body of research on race and capital sentencing indicates that the race of the victim is a significant factor linked to imposition of the death penalty.¹³ Part II of this essay examines these capital sentencing studies. These studies indicate that offenders alleged to have killed White victims are more likely to be charged with special circumstances supporting the death penalty and more likely to receive a sentence of death than offenders alleged to have killed Black victims.

Whether the race of the victim influences the determination of guilt in non-capital cases is not as clear. Rather than looking at the race of the victim in isolation, the few social scientists who have considered the issue have looked at the race of the victim in conjunction with the race of the juror to determine whether juror-victim racial similarity has any influence on the determination or attribution of guilt.¹⁴ Relatively few studies have been conducted on juror-victim racial similarity and guilt attribution when compared to the number of studies on juror-defendant racial similarity.¹⁵ Studies examining juror-victim racial similarity and guilt attribution published prior to 1985 indicate that juror-victim racial similarity has a statistically significant

sian (or White), and one was Hispanic. See Harvey A. Silverglate, *Simpson Jury Sends a Subtle Message on Race*, NAT'L L.J., Oct. 16, 1995, at A21. In the first Rodney King beating trial, none of the jurors shared racial affinity with the victim, Rodney King, a Black man. See Serrano & Wilkinson, *supra* note 6 (noting that the jury included no Blacks).

12. Elsewhere I have suggested reforms to deal with the influence of race upon jury decisionmaking. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996) (proposing limiting instruction permitting jurors to race-switch in cases involving claims of self-defense).

13. See *infra* Part II. I do not claim to have presented an exhaustive survey of all the capital sentencing studies that exist.

14. See *infra* Part III. I do not claim to have presented an exhaustive survey of all the guilt attribution studies on juror-victim racial similarity that could possibly exist.

15. See, e.g., J.L. Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & PSYCHOL. REV. 103 (1979); Linda A. Foley & Minor H. Chamblin, *The Effect of Race and Personality on Mock Jurors' Decisions*, 112 J. PSYCHOL. 47 (1982); Randall A. Gordon, *Attributions for Blue-Collar and White-Collar Crime: The Effects of Subject and Defendant Race on Simulated Juror Decisions*, 20 J. APPLIED SOC. PSYCHOL. 971 (1990); Randall A. Gordon et al., *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCHOL. 191 (1988); Jack P. Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAV. SCI. 275 (1983); Richard P. McGlynn et al., *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. PSYCHOL. 93 (1976); J.L. Miller et al., *Perceptions of Justice: Race and Gender Differences in Judgments of Appropriate Prison Sentences*, 20 L. & SOC. REV. 313 (1976); Charlan Nemeth & Ruth Hyland Sosis, *A Simulated Jury Study: Characteristics of the Defendant and the Jurors*, 90 J. SOC. PSYCHOL. 221 (1973). Similarly, with the exception of Sheri Lynn Johnson's article, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985), few law review articles have focused on the effect of juror-victim racial similarity on guilt attribution.

effect on guilt attribution.¹⁶ Studies published after 1985 have reached the opposite conclusion.¹⁷ Part III of this essay summarizes the existing research on juror-victim racial similarity and guilt attribution. Part IV critiques the methodological design of these studies, and concludes that further research on juror-victim racial similarity and guilt attribution should be conducted.

II. RACE AND THE DEATH PENALTY: CAPITAL SENTENCING STUDIES

A large body of research conducted on race and capital sentencing indicates that the race of the victim is a significant factor linked to imposition of the death penalty, with offenders convicted of killing White victims more likely to be charged with capital murder (a prosecutorial decision) and more likely to receive the death penalty (generally a jury decision) than offenders convicted of killing Black victims. There is also some evidence that defendants charged with killing White victims are more likely to be charged with special circumstances than defendants charged with killing Latino victims.¹⁸

The most comprehensive study on race and capital sentencing is the Baldus study, conducted during the 1970s by David Baldus, George Woodworth, and Charles A. Pulaski, Jr.¹⁹ Baldus, Woodworth, and Pulaski examined over 2,000 capital murder cases in Georgia and found that a defendant charged with killing a White person was 8.3 times more likely to receive the death penalty than a defend-

16. See *infra* Part III.A (discussing guilt attribution studies indicating strong race-of-the-victim effect). For a detailed examination of guilt attribution studies published prior to 1985, see Johnson, *Black Innocence and the White Jury*, *supra* note 15.

17. See *infra* Part III.B (discussing guilt attribution studies indicating little or no race-of-the-victim effect).

18. See Robert Garcia, *Crime and Justice: Latinos and Criminal Justice*, 14 CHICANO-LATINO L. REV. 6, 14 (1994) ("Offenders who were charged with having killed an Anglo were fourteen times more likely to be charged with special circumstances than offenders who were charged with having killed a Latino") (citing study conducted by Professor Richard Berk, Director, Center for the Study of the Environment and Society, University of California, Los Angeles (Aug. 12, 1992) (on file with Garcia)).

19. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983). Randall Kennedy has characterized the Baldus study as "the most complete and thorough analysis of sentencing that [has] ever been done." Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1399 (1988) (quoting Brief for Petitioner at 67, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811)). Others have heralded Baldus's work as "among the best empirical studies on criminal sentencing ever conducted." *Id.* at 1400 (quoting Brief Amici Curiae for Dr. Franklin M. Fisher et al. in Support of Petitioner Warren McCleskey at 3, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (No. 84-6811)).

ant charged with killing a Black person.²⁰ When the cases were divided according to the race of the defendant and the race of the victim, Baldus, Woodworth, and Pulaski found that juries imposed the death penalty in 22% of the cases involving Black defendants and White victims; 8% of the cases involving White defendants and White victims; 3% of the cases involving White defendants and Black victims; and only 1% of the cases involving Black defendants and Black victims.²¹ Even after controlling for thirty-nine nonracial variables, Baldus, Woodworth, and Pulaski found that capital defendants convicted of killing White victims were 4.3 times more likely to be condemned to death than those convicted of killing Blacks.²²

Even greater disparities appeared in the exercise of prosecutorial, as opposed to jury, discretion. Baldus, Woodworth, and Pulaski found that prosecutors sought the death penalty in 70% of the cases involving Black defendants and White victims; 32% of the cases involving White defendants and White victims; 19% of the cases involving White defendants and Black victims; and 15% of the cases involving Black defendants and Black victims.²³ The race of the victim, more than any other factor, was the most significant factor influencing both the prosecutor's decision to seek the death penalty and the jury's decision to impose a death sentence.²⁴

20. BALDUS ET AL., *supra* note 19, at 314.

21. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987). In *McCleskey*, the petitioner, a Black man convicted of killing a White police officer, tried to use the Baldus study to overturn his death sentence. The Supreme Court denied *McCleskey's* petition, holding that the Baldus study was insufficient proof that any of the decisionmakers in *McCleskey's* case had acted with discriminatory purpose. See *id.* at 297. While some have interpreted the Supreme Court's ruling in *McCleskey* as a repudiation of the Baldus study, the Court did not question the validity of the study: "As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court." *Id.* at 291 n.7; see also Kennedy, *supra* note 19, at 1400-01 (noting that both the Court of Appeals and the Supreme Court assumed the validity of the Baldus study). The *McCleskey* opinion has been widely criticized by legal academics and others. See, e.g., Norval Morris, *Race and Crime: What Evidence Is There that Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111 (1988); Kennedy, *supra* note 19, at 1389 ("I, too, believe that both the Court's ruling and the way it was articulated are grievously flawed."); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 509 (1994) (calling the *McCleskey* opinion a "deeply disturbing opinion about race and the administration of criminal justice in the United States"); *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 149, 158 (1987) (describing the opinion as "logically unsound, morally reprehensible, and legally unsupportable").

22. See *McCleskey*, 481 U.S. at 287.

23. See *id.*

24. Baldus also found that Black defendants were 1.1 times as likely to receive a death sentence than other defendants. See *id.* Later research by Baldus, Woodworth, and Pulaski suggested, however, that the race of the defendant did not significantly influence the decision whether to impose the death penalty. See David C. Baldus et al., *Arbitrariness and Discrimina-*

The Baldus study is consistent with a large body of research.²⁵ In 1989, Samuel Gross and Robert Mauro published the results of a study examining capital sentencing under post-*Furman* death penalty statutes in eight states: Arkansas, Florida, Georgia, Illinois, North Carolina, Mississippi, Oklahoma, and Virginia.²⁶ In each of these states, Gross and Mauro found a statistically significant disparity between killers of Whites and killers of Blacks, with killers of Whites receiving the death penalty at a much higher rate than killers of Blacks.²⁷

tion in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 STETSON L. REV. 133, 158 (1986).

25. See SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1989) (finding in each of eight states studied that killers of Whites were more likely than killers of Blacks to receive the death penalty); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 577 (1980) (studying death sentences during the five years following the U.S. Supreme Court decision in *Furman v. Georgia* in Florida, Georgia, Ohio, and Texas, which were responsible for roughly 70% of all death sentences imposed nationwide during this period, and finding in all four states that the race of the victim was an important determinant of sentence, with Black offender-White victim cases most likely to result in the death penalty); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 105 (1984) [hereinafter Gross & Mauro, *Patterns of Death*] (examining capital sentencing in Arkansas, Florida, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia between 1976 and 1980 and finding discrimination based on the race of the victim in each of these states); Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, 7 JUST. Q. 189 (1990) (finding that even after controlling for the heinousness of the murder, prior criminal record, and the personal relationship between the victim and the offender, Blacks accused of killing Whites had a higher than average probability of being charged with capital murder and sentenced to death); Thomas J. Keil & Gennaro F. Vito, *Race, Homicide Severity, and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511, 511 (1989) [hereinafter Keil & Vito, *Race, Homicide Severity and Application of the Death Penalty*] (finding that even after controlling for the seriousness of the offense, the impact of race was still significant because Blacks who killed Whites were still more likely to receive the death penalty); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 921-22 (1981) (studying over 600 homicides in twenty Florida counties between 1976 and 1977 and finding that defendants who kill Whites are more likely to be sentenced to death than defendants who kill Blacks); Jonathan R. Sorensen & Donald H. Wallace, *Capital Punishment in Missouri: Examining the Issue of Racial Disparity*, 13 BEHAV. SCI. & L. 61, 72 (1995) (finding that Blacks who kill Whites are nearly four times as likely as Whites who kill Blacks to be charged and convicted of capital murder). *But cf.* Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 792 (1981) [hereinafter Kleck, *Racial Discrimination in Criminal Sentencing*] (acknowledging that Black offender-White victim crimes are punished more severely than crimes with other combinations, but questioning whether this disparity is due to the racial character of the crime or to other factors); *A Study of the California Penalty Jury in First-Degree Murder Cases*, 21 STAN. L. REV. 1297, 1366-67 (1969) (finding that neither the race of the defendant nor the race of the victim were associated with the imposition of the death penalty).

26. GROSS & MAURO, *supra* note 25, at 35 (examining all homicides reported to the FBI from the eight listed states between January 1, 1976 to December 31, 1980).

27. See *id.* at 43-87 (racial patterns in capital sentencing in Georgia, Florida, and Illinois) and 88-94 (racial patterns in capital sentencing in Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas).

The three states with the largest numbers of death sentences were Georgia, Florida, and Illinois.²⁸ In these states, even after controlling for the effects of nonracial variables, such as the commission of a separate felony, the relationship between the victim and the offender, and the number of victims, Gross and Mauro still found that killing a White victim increased the odds of a death sentence by a factor of four in Illinois, about five in Florida, and about seven in Georgia.²⁹ In other words, in Illinois, the odds of an offender receiving the death penalty for killing a White were four times greater than for killing a Black.³⁰ In Florida, the odds of an offender receiving the death penalty for killing a White victim were 4.8 times greater than for killing a Black victim.³¹ In Georgia, the odds of receiving the death penalty for killing a White victim were approximately 7.2 times greater than for killing a Black victim.³²

In 1989, Thomas Keil and Gennaro Vito published the results of their study of the capital sentencing process in Kentucky.³³ After controlling for the level of seriousness of the offense, Keil and Vito found that Blacks who killed Whites were more likely to be charged with capital murder and sentenced to death than any other offender.³⁴ In 1990, Keil and Vito published the results of a second study that used the same data set as the first study, but controlled for differences in prior criminal record and the personal relationship between the offender and victim, in addition to the heinousness of the offense.³⁵ Again, Keil and Vito found that Blacks who killed Whites were more likely to be charged with capital murder than Whites who killed Whites, Blacks who killed Blacks, and Whites who killed Blacks, and that Blacks who killed Whites were most likely to receive a death sentence from the jury.³⁶

28. *See id.* at 39.

29. *See id.* at 69. In each of the five remaining states (Oklahoma, North Carolina, Mississippi, Virginia, and Arkansas), even after controlling for nonracial variables, Gross and Mauro found that White victim homicides were more likely to result in death sentences than Black victim homicides. *See id.* at 92.

30. *See id.* at 66.

31. *See id.* at 65.

32. *See id.* at 66.

33. *See Keil & Vito, Race, Homicide Severity, and Application of the Death Penalty, supra* note 25 (studying murder cases in Kentucky during a ten year period between December 22, 1976 through October 1, 1986).

34. *See id.* at 527.

35. *See Keil & Vito, Race and the Death Penalty, supra* note 25.

36. *See id.* at 197, 203.

In 1995, Jonathan Sorensen and Donald Wallace published the results of a study of capital sentencing in Missouri.³⁷ Sorensen and Wallace found that Blacks who killed Whites were nearly four times as likely as Whites who killed Blacks to be charged with and convicted of capital murder.³⁸

One recent study stands in opposition to these consistent findings regarding the effect of the race of the victim on the capital charging and sentencing process. In 1991, Stephen Klein and John Rolph published the results of their study of homicides committed in California after August 10, 1977 (the date California's current death penalty law took effect) for which the offender was under a sentence of death or life in prison without the possibility of parole as of March 1, 1984.³⁹ Contrary to the substantial body of research that has found the race of the victim to be a statistically significant factor in charging and sentencing of capital cases, Klein and Rolph found that the race of the victim was not a statistically significant factor in the imposition of the death penalty.⁴⁰ The Klein and Rolph study did not purport to address the spectrum of capital charging and sentencing, but focused only on the sentencing decision.⁴¹

The methodological design of Klein and Rolph's study might be critiqued for sample selection bias because the sample of cases selected by Klein and Rolph may not have been adequate to measure racial bias in the administration of the death penalty. The problem of "sample selection bias" in capital sentencing studies occurs when researchers examine the jury's decision to impose the death penalty from a limited selection of cases in which the defendant has been charged and convicted of a capital offense. Bias occurs because decisions influenced by race made earlier in the process, such as prosecutorial charging and bargaining decisions, may mask the racial effects of later decisions.⁴² Because racial factors may influence decisions at different stages of the process, a study that considers only those persons sentenced to death might not reflect racial effects occurring at earlier stages, such as the prosecutor's decision to seek the

37. See Sorensen & Wallace, *supra* note 25.

38. See *id.* at 72.

39. See Stephen P. Klein & John E. Rolph, *Relationship of Offender and Victim Race to Death Penalty Sentences in California*, 32 JURIMETRICS J. 33, 37 (1991).

40. See *id.* at 42 ("Within each cluster, the death sentencing rate for white victim cases did not differ in a statistically significant way from the rate for nonwhite victim cases.").

41. See *id.* at 44.

42. See U.S. GENERAL ACCOUNTING OFFICE, REP. NO. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERNS OF RACIAL DISPARITIES (Feb. 1990), reprinted in 136 CONG. REC. S6889-90 (daily ed. May 24, 1990) [hereinafter U.S. GAO].

death penalty.⁴³ Klein and Rolph limited their database to capital cases in which there were convictions and limited their study to the jury's decision whether to impose death or life without the possibility of parole,⁴⁴ thus deleting from their sample any examination of the impact of the race of either the victim or the defendant on the prosecutor's charging decision.

Klein and Rolph acknowledged this limitation:

Our research dealt with the issue of possible racial bias in sentencing. It focused on just the cases for which a death penalty could be legally imposed; i.e. offenders convicted of crimes with special circumstances. *We did not examine possible bias at earlier stages* such as police investigation and arrest practices, *prosecutor charging decisions*, case preparation, jury verdicts regarding guilt or innocence, and *prosecutor requests for the death penalty*. Bias at any of these stages could affect which cases reach the point at which a death/[life without possibility of parole] decision is made.⁴⁵

In 1990, the General Accounting Office ("GAO") published the results of its examination of all relevant empirical studies on race and capital sentencing conducted after the *Furman* decision in 1972.⁴⁶ The GAO found that in 82% of the relevant studies, the race of the victim influenced the likelihood of being charged with capital murder or receiving the death penalty.⁴⁷ The GAO noted that this finding was "remarkably consistent across data sets, states, data collection methods, and analytic techniques."⁴⁸

A number of scholars have offered various explanations for the disparity in the imposition of the death penalty based on the race of the victim. Some have argued that interracial crimes are perceived as particularly threatening to the social order and, therefore, are pun-

43. *See id.*

44. *See Klein & Rolph, Death Penalty Sentences in California, supra* note 39, at 33.

45. *Id.* at 44 (emphasis added).

46. *See* U.S. GAO, *supra* note 42, at S6889-90. First, the researchers identified and collected all potentially relevant studies done at national, state, and local levels from both published and unpublished sources. Computer generated bibliographic searches and manual reviews of the bibliographies of studies obtained contributed to their list of potentially relevant material. Researchers also surveyed twenty-one criminal justice researchers and directors of relevant organizations whose work relates to death penalty sentencing. They screened over 200 annotated citations and references to determine relevance. They excluded studies that were based primarily on data collected prior to *Furman v. Georgia*, 408 U.S. 238 (1972) and which did not examine race as a factor that might influence death penalty sentencing. From this initial screening, researchers obtained fifty-three studies that they determined to be relevant. Researchers then reviewed these fifty-three studies to determine appropriateness and quality. They excluded studies that did not contain empirical data or that were duplicative. Twenty-eight studies remained after this screening. *See id.* at S6889.

47. *See id.*

48. *Id.*

ished more harshly.⁴⁹ The problem with this theory is that it does not explain why Whites who kill Whites (i.e., intraracial homicides) are more likely to receive the death penalty than Whites who kill Blacks (i.e., interracial homicides).⁵⁰ Others have argued more persuasively that prosecutors with limited resources must choose to pursue only those homicides that are disturbing to the majority of the community, and homicides with White victims are the homicides that the majority finds disturbing.⁵¹ Along the same lines, some have speculated that prosecutors may believe it is easier to win a conviction before an all-White or mostly White jury when the victim is White than when the victim is Black.⁵² Some have argued that the explanation for this phenomenon has nothing to do with race. "When a murder involves people of different races, it is more likely that the victim and the killer are strangers, and such murders tend to be of the kinds where [sic] the death penalty applies."⁵³ Others have argued that the capital sentencing studies reflect the fact that society as a whole cares less about Black victims than White victims and devalues Black victims' lives.⁵⁴

III. SOCIAL SCIENCE STUDIES EXAMINING THE INFLUENCE OF JUROR-VICTIM RACIAL SIMILARITY ON GUILT ATTRIBUTION

In addition to the research conducted on race and capital sentencing, some social scientists have found that the race of the victim has a statistically significant effect on guilt attribution. Others have reached contrary results. This section summarizes some of the research that has been conducted on juror-victim racial similarity and guilt attribution.

49. See Gross & Mauro, *Patterns of Death*, *supra* note 25, at 106 (citing Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV., 456, 467-68 (1981)).

50. See *id.*

51. See *id.* at 106-07; see also Zeisel, *supra* note 49, at 467 ("Public opinion is more likely to be aroused if the victim is White . . . these cases are more likely to receive greater media attention, making it more difficult for the prosecutor to offer a deal.").

52. See Keil & Vito, *Race and the Death Penalty*, *supra* note 25, at 204.

53. J. Daryl Charles, *Justice By Quota*, NAT'L REV., Sept. 12, 1994, at 76.

54. See Gross & Mauro, *Patterns of Death*, *supra* note 25, at 107 (citing Kleck, *Racial Discrimination in Criminal Sentencing*, *supra* note 25, at 800); Bowers & Pierce, *supra* note 25, at 573-74.

A. Studies Indicating Strong Race-of-the-Victim Effect⁵⁵

1. Miller and Hewitt (1978)

In 1978, Marina Miller and Jay Hewitt published the results of a study testing the reactions of 133 university students (eighty-three women, approximately half of whom were Black and half of whom were White, and fifty men, half of whom were Black and half of whom were White).⁵⁶ The students were told to pretend they were jurors and then were shown a videotape of a court case involving a Black defendant charged with raping a thirteen-year-old girl.⁵⁷ Half the students were told that the victim was Black and half were told that she was White.⁵⁸

Miller and Hewitt found that both Black and White students tended to convict more often when they shared racial affinity with the victim. Sixty-five percent of the White students voted for conviction when they thought the victim was White, but only thirty-two percent voted for conviction when they thought the victim was Black.⁵⁹ Eighty percent of the Black students voted for conviction when they thought the victim was Black, but only forty-eight percent voted for conviction when they thought the victim was White.⁶⁰

2. Ugwuegbu (1979)

In 1979, Denis Chimaeze E. Ugwuegbu published the results of two sets of experiments, one with White participants and the other with Black participants, assessing the behavior of jurors in the decisionmaking process.⁶¹ In the first experiment, 256 White undergradu-

55. For a comprehensive discussion of the pre-1985 guilt attribution studies, see Johnson, *Black Innocence and the White Jury*, *supra* note 15.

56. See Marina Miller & Jay Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity*, 105 J. SOC. PSYCHOL. 159, 159-60 (1978).

57. See *id.* at 160.

58. See *id.*

59. See *id.*

60. See *id.*

61. See Denis Chimaeze E. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 133, 133 (1979). In both experiments, students were asked to complete or respond to the following statements with one of the indicated responses:

- (1) I feel that the defendant's *intention* was to cause the plaintiff, Miss Brown: (No harm at all, Some harm, Extreme harm.)
- (2) To what extent was Mr. Williams, the defendant, *responsible* for the rape? (Not at all responsible, Moderately responsible, Very much responsible.)
- (3) With respect to my *verdict*, I feel the defendant is guilty as charged (Not guilty of any crime, Moderately guilty as charged, Exactly guilty as charged.)
- (4) Based on the evidence, I feel I would recommend for the defendant as punishment (No punishment at all; Suspended sentence; 1-5 years in the State Prison; 5-9 years; 10-14 years; 15-20 years; Over twenty years but not life; Life imprisonment; Death penalty.)

ate students in introductory psychology classes at a Midwestern university read a transcript of a simulated rape case that occurred on a college campus.⁶² The racial identities of the victim and defendant and the amount of evidence presented to the jurors were varied.⁶³ Students filled out pre-deliberation questionnaires based on their individual assessments of the evidence.⁶⁴ The students then deliberated in groups of twelve.⁶⁵ In the second experiment, 196 Black undergraduates at the African-American Affairs Institute were similarly tested.⁶⁶

Ugwuegbu's findings were similar to Miller and Hewitt's findings. The responses indicated that the student-jurors felt the defendant was more culpable when the students shared racial affinity with the victim than when they lacked such affinity.⁶⁷ White students believed the defendant was more culpable when the victim was White than when the victim was Black.⁶⁸ Black students believed the defendant was more culpable when the victim was Black than when the victim was White.⁶⁹

Additionally, Ugwuegbu's findings mirrored the findings of the Baldus study and other capital sentencing studies. White students thought Black defendants who raped White victims were more culpable than White defendants who raped Black victims, White defendants who raped White victims, and Black defendants who raped Black victims.⁷⁰ Ugwuegbu concluded that the race of the victim inappropriately influenced the level of culpability that the student-jurors ascribed to the defendant.⁷¹

3. Klein and Creech (1982)

In 1982, Kitty Klein and Blanche Creech published the results of two experiments on race and guilt attribution.⁷² In the first experiment, sixty-five White male and thirty-nine White female students served as subjects in return for credit in their introductory psychology

Id. at 137-38.

62. *See id.* at 136, 137.

63. *See id.* at 135.

64. *See id.* at 136-37.

65. *See id.* at 137.

66. *See id.* at 141.

67. *See id.* at 139, 141.

68. *See id.* at 139.

69. *See id.* at 141.

70. *See id.* at 139.

71. *See id.* at 143.

72. Kitty Klein & Blanche Creech, *Race, Rape and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 21 (1982).

class.⁷³ Four crimes (rape, murder, sale of drugs, and burglary) were presented in pairs to the students.⁷⁴ The races of the male defendant and the female victim were systematically varied.⁷⁵ The students were asked to rate which defendant they thought was more likely to be guilty.⁷⁶ This study revealed that for the crimes of rape, murder, and burglary, regardless of the race of the defendant, the students thought the defendant was more likely to be guilty when the victim was White than when the victim was Black.⁷⁷ When the offense charged was the sale of drugs, the race of the victim did not have a significant impact on the students' guilt ratings.⁷⁸

In the second experiment, sixty-five White male and sixty-eight White female students served as subjects.⁷⁹ The students were shown a videotape of a rape trial in which the defendant's race and the victim's race were varied (Black or White).⁸⁰ The students were then asked to answer questions regarding the defendant's guilt and the appropriate punishment.⁸¹ While there were no significant differences in responses as to the defendant's guilt, White male subjects recommended the harshest punishment for Black male defendants convicted of raping White female victims.⁸² Both male and female students recommended the most lenient punishment for White defendants convicted of raping Black females.⁸³

In each of these three studies, researchers found that the race of the victim had a statistically significant impact on juror determinations of guilt or punishment. White student-jurors found the defendant guilty more often, thought the defendant was more culpable, or punished the defendant more severely when the victim was White than when the victim was Black. Conversely, Black student-jurors found the defendant guilty more often, believed the defendant was more cul-

73. *See id.* at 23.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.* at 24.

78. *See id.* Perhaps the race of the victim was not significant when the crime was a drug offense because drug offenses are often viewed as victimless crimes. In contrast, rape, murder, and burglary are crimes with definite victims or persons harmed by the criminal act.

79. *See id.* at 26.

80. *See id.* at 25, 27.

81. *See id.*

82. *See id.* at 28-29.

83. *See id.* at 29.

pable, or punished the defendant more severely when the victim was Black than when the victim was White.⁸⁴

B. Studies Indicating Race-of-the-Victim Has Little or No Effect on Guilt Attribution

1. Poulson (1990)

In 1990, Ronald L. Poulson published the results of a test of 197 undergraduate students (ninety-six percent of whom were White; the remaining four percent were Black and Asian) enrolled in introductory psychology classes at Northwestern University.⁸⁵ The students were shown, by means of audiotape and a synchronized slide projector, a simulated insanity defense trial in which a male defendant stabbed a female victim to death.⁸⁶ The students were randomly as-

84. In 1989, Gary LaFree published the results of his study of actual rape cases processed during the 1970s in Indianapolis, Indiana. GARY D. LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* (1989). LaFree's study is not included in the text of this section because it did not focus solely upon juror-victim racial similarity and guilt attribution. LaFree found that the race of the victim played a significant role in the processing of the rape cases studied. *See id.* at 145, 219-20; *see also* Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 *VAND. L. REV.* 868, 880 (1996) (describing and analyzing LaFree's study). LaFree pointed out that at the beginning of the process, Black defendant/Black victim cases were the largest category of reported rape cases, White defendant/White victim cases were the second largest category, and Black defendant/White victim cases constituted the smallest number of reported rapes. *See LAFREE, supra*, at 133 (noting that Black men accused of assaulting Black women accounted for 45% of all reported rapes, White intraracial assaults constituted 32.3% of all reported rape cases, and Black men accused of assaulting White women accounted for 23% of all reported rapes). White offender/Black victim cases were not included because there were only eleven cases involving White offenders and Black women in the study. *See id.* at 129. As the cases progressed from reporting of the crime to sentencing, however, the percentage of Black defendant/White victim cases increased, the percentage of Black defendant/Black victim cases decreased, and the percentage of White defendant/White victim cases remained about the same. *See id.* at 133. Cases involving Black offenders and White victims also resulted in more substantial penalties than other cases, while cases involving Black offenders and Black victims consistently resulted in the least serious punishment. *See id.* at 145. These results indicate that the race of the victim significantly influenced the cases that made it to trial. *See id.* The rape cases involving White women victims were the ones that were believed to be important enough to try. Lisa Iglesias points out that focusing solely on the defendant's race, not taking the victim's race into account, "does not adequately account for bias in the processing of rape cases." Iglesias, *supra*, at 881. Iglesias explains:

Indeed, if Black men committed approximately seventy percent of the reported rapes, then the fact that they received the harshest sanction in seventy percent of the cases belies any inference of discrimination. When the victim's race is factored into the analysis, however, these results suggest that the harsher treatment of Black men convicted of interracial rape compensated for the more lenient treatment of Black men convicted of intraracial rape. This disparity produces the appearance of proportionality.

Id. at 881-82.

85. *See* Ronald L. Poulson, *Mock Juror Attribution of Criminal Responsibility: Effects of Race and the Guilty But Mentally Ill (GBMI) Verdict Option*, 20 *J. APPLIED SOC. PSYCHOL.* 1596, 1599 (1990).

86. *See id.*

signed to different experimental conditions in which the race of the defendant (Black or White), the race of the victim (Black or White), and number of verdict alternatives (four choices: (1) GBMI,⁸⁷ (2) NGRI,⁸⁸ (3) guilty, and (4) not guilty vs. three choices: (1) NGRI, (2) guilty, and (3) not guilty) were varied.⁸⁹ The genders of the defendant and victim were held constant.⁹⁰ Students were not allowed to discuss their decisions with any other students.⁹¹ Poulson found that the race of the victim did not significantly affect the student-jurors' verdict assessments.⁹²

2. Rector, Bagby, and Nicholson (1993)

In February 1990, Neil A. Rector, R. Michael Bagby, and R. Nicholson tested 245 students at a university in the southern United States.⁹³ Ninety-one percent of the students were White, five percent were Black, and five percent were racially identified as "other."⁹⁴ Students were asked to assume the role of a juror, then read a partial transcript from a rape trial.⁹⁵ The races of the defendants and the victims were varied in the transcript (White, Black, or not stipulated).⁹⁶ Half of the vignettes included jury instructions, while the other half did not.⁹⁷ Rector found that the race of the victim did not significantly affect the students' decisionmaking,⁹⁸ rather, differences in guilt attribution were mediated by the perceived attractiveness of the defendant and victim, not their race.⁹⁹

3. Hymes (1993)

In December 1990, Robert W. Hymes, Mary Leinart, Sandra Rowe, and William Rogers tested fifty-four White male and forty-two White female students enrolled in an introductory psychology course

87. "GBMI" stands for guilty but mentally ill.

88. "NGRI" stands for not guilty by reason of insanity.

89. See Poulson, *supra* note 85, at 1600.

90. See *id.*

91. See *id.*

92. See *id.* at 1601.

93. See Neil A. Rector et al., *The Effect of Prejudice and Judicial Ambiguity on Defendant Guilt Ratings*, 133 J. SOC. PSYCHOL. 651, 653 (1993).

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.* at 657.

99. See *id.*

at a Midwestern university.¹⁰⁰ The students read legal briefs on an acquaintance rape case, then responded to a questionnaire.¹⁰¹ The races of the defendant and victim were varied to produce four combinations (Black-White, Black-Black, White-White, and White-Black).¹⁰²

This study indicated that the students were more likely to find the defendant guilty when the defendant's race differed from the victim's race (i.e., interracial crimes), than when the defendant and the victim were the same race (i.e., intraracial crimes).¹⁰³ Hymes and his colleagues concluded that this type of racial bias in jury decisionmaking does not automatically place Blacks at a disadvantage.¹⁰⁴

IV. PROBLEMS WITH THE EXISTING RESEARCH INDICATE NEED FOR FURTHER RESEARCH

The existing research that has been conducted on the race of the victim and jury decisionmaking leaves much to be desired. The empirical studies on guilt attribution discussed in Part III raise questions of ecological validity because none of the studies replicated actual jury conditions.¹⁰⁵ Unlike actual jurors, most student-jurors did not engage in jury deliberations. Unlike actual jurors, the student-jurors did not sit through a trial that would include oral argument from the attorneys and live witness testimony. Instead, the student-jurors read portions of transcripts, listened to audiotapes, or watched videotapes. All of the studies utilized undergraduate students, most of whom were enrolled in introductory psychology courses. The students knew that they were playing a role as mock jurors, which may have affected their decisions. Being aware that they were participating in a simulated study, student-jurors may have tried to give what they perceived to be the socially desirable response. Additionally, the studies focused on different issues. Some studies focused on guilt attribution. Others focused on sentencing. One examined mental illness. Another tested

100. See Robert W. Hymes et al., *Acquaintance Rape: The Effect of Race of Defendant and Race of Victim on White Juror Decisions*, 133 J. SOC. PSYCHOL. 627, 630 (1993).

101. See *id.*

102. See *id.*

103. See *id.* at 631.

104. See *id.* at 632.

105. See Neil A. Rector & R. Michael Bagby, *Criminal Sentence Recommendations in a Simulated Rape Trial: Examining Juror Prejudice in Canada*, 13 BEHAV. SCI. & L. 113, 115 (1995). But see Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socio-economic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1335-36 (1994) (countering charge that mock juror research is simplistic and lacks ecological validity).

whether the failure to give jury instructions made a difference. These differences may partially explain why the findings are inconsistent.

A. *Absence of Jury Deliberation*

In all of the studies (with the exception of Ugwuegbu's study in which students engaged in deliberations), the subjects were asked *individually* how they would vote had they actually been on a jury. The subjects did not engage in collective decisionmaking even though actual jury verdicts are a product of collective deliberation rather than individual decisionmaking. Because the process of interacting with other jurors can have a significant influence on a juror's final decision, the absence of deliberation limits the reliability of these studies.¹⁰⁶ Professor J.L. Bernard contends that the level of simulation achieved in many of the studies on jury decisionmaking has been unsatisfactory:

Research designs of jury studies frequently require 'jurors' to read a written summary of a 'trial,' and to make individual judgments on issues of the case. This procedure . . . has little relation to the activities demanded of actual jurors. In short, the problem with many jury studies is that what has been done in the laboratory simply does not simulate what happens in the real world of the courtroom.

. . . .
 . . . [A]ctual jurors discuss the issues of the case, attempt to alter each other's perceptions and misperceptions of the evidence, argue logically (and illogically), cajole and insult one another, and typically go through a series of ballots before arriving at a verdict.¹⁰⁷

Researchers defend studies focusing on individual juror decisionmaking as opposed to collective jury decisionmaking on the ground that deliberation in jury simulation research is not that important. These researchers refer to a field study by the Chicago Jury Project to support this view. That study indicated that the first ballot taken by the jury is a strong predictor of jury verdicts.¹⁰⁸ One problem with

106. See Lipton, *supra* note 15, at 285 ("[I]ndividual juror characteristics cannot be considered in isolation since these variables interact with the characteristics of the jury as a whole.")

107. Bernard, *supra* note 15, at 104-05 (footnote omitted).

108. See Herman E. Mitchell & Donn Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCHOL. 123, 128 (1973) (noting that the absence of deliberation may not be that significant if members of the jury make up their minds before they deliberate) (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 488 (1966)); see also Johnson, *Black Innocence and the White Jury*, *supra* note 15, at 1698 (suggesting that unless at least three minority race jurors are on the jury, majority race jurors will not be influenced by minority race jurors). *But cf.* Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. APPLIED SOC. PSYCHOL. 1713, 1722 (1991) ("Although it has been suggested that the deliberation process plays a minimal role in affecting jurors [sic] preconceived decisions in general (Mitchell & Byrne,

using this finding to support individualized mock juror decisionmaking is that actual jurors often engage in extensive, collective discussion *before* the first vote is taken.¹⁰⁹ Because individual decisionmaking and group decisionmaking are fundamentally different processes,¹¹⁰ one should be hesitant to rely heavily on studies that test individual juror decisionmaking to the exclusion of collective jury decisionmaking.

B. Differences in the Level and Mode of Information Input

Another problem with the research reported in Part III involves the amount of information given to mock jurors and the method of disseminating such information to the mock jurors. Typically, trial simulations provide less information to mock jurors than actual jurors receive in real life trials.¹¹¹ Additionally, many simulations, including some reported in Part III, provide mock jurors with written transcripts, when in real life, jurors see and hear live testimony.¹¹²

When mock jurors are given a written transcript, they may assume that everything on the transcript is relevant. For example, mock jurors presented with a written transcript that says, "John, a Black man, is charged with raping Mary, a White woman," may assume that the race and gender of the individuals described are relevant. When jurors in real life sit through an actual case, they may notice the race and gender of the defendant and victim, but not necessarily assume that race and gender are relevant.

On the other hand, visual representations of race may be more powerful than written descriptions. For example, in the Bernhard Goetz trial,¹¹³ the defense highlighted the race of the victims without an overt appeal to race. George Fletcher, who observed the trial, commented:

1973), it has yet to be demonstrated whether or not specific prejudicial attitudes are affected by the deliberation process.").

109. See Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 *LAW & HUM. BEHAV.* 71, 78 (1979).

110. See *id.*

111. See *id.* at 77 ("The information input to the simulated jurors is minute in comparison to that generally received by real jurors.").

112. See *id.*

113. Bernhard Goetz gained fame and notoriety when he shot four Black youths who had asked him for five dollars on a New York subway. See Lee, *Race and Self-Defense*, *supra* note 12, at 416-19. One of the youths was paralyzed from a shot to the spinal cord. Goetz was charged with assault, attempted murder, reckless endangerment, and illegal possession of a weapon and was acquitted of all but the illegal possession charge. See *id.*

Reading the record of the Goetz case, one hardly finds an explicit reference to the race of anyone. But indirectly and covertly, the defense played on the racial factor. . . .

. . . .
The covert appeal to racial bias came out most dramatically in the re-creation of the shooting, played out while Joseph Quirk was testifying. The defendant called in four props to stand in for the four victims, Canty, Allen, Ramseur, and Cabey. The nominal purpose of the demonstration was to show the way in which each bullet entered the body of each victim. The defense's real purpose, however, was to re-create for the jury, as dramatically as possible, the scene that Goetz encountered when four young black passengers began to surround him. For that reason Barry Slotnick asked the Guardian Angels to send him four young black men to act as the props in the demonstration. In came the four young black Guardian Angels, fit and muscular, dressed in T-shirts, to play the parts of the four victims in a courtroom minidrama.¹¹⁴

Moreover, actual jurors may pay considerable attention to the nonverbal behavior of witnesses and other trial participants, factors which cannot adequately be captured in a written transcript.¹¹⁵ For these reasons, the studies conducted by Miller and Hewitt (1978), Klein and Creech (second experiment) (1982), and Poulson (1990), which utilized either a videotape or an audiotape with a synchronized slide projector, may better reflect actual trial conditions than the studies which relied solely on written transcripts.

C. *Problem of Role-Playing*

Another problem with mock trial simulations is that mock jurors deciding hypothetical questions in an experimental situation are not subject to the pressures actual jurors face in real trials.¹¹⁶ "The simulated juror knows that no real persons will be affected by his decision, while the actual juror is acutely aware of the power of his decision to alter a human's life."¹¹⁷ It is extremely difficult to replicate the pressures that actual jurors feel when their decisions can mean the difference between life and death or freedom and prison. Role-playing, which represents the essence of the jury trial simulation paradigm,

114. GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 206-07 (1988).

115. See Weiten & Diamond, *supra* note 109, at 77.

116. See *id.* at 81 ("Perhaps the most critical difference between real and simulated jury decisionmaking and the gap most difficult to close, is the difference in the consequences of the two decision tasks.")

117. *Id.* (citing Cookie Stephan, *Sex Prejudice in Jury Simulation*, 88 J. PSYCHOL. 305, 311 (1974)).

represents the subjects' *guesses* as to how they would behave *if* they were in a given situation.¹¹⁸

Additionally, the results of these studies may have been influenced by the perceived social desirability of certain responses over others. The subjects were aware of their participation in a simulated study. They may have tried to give what they perceived to be the socially desired response. If this occurred, the results of the studies may mask even stronger racial effects in real life. In actual trial situations, jurors may feel they can decide matters without accountability because their vote is hidden by the votes of the other eleven jurors. Moreover, in real life, jurors deliberate in secret, and ethical and evidentiary rules prohibit post-verdict inquiry into the jury's deliberation process.¹¹⁹ If the jury returns a not guilty verdict, the acquittal cannot be appealed.¹²⁰ Thus, actual jurors may feel less compulsion to respond in socially desirable ways, particularly if they are not reminded that it is important to do so.

D. *University Students Not Representative of Actual Jury Pool*

University students may not be representative of jurors in actual trials.¹²¹ University students are typically better educated than actual jurors and may pay closer attention to jury instructions given to them by the court than actual jurors.¹²² Some social science research indicates that college students tend to be less conservative and less authoritarian than the general adult population from which juries are

118. *See id.*

119. Rule 606 of the Federal Rules of Evidence prohibits jurors from testifying about their verdicts except under limited circumstances. Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

FED. R. EVID. 606(b). This rule has been interpreted fairly strictly. In *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that an evidentiary hearing in which jurors would testify regarding juror alcohol and drug use during trial was barred by Rule 606(b).

120. The double jeopardy clause states "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V.

121. *See* Hubert S. Feild & Nona J. Barnett, *Simulated Jury Trials: Students vs. "Real" People as Jurors*, 104 J. SOC. PSYCHOL. 287, 287 (1978).

122. *See* Weiten & Diamond, *supra* note 109, at 76; *see also* Pfeifer & Ogloff, *supra* note 108, at 1722 (noting that participants in study were college students who may have paid more attention to jury instructions than "actual" jurors might have); Rector & Bagby, *supra* note 105, at 114 (noting that a juror pool that is extremely well-educated is not representative of a typical juror pool).

drawn.¹²³ One study found that college students were significantly more lenient in sentencing than nonstudents.¹²⁴ Therefore, studies utilizing university students as subjects may inadequately reflect how actual jurors might act.

E. Exclusive Focus on Blacks and Whites

Another problem with the existing guilt attribution research is its virtually exclusive focus on Blacks and Whites, both in terms of student-subjects and the parties (defendants and victims) represented in the simulated cases. While this focus is understandable in light of the apparently small numbers of Asian Pacific Americans, Latino/as, and Native Americans who actually serve on juries, it would be beneficial if future researchers included other racial minorities in their studies.

F. Inconsistent Results

The criticisms detailed above indicate the need for social scientists to conduct further research on juror-victim racial similarity and guilt attribution. The fact that the results of the studies are inconsistent provides additional support for this call for further research.¹²⁵ Three of the studies suggest that both Black and White jurors tend to convict more often (or punish more severely) when they share racial affinity with the victim. Three of the studies suggest that the race of the victim is not a significant factor in juror decisionmaking.

Some might argue that the three most recent social science studies prove that race does not influence jury decisionmaking. The conclusion that race does not matter, however, is counterintuitive. Additionally, such a conclusion contradicts research on social cognition which demonstrates that people tend to value those who are perceived to be more like themselves (in-group favoritism) than others who are perceived to be different (out-group antagonism).¹²⁶ Given the numerous methodological problems common to all of the social science studies outlined in this section, it would be premature to conclude either that the race of the victim influences jurors, or that it does

123. See Weiten & Diamond, *supra* note 109, at 76.

124. See Feild & Barnett, *supra* note 121, at 291.

125. Today, most Americans know and believe that racial prejudice is wrong. Therefore, when faced with an *obviously* racial situation, most will strive to act in an egalitarian fashion. Race of the victim disparity would be reflected in the older studies and not in the more recent studies if it was more acceptable to hold prejudiced beliefs at that time than it is today.

126. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

not. The only fair conclusion is that the studies are inconclusive and further research must be conducted to resolve the question.

Even if additional research were to confirm the results of the more recent studies, this would not necessarily eliminate the problem of socially constructed racialized images which influence legal decisionmaking in subtle and covert ways. All of the social science studies testing the significance of the race of the victim treated race simply as a physical fact, ignoring the socially constructed nature of race and the ways in which racialized images of Blacks, Asian Americans, and Latinos might affect legal decisionmaking. In real life, attorneys may appeal to racial stereotypes covertly, using metaphors and images that are not overtly racial.¹²⁷ Jurors, who may not be aware of covert appeals to race, may be influenced by racial bias even more than if the appeal to race were obvious. None of the studies on juror-victim racial similarity and guilt attribution tested whether the covert exploitation of racial stereotypes by attorneys influences jury decisionmaking.

Additional research is also warranted because different racial stereotypes may attend different crimes and defenses.¹²⁸ For example, Poulson's 1990 study tested the influence of race on mock jurors in a simulated insanity trial.¹²⁹ The defense of insanity focuses on the defendant's state of mind; the victim's characteristics, racial or otherwise, have little influence on whether the defendant is able to know right from wrong or conform her conduct to the requirements of the law. Because racial stereotypes about Blacks being mentally ill are not that common, it is not surprising that no significant race effects were found when the defense at issue was insanity. It is possible that people in general disfavor the insanity defense, regardless of the race of the defendant or victim, because it is seen as an excuse easily fabricated.

127. See *supra* text accompanying note 114.

128. One study found that Blacks were more likely than Whites to receive harsher punishment for negligent homicide and Whites were more likely than Blacks to receive harsher punishment for fraud. See Mazzella & Feingold, *supra* note 105, at 1325 (concluding that defendants are treated more harshly when they commit crimes that are stereotypically associated with their race). Another study found that crime related racial stereotypes exist. See Michael Sunnafrank & Norman E. Fontes, *General and Crime Related Racial Stereotypes and Influence on Juridic Decisions*, 17 CORNELL J. SOC. REL. 1 (1983) (concluding that certain crimes produce a juror bias concerning the race of the individuals likely to commit the crime). Subjects attributed assault-mugging, grand-theft auto, assault on a police officer, and soliciting more frequently to Blacks than Whites. Fraud, embezzlement, child molestation, rape, and counterfeiting were attributed to Whites more often than Blacks. See *id.*

129. See Poulson, *supra* note 85.

The remaining guilt attribution studies utilized simulated rape trials as the primary or only offense at issue.¹³⁰ Racial stereotypes about Black sexuality, as opposed to racial stereotypes about Black criminality, may have influenced subject decisionmaking in these studies.¹³¹ Moreover, subjects in Hymes' 1993 study, which used acquaintance rape as the offense, may have viewed interracial relationships as anomalous and therefore less likely to be the predicate for a genuine date rape situation. Additional research should be conducted testing whether the race of the victim influences jurors in other types of cases, such as homicide and assault cases.

For purposes of measuring the impact of the victim's race, the capital sentencing studies, which are based on actual cases, may prove more valuable than the social science studies conducted under laboratory conditions. The usual criticism with studies that rely on sentencing patterns to generalize about juror decisionmaking in guilt determinations—that jurors generally do not determine sentences¹³²—is not applicable because jurors in capital cases do choose which sentence should be imposed. Therefore, the capital sentencing studies provide support for the notion that the race of the victim affects legal decisionmaking. Jurors in capital cases, knowing that their decision means life or death, might try harder not to let race influence their decisionmaking because the defendant's life is at stake.¹³³ Jurors in non-capital cases generally do not know the possi-

130. See Hymes et al., *supra* note 100 (rape); Klein & Creech, *supra* note 72 (rape, murder, sale of drugs, and burglary); Miller & Hewitt, *supra* note 56 (rape); Rector et al., *supra* note 93 (rape); Ugwuegbu, *supra* note 61 (rape).

131. See Hubert S. Feild, *Rape Trials and Jurors' Decisions*, 3 LAW & HUM. BEHAV. 261, 264 (1979) (noting that sexual assailants of White women are likely to be treated more severely than sexual assailants of Black women for two reasons: "(a) white women are viewed as the 'property' of white men and must be protected from black men . . . ; and (b) the 'rape' of black women is highly suspect; they may have received just what they wanted.").

132. See Neil Vidmar, *The Other Issues in Jury Simulation Research*, 3 LAW & HUM. BEHAV. 95, 96-97 (1979) (noting that jury simulation studies that use a measure of sentencing in lieu of a verdict choice of guilty or not guilty ignore the fact that juries are rarely involved in sentencing).

133. Interestingly, jurors in federal death penalty cases are instructed not to recommend a sentence of death unless they have concluded that they would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or gender of the defendant or victim. See 21 U.S.C. § 848(o)(1) (1994).

In any hearing held before a jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the

ble punishment that awaits the defendant who is found guilty.¹³⁴ Because of this lack of knowledge regarding the punishment, the non-capital juror may not be as vigilant as the capital juror in attempting to guard against the influence of racial bias.

Two arguments might be asserted by those who feel the capital sentencing studies do not demonstrate that the race of the victim influences decisionmaking in non-capital cases. First, jurors deciding sentencing matters generally consider a broader range of factors than jurors deciding guilt or innocence. At sentencing, in both capital and non-capital cases, evidence that might have been inadmissible at trial is often considered. Capital jurors at sentencing have broad discretion to consider any and all mitigating factors that might lead them to reject death.¹³⁵ In contrast, jurors deciding guilt or innocence are generally instructed that they must find certain elements beyond a reasonable doubt in order to convict. Theoretically, the discretion of jurors deciding guilt or innocence in non-capital cases is much more circumscribed than the discretion of jurors deciding punishment in capital cases. In practice, however, when jurors in non-capital cases are not instructed otherwise, they are permitted to consider extra-legal factors such as race and their interpretation of the facts may be influenced by racial considerations.¹³⁶ Whether or not jurors in non-capital cases in fact are influenced by the race of the victim, the fact remains that the law as currently structured permits racial bias to operate by the absence of a specific prohibition.

crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

Id.

134. Some courts instruct jurors that their job is solely to decide guilt or innocence and that the court will determine the penalty. *See, e.g.*, CALJIC No. 17.42 (6th ed. 1996) (instructing jurors to "not discuss or consider the subject of penalty or punishment" in their deliberations). Moreover, the Supreme Court has often stated, "It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" *Shannon v. United States*, 512 U.S. 573, 579 (1994) (citing *Rogers v. United States*, 422 U.S. 35, 40 (1975)).

135. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

136. While California has a standard jury instruction that instructs jurors not to be swayed by prejudice or emotion, there is no explicit instruction telling jurors not to allow racial stereotypes to influence their decisionmaking. *See* CALJIC No. 1.00 (6th ed. 1996) ("You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."). The model federal jury instructions contain a similar instruction. *See* 1 HON. EDWARD J. DEVITT ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS* §12.01 (4th ed. 1992) ("In deciding the issues presented to you for decision in this trial you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion."). Perhaps these model instructions could be modified to include an explicit reference to stereotypes based on race, ethnicity, gender, and sexual orientation as examples of types of stereotypes that might lead to prejudice.

Second, it might be argued that prosecutorial discretion in deciding whether to seek the death penalty plays a large role in shaping the types of cases that are charged as capital offenses and thus come before the capital jury. That prosecutorial charging discretion plays a significant role in determining which cases are prosecuted as death penalty cases cannot be denied. Prosecutorial charging discretion, however, also plays a significant role in shaping which non-capital cases are prosecuted. As the capital sentencing studies indicate, prosecutors, like jurors, are influenced by the race of the victim. There is no evidence that prosecutors are not similarly influenced in non-capital cases.

Some might argue that the methodological problems noted in Part IV are insurmountable because no study could ever precisely replicate the exact same conditions encountered by actual jurors in actual cases. I would not be so pessimistic. First, social scientists can and do study actual trials. Second, trial simulations can and should be improved by having mock jurors receive information in a manner more similar to the manner that actual jurors receive information (e.g., via videotape rather than written transcript), by measuring juror responses after collective or group deliberation, and by using voluntary subjects from a cross-section of the community in addition to university students. Jury consulting services currently replicate trial conditions in this manner to determine which types of jurors would be best for the prosecution or defense. Such trial simulations might be more costly, but the results would be more reliable, and thus more useful.

V. CONCLUSION

Fundamental disagreement exists over the question whether the race of the victim matters. On the one hand, the majority of capital sentencing studies, three guilt attribution studies, social cognition research, and intuition support an affirmative answer to this question. On the other hand, there is no direct evidence that what happens in capital cases also occurs in non-capital cases, three guilt attribution studies indicate that the race of the victim does not matter, and intuition is a far cry from hard proof that the race of the victim matters. Rather than end the debate, these observations suggest the need for further study.

Ultimately, racial differences in guilt attribution and punishment may arise less from the presence or absence of racial affinity between jurors and the defendant or victim than from the vastly different ways

in which Whites, Blacks, and other minorities view everyday reality.¹³⁷ During the Simpson trial, many Blacks were sympathetic to O.J. Simpson and highly skeptical of the evidence against him because they themselves had seen or personally experienced racial discrimination by police officers or the judicial system. In contrast, many Whites thought the evidence against Simpson constituted conclusive proof of his guilt. This point of view may have been influenced by the fact that many Whites have not experienced racial discrimination by police officers or the judicial system. Because of the vastly different experiences of Whites and Blacks in American society, Black skepticism about the evidence and White belief in Simpson's guilt may have existed even if the victims had been Black. This suggests that whether the race of the victim influences jurors is only the first of a series of questions that must be addressed in order to better understand the role of race in criminal jury trials.

137. In speaking of Whites, Blacks, and other minorities, I do not claim that there is a unitary or essential White, Black, or minority experience. Whites, Blacks, and non-Black minorities represent diverse and heterogenous individuals, differing in terms of gender, class, sexual orientation, and disability.