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Source: *Law and Human Behavior*, Vol. 28, No. 5 (Oct., 2004), pp. 529-545

Published by: Springer

Stable URL: <http://www.jstor.org/stable/4141718>

Accessed: 23/04/2009 11:05

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Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination

Thomas W. Brewer¹

This paper examines the variation in receptivity to mitigation evidence by capital jurors as it varies by the race of the juror, defendant, and victim individually and in combination. Attitudinal and racial characteristics from 865 respondents in the Capital Jury Project were used in the analysis. Using a generalized form of multiple regression, the respondent's receptivity to mitigation evidence was predicted and changes in receptivity were calculated as the race of the main trial participants (juror, defendant, and victim) were varied. Statistical controls were put in place for gender of respondent; respondent's perception of the dangerousness of the defendant, heinousness of the crime, and view of the defense attorney; respondent's formation of a premature sentencing decision; and whether the trial took place in a southern state jurisdiction. Results indicate that Black jurors in cases where a Black is charged with killing a White victim are chiefly responsible for the observed variance in receptivity to mitigation.

KEY WORDS: capital punishment; race; empathy; juries.

INTRODUCTION

In 1972 the Supreme Court set aside all capital punishment statutes then enacted in the United States. The plurality in *Furman v. Georgia* (1972) based this decision on the view that death sentences were being handed down in an arbitrary and standardless manner. In addressing the constitutional infirmities pointed out by the Court, several states drafted so-called "guided discretion" statutes seeking to provide a framework for capital sentencing that would assist jurors in making more reliable decisions. The foundation of this framework is the presentation of aggravating and mitigating factors to the jurors. These competing arguments regarding the propriety of a death sentence help fulfill the eighth Amendment requirement that jurors consider "character and record of the individual offender and the circumstances of the particular offense" (*Woodson v. North Carolina*, 1976, p. 304).

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The importance of this process, particularly the admission of mitigation evidence has been continually underscored by the Supreme Court. *Lockett v. Ohio* (1978) and its progeny make clear that the state cannot preclude the defense from offering virtually any mitigating factor for consideration. However, the Supreme Court's interest in the importance of mitigation does not end once the evidence has been proffered. The Court held in *Eddings v. Oklahoma* (1982, p. 114) that the sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." Jurors remain free to decide for themselves the importance that they feel should be attached to a particular mitigating factor in their individual sentencing decision. They may even decide after deliberation that a piece of mitigation is completely without merit and carries no weight in their personal decision-making process. However, jurors may not simply dismiss mitigation out of hand and refuse to give it any consideration. Justice Powell summed up the decision in *Eddings* in a succinct footnote: "we note that the Oklahoma death penalty statute permits the defendant to present evidence as to any mitigating circumstances . . . Lockett requires the sentencer to listen (*Eddings v. Oklahoma*, 1982, p. 114). Ten years later the Supreme Court once again underscored the Constitutional imperative that capital jurors give consideration to mitigation in *Morgan v. Illinois* (1992, p. 793). The court held that "any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis." The question then becomes, are jurors actually considering mitigation evidence as envisioned by the Supreme Court? What obstacles might prohibit, or limit consideration or receptivity to mitigation? This paper will focus on the effect of race on the consideration of mitigation evidence in capital trials.

Race and Capital Punishment

There have been numerous procedural obstacles identified within the context of a capital trial that work to limit the ability and/or willingness of a juror to actually consider mitigation evidence. Inadequacy of counsel (White, 1993), premature sentencing decisions (Bowers, Sandys, & Steiner, 1998), the effects of "death qualification" during jury selection (Fitzgerald & Ellsworth, 1984; Sandys, 1998), and Haney's (1997) chronic "mechanisms of moral disengagement" are just some examples.

Early in the history of the United States the overt differential application of capital punishment based on race was clearly evident, and in some cases legally mandated. In the 1830s Virginia law listed over seventy crimes that carried a death sentence if committed by a Black, compared to only five if committed by Whites (Bowers, 1974, pp. 139–140). Prior to the Civil War laws in several states specifically authorized harsher punishments for slaves and free-Blacks than for Whites (Radelet & Vandiver, 1986, p. 97). Throughout history, Blacks have been executed for less serious crimes than Whites and their death sentences were carried out with fewer legal appeals (Bowers, 1974, pp. 78–96; Bowers, Steiner, & Sandys, 2001, p. 175). During the period following the Civil War, progress was made with the ratification of the Fourteenth Amendment which prohibited facially discriminatory laws. The Supreme Court also struck down laws that excluded Blacks from jury service (*Strauder v. West Virginia*, 1880). However, actors in the criminal justice system often applied the

newly mandated race-neutral laws in a discriminatory manner by punishing Blacks and persons who victimized Whites more severely. In contrast, those who killed a Black victim, especially a White killing a Black, were treated much more leniently (Baldus & Woodworth, 1998, p. 389). States, no longer able to bar Blacks from serving on juries outright, used poll taxes and other voting requirements to keep Blacks from making it on to jury service lists (Coke, 1994, p. 334, as cited in Bowers et al., 2001, footnote 14). These measures maintained the system of all White juries and contributed to racially discriminatory sentencing.

Despite the abolition of race as a legally relevant factor in capital sentencing, researchers continue to find variation in capital sentencing patterns along racial lines. One of the most renowned studies of this issue, the so-called "Baldus Study" (Baldus, Woodworth, & Pulaski, 1990; United States General Accounting Office, 1990), was conducted using data from approximately 2,484 homicide cases in Georgia processed from 1973 to 1979. The most striking finding was the strong effect of the race of victim on capital sentencing, especially when the offender was Black. The unadjusted results showed that a Black defendant who murdered a White victim received the death penalty in 21% (50/233) of cases where a White defendant who killed a Black defendant was sentenced to death in only 3% (2/60) of cases (Baldus et al., 1990, pp. 314–315; Baldus & Woodworth, 1998, p. 406). After subjecting the data to rigorous statistical controls accounting for a large number of legally relevant factors, the effect of race diminished. However, even after control variables were analyzed, the average defendant's odds of being sentenced to death were 4.3 times higher if the victim of the killing was White (Baldus & Woodworth, 1998, p. 406). Other researchers have found similar results relating to the race of victim (Bowers & Pierce, 1980).

The most obvious question, given the repeated findings of racial variation in capital sentencing, is how a system, which is painstakingly designed to be racially neutral, can produce such results? Undoubtedly there is some element of the population that is overtly racist and would consciously use the discretion provided by service on a capital jury to inflict the harshest possible sentence on a minority defendant. However, one would assume that numerical rarity, jury selection, and the insulation of 11 other jurors would limit the potential impact of such persons. This leaves us with the assumption that fair, well-meaning, and right-minded people are conscientiously operating within a system that is producing racially discriminatory results. In seeking an answer to this problem, researchers need to examine areas of the capital trial process that may lie beyond effective legislative control. One such area is simple human discretion and how it is applied.

Race, Empathy, and Receptivity to Mitigation

U. S. Supreme Court Justice White articulated his concern regarding race, empathy, and the consideration of mitigation evidence in *Turner v. Murray* (1986). Justice White hypothesized that the wide range of discretion constitutionally entrusted to capital jurors provides "a unique opportunity for racial prejudice to operate but remain undetected" (*Turner v. Murray*, 1986, p.35). Justice White posited that one avenue for discretion to operate as a function of race is with jurors who believe minority defendants are prone to violence or morally inferior. These jurors, he felt, might

be less receptive to mitigation evidence. Justice White's concern would appear to be that of the classic fundamental attribution error. Jurors who view the defendant as inherently violent would seem to be more likely to attribute his murderous behavior to dispositional factors (e.g. he's just an evil person) as opposed to situational factors (e.g. he was operating under the influence of some mental disturbance). There is evidence to suggest that a segment of the American population may hold such beliefs. Opinion polls in the United States show that the public views Blacks and Hispanics as more likely to commit crimes than other groups (Gallup Poll Monthly, 1983, as cited in Bowers et al., 2001, footnote 34).

The potential power of the fundamental attribution error to limit the consideration of mitigation evidence is not lost on litigators in capital cases. Haney (1997) argues that in fact the entire system of capital punishment works to dehumanize the defendant in the eyes of the jury. The prosecutor's goal is to reduce the defendant to nothing more than the sum of his murderous crime. Doyle (1996, p. 424) likens the prosecutor's actions to asking Yeats' famous question, "How can we know the dancer from the dance?" The murderer becomes indistinguishable from the murder. Jurors are encouraged to attribute the motivation for the crime to a fundamental, inherent, or dispositional trait of the defendant. If this murderous impulse is seen as immutable, it cannot be controlled and therefore is not subject to the explanatory power of mitigation evidence presented by the defense. Defense attorneys are keenly aware of this ongoing dynamic and the need to humanize the client in front of the jury as a way of deemphasizing dispositional attributions regarding the defendant and the crime (White, 1993). Previous research has demonstrated support for this position. The more jurors are able to see the defendant as a human being, the more likely they are to report considering mitigation evidence during penalty-phase deliberations (Brewer, 2003).

There is support for the existence of a nexus between empathy, attributions of the defendant, and legal decision-making. Much of what is presented in mitigation during capital trials has been termed by legal practitioners as "empathy evidence" (Perlin, 1996, p. 233). Olsen-Fulero and Fulero (1997) suggest that empathy in the legal system operates on two levels. The first such level is the degree to which the jury can personally identify with the defendant. They argue that if jurors can find any similarity between themselves and the defendant those jurors will be more receptive to situational attributions regarding the criminal act as opposed to dispositional attributions. This proposition makes intuitive sense. We are less likely to see someone who we identify with as inherently evil. However the ability of jurors to identify with defendants is not uniform across racial boundaries. Research has shown that arousal of empathetic feelings is limited when the observer (in this case the juror) and the model (in this case the defendant) are from different cultures (Hoffman, 1984, p. 114). This limitation may be due in part to intergroup bias, which usually operates as favoring the in-group while derogating the out-group (Hewstone, Rubin, & Willis, 2002, p. 576). For example, trust is more likely to be extended to in-group members than out-group members (Insko, Schopler, Hoyle, Dardis, & Graetz, 1990; Insko, Schopler, & Sedikides, 1998).

The full range of effects stemming from intergroup bias are varied and often subtle ranging from active discrimination, prejudicial attitudes, and cognitive

stereotyping (Krieger, 1995; Mackie & Smith, 1998; Wilder & Simon, 2001). Bias induced responses can generally be categorized along two lines. In-group favoritism is demonstrated by the extension of trust, positive regard, and empathy to the in-group, but not out-group members (Hewstone et al., 2002, p. 578). In-group favoritism is distinguished from a less common but more active and aggressive form of bias described as out-group derogation (Brewer, 1999, 2000; Hewstone et al., 2002, p. 579). Recent research suggests that individuals are more likely to make the leap between passive in-group favoritism to active out-group derogation when powerful emotions such as fear, hatred, or disgust come into play (Hewstone et al., 2002, p. 579; Smith, 1993; Stephan & Stephan, 2000). Capital trials can be expected to arouse these emotions, especially when the crime is particularly heinous.

The second plane on which empathy operates in the courtroom suggested by Olsen-Fulero and Fulero (1997) is more cognitive. Cognition and empathy in capital decision-making are extremely important in that the observer must be able to vicariously experience the feelings that have been directly experienced by the model (Hoffman, 1984, p. 107). Although certain events may be so intrinsically arousing of an empathetic response that they obviate the need for direct experience on the part of the observer, other experiences require an explicit cognitive effort on the part of the observer to process the meaning of the experience and cultivate empathy (Izard, 1971). The cognitive effort required is heavily influenced by the observer's own appraisal of the events (Schacter & Singer, 1962). The differential appraisal of mitigating life events could have very real implications for fostering empathy in jurors, the majority of whom cannot directly relate to the life experiences of typical capital defendants. Middle-class, White juries who may have the best intentions, may be simply incapable of understanding the mitigating nature of extreme poverty; emotional, physical, and/or sexual abuse; drug addiction; exposure to violence; and the litany of other experiences that are facts of life to many members of the lowest socioeconomic strata.

Experimental research into the effects of race on capital juror decision-making has also yielded significant findings. Lynch and Haney (2000) studied the relationship between race and the evaluation of evidence at sentencing in capital trials. They found that the defendant's race influenced the respondents' use of certain categories of mitigation. Arguments relating to the defendant's history of child abuse psychiatric problems, and history of substance abuse were viewed as less mitigating in cases where the defendant was Black compared to those in which he was White (Lynch & Haney, 2000, p. 352). Race of defendant also affected the manner in which the mitigation was used. Respondents who viewed the Black-defendant trial vignettes were more likely to view mitigation as aggravating than in White defendant cases.

This Study

This study explores the interaction between race and the ability and/or willingness of capital jurors to consider mitigation evidence during penalty-phase deliberations in a death penalty trial. With survey data from the Capital Jury Project, an overall indicator of the use of mitigation evidence by capital jurors will be created. Using a generalized form of Ordinary Least Squares (OLS) regression, changes in

jurors' receptivity will be measured as a function of the race of three principle trial actors: juror, defendant, and victim. The central hypothesis is that receptivity will vary as a function of race. More specifically Black jurors overall should be more receptive to mitigation overall than White jurors. As discussed above, empathy is believed to be a major component of much mitigation. Empathy is not automatic and not all persons are equally equipped to respond empathetically to all types of information. The cognitive appreciation of empathy arousing evidence is more easily facilitated if the juror walks into the courtroom with some appreciation for the conditions and situations that generally give rise to such evidence. Blacks are more likely than Whites to be exposed, either directly or indirectly, to conditions that might serve as evidence of mitigation such as poverty,² residence in an inner-city neighborhood,³ criminal victimization,⁴ criminal arrest,⁵ and incarceration.⁶

Receptivity should also vary as a function of juror/defendant pairings. On the basis of in-group/out-group dynamics, we should expect jurors to be more receptive in situations where the defendant is of the same race (in-group) and less receptive in situations where the defendant is of a different race (out-group).

Finally, perceived threats to the in-group (same race victim) can also be expected to produce variation in the juror/victim pairings. Much of the psychological literature on intergroup bias focuses on threats to in-groups' social identity, goals and values, and social and economic status (Hewstone et al., 2002, p. 586). However, the conception of threat in this context could easily be extended to include the danger from violent crime.

METHOD

Sample and Procedures

The data used in this research were compiled by the Capital Jury Project (CJP) headquartered at Northeastern University. The CJP consists of a consortium of social science and legal researchers located in 14 states.⁷ The data are cross-sectional, coded at the individual level and obtained through lengthy in-person interviews. Respondents served as jurors in a capital trial, wherein the defendant was convicted

²Blacks have a median income of approximately 38% less than Whites. Thirty-two percent of Black households earn less than \$15,000 a year compared to 16.1% for White households (United States Census Bureau, 2000a).

³Blacks account for 21.6% of the population in central metropolitan areas but only 12.3% of the total U.S. population (United States Census Bureau, 2000b).

⁴Blacks were victimized (nonhomicide violent crimes) at a rate of 31.2 per 1,000 persons in 2001. The rate per 1,000 for Whites was 24.5 (United States Department of Justice, Bureau of Justice Statistics, 2002a). Blacks were six times more likely to be murdered than were Whites in 2000 (United States Department of Justice, Bureau of Justice Statistics, 2003).

⁵Blacks accounted for 27.9% of criminal arrests reported to the FBI in 2000. This exceeds their representation in the U.S. population of 12.3% (United States Department of Justice, Federal Bureau of Justice Statistics, 2000).

⁶Black males are incarcerated in state and federal prisons at a rate of 3,535 per 100,000 as compared to White males at a rate of 462 per 100,000 (United States Department of Justice, Bureau of Justice Statistics, 2002b).

⁷Georgia, Kentucky, South Carolina, Virginia, Alabama, California, Florida, Indiana, Louisiana, New Jersey, North Carolina, Pennsylvania, Tennessee, and Texas.

and a penalty or sentencing phase trial was conducted to verdict (Bowers, 1995, p. 1077).

The respondents were administered a 3- to 4-hour interview concerning decision-making processes during their capital jury experience. The survey instrument spans nearly 50 pages and gathers demographic information about the respondent, defendant, and victim. Detailed questions ask the respondent to recall his or her impressions and feelings about the crime; trial participants, including the attorneys, witnesses, family members, and judge; and how they perceived the character of the defendant and victim. In addition to the demographic and attitudinal data, respondents were asked to recall the timing, processes, and factors involved in their sentencing decision (Bowers, 1995, p. 1077). The complete CJP dataset contains information on 1,198 jurors. However, not all survey items used in the construction of this model were asked of all respondents. Cases that contained a missing value, for whatever reason, in any variable required here were excluded from the analysis. The resulting dataset contained 865 valid cases.⁸ Demographic and other descriptive statistics of the sample will be presented as appropriate for each measure discussed below.

Measures

Receptivity to Mitigation

The creation of this measure includes information from three different sets of survey items in the CJP instrument, all of which relate to the jurors' use of mitigation evidence during penalty-phase deliberations. Respondents were presented by the interviewer with a list of factors one at a time. These factors are commonly used as aggravators and mitigators in capital trials. For each factor the respondent could be asked three questions. The first question asked of all respondents was if they recall the factor being an issue in the case. If the respondent answered "no," the interviewer would skip to the next factor. However, if the respondent indicated that the factor was an issue, they were then asked how important the factor was in the sentencing decision and whether the factor made the respondent more or less likely to vote in favor of a death sentence. Although the survey instrument contains traditional aggravators as well as mitigators, because the focus of the study is on mitigation, this measure contains 17 items that are traditionally considered to be mitigating. These factors are listed in Appendix.

The receptivity variable is a single composite measure that is coded such that a positive and higher numerical value signifies that the respondent found the factor to be a more important argument in favor of a life sentence. Conversely, a negative and lower value on the variable means that the respondent found the factor to be a more important argument in favor of a death sentence. The measure was constructed in such a way so as to allow for the very real possibility that respondents would actually use mitigation as support for a death sentence. In fact, 99 (11.5%) respondents actually had a negative overall receptivity index. The actual coding of the receptivity index is as follows: the factor was a very important argument in favor of death, -2;

⁸A total of 53 individual variables from the dataset were used to create the 9 measures included in the models, including 34 for the defendant variable alone.

the factor was a fairly important argument in favor of death, -1 ; the factor was not important in the sentencing decision, 0 ; the factor was a fairly important argument against death, $+1$; the factor was a very important argument against death, $+2$. This coding procedure was conducted individually for each of the 17 items. The mean of the individual scores was then calculated to produce an overall measure of receptivity to mitigation (range -2 to $+2$, $M = 0.539$, $SD = 0.743$).

A measure of association was calculated between the index of receptivity and the outcome of the jury's sentencing verdict. This test was conducted by means of a binary logistic regression model using the jury's sentencing recommendation as the dependent variable (Death: $n = 492$, 56.9% ; Life: $n = 373$, 43.1%) and the receptivity to mitigation variable as a predictor. The results can best be summarized in this narrative by using the change in odds ratio metric described in Long (1997). For a 1-unit increase in the respondent's receptivity to mitigation the odds that the defendant will receive a life sentence as opposed to a death sentence increase by 105% (logit $b = 0.718$, $z = 6.63$, $p > .000$, Wald $\chi^2 43.89$, $df = 1$, $p > .000$). Given the almost infinite number of factors that play into the ultimate sentencing decision in a capital case, great care should be taken when attempting to generalize this finding beyond its role as a rough measure of the receptivity index's ability to predict a positive outcome for the defendant in the sentencing phase.

Race

The race of the juror/respondent, defendant, and victim were all measured by the survey instrument. There were 763 (88.2%) White jurors, 73 (8.4%) African American jurors, and 29 (3.4%) other minority jurors in the sample. Defendants were White in 439 (51.8%) cases, African American in 350 (40.5%) cases, and defendants in 76 (8.8%) cases were other, non-Black, minorities. Finally, 633 (73.2%) of the victims were White, 161 (18.6%) African American, and 71 (8.2%) were other minorities.

Respondent's View of Defense Attorney

A measure of the respondent's view of the defense attorney will be added to the model in order to control for the possibility that the jurors' receptivity to mitigation evidence has more to do with their view of the defense attorney individually than race. This variable will comprise two survey items relating to the quality of the defense attorney's advocacy, professionalism, and overall impression on the respondent. The survey items each measured the respondent's agreement with two characterizations of the defense attorney: the defense attorney was a competent professional; and, the defense attorney did an outstanding job of presenting her case. Likert responses were coded such that a higher numerical value indicated more agreement with the statement and summed (range $0-6$, $M = 4.40$, $SD = 1.49$, $\alpha = .77$).

Southern

In an attempt to control for the impact of regional attitudes on the dependent variables in the model, a variable indicating whether the trial was held in a southern jurisdiction will be included in the models. The variable will be defined as "southern" and coded as 1 for those cases in which the trial was held in a state that had been part of the former Confederacy, and 0 if the trial was held outside of this region. A total

of 504 (58.3%) of the cases were held in the south. The rationale behind choosing southern as the included category stems from the long-standing tradition of support for capital punishment and racial bias which have traditionally been associated with states in the southern part of the country (see generally Banner, 2002, pp. 112–143).

Gender of Respondent

The gender of the respondent will also be included as a term in the model. Although past research has not focused specifically on gender as a significant factor in capital jury sentencing, previous studies have found relationships between gender and punitiveness (Baldus, Woodworth, Zuckerman, Weiner, & Broffitt 2001, footnote 34). The most consistent findings suggest that women are less punitive than men. There were 447 (51.68%) female jurors in the sample.

Premature Punishment Sentencing Decision

A measure of the respondent's premature sentencing decision regarding punishment (or lack thereof) will also be included in the model. The premature sentencing decision measure relates to the substance of the respondent's sentencing decision at the conclusion of the guilt phase of trial. The timing of the respondent's sentencing decision can be roughly determined by an item in the CJP survey instrument. The question asks, "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. . ." Respondents are prompted for the following answers: a death sentence; a life (or alternative) sentence, or undecided. If the juror responds that he or she was undecided at the end of the guilt phase he or she can be viewed as not having made a premature sentencing decision. The term "premature" in this context means any time before the penalty phase of the capital trial. In a strictly legal context, any sentencing decision made before the sentencing instructions and deliberation would be considered premature. However, the focus of this study is on the respondents' receptiveness to mitigating factors presented during the penalty phase. Therefore, as long as the respondent remains undecided going into the penalty phase, where mitigating evidence is presented, they will be considered to have not prematurely made a sentencing decision. This concept is an important inclusion in the model to control for the possibility that jurors are less receptive to mitigation evidence because they have fixed on what they feel is the appropriate sentence before the evidence is even offered. The measure will be coded as a nominal level variable, which represents the theoretical universe of potential premature sentencing outcomes. Respondents were coded as either having made a premature decision in favor of a death sentence ($n = 259, 29.9\%$), a premature decision in favor of a life sentence ($n = 161, 19.3\%$), or as being undecided ($n = 445, 51.4\%$).

Heinousness of Crime

It is possible that certain capital defendants could be charged with committing murders that are so heinous that the facts of the case alone may drive sentencing decisions. In these cases the brutality and depravity that jurors associate with the crime may overwhelm any mitigation presented. To control for this possibility, a measure of

the respondents' attitudes regarding the depravity, viciousness, and brutality of the crime will be added to the model. This measure will be a scale consisting of survey items that measured the respondents level agreement with nine characterizations of the crime. Respondents were asked, "How well do the following words describe the killing." They were then prompted with bloody, gory, vicious, depraved, cold-blooded, repulsive, made you sick, made the victim suffer, and body was maimed after death. Levels of agreement were measured on a Likert scale with higher values indicating greater agreement. The individual scores for the nine items were averaged and the mean score used as the measure of the heinousness of crime (range 0–3, $M = 2.43$, $SD = 0.418$, $\alpha = .78$)

Statistical Analysis

A series of seven models were estimated using a generalized form of Ordinary Least Squares (OLS) regression. Models estimated the level of receptivity for each of the juror/defendant/victim combinations separately and in combination. These racial combinations represented Black versus White differences among the following trial actors or groups or trial actors: juror, defendant, victim, juror/defendant, juror/victim, defendant/victim, and juror/defendant/victim. The models were limited to estimating only differences between Black/White actors. A form of OLS was chosen for this analysis as the distribution of the dependent variable was approximately normal and also for the ease of interpretation. The control variables described above were also included in each model.

An important consideration concerning the data results from stratification and clustering in the sampling procedure. The CJP sample was stratified according to the juries' sentencing decision. The goal was to produce a sample where half of the jurors sampled served on a trial where the ultimate sentence was life and half of the jurors served on a trial where a death sentence was returned. The data were then sampled by state jurisdiction and then trials within those states. This multistage sampling design results in observations within a cluster not being completely independent of one another that violates a basic assumption of OLS regression regarding the independence of the error terms. This clustering and stratification will lead to incorrect standard error estimates that in turn affect the reliability of confidence intervals and test statistics.

To correct for the complex sampling design, the model is calculated using a specialized survey form of multiple linear regression offered in Stata statistical software (StataCorp, 2003a). The software allows the user to specify the sampling procedure used and calculates adjusted standard errors correcting for the effects of stratification and clustering within sampling stages. Stratification in the data was specified by a dichotomous variable identifying the type of sentence. Individual trials were specified as the primary sampling unit (PSU). The variance estimators used in Stata, because they make fewer assumptions, are more robust and will generally be unbiased or biased toward more conservative estimates even in multistage sampling designs (StataCorp, 2003b, pp. 346–347). Each model was tested for the effects of multicollinearity among independent variables by calculating the Variance Inflation Factor (VIF). No variable exceeded a VIF of 3.0.

RESULTS

The control variables were included in each model and their relationship to the dependent variable were consistent across each of the seven basic models estimated in respect to direction (positive or negative relationship), significance, and in magnitude. Three control variables were consistently significant predictors of receptivity. Female jurors were consistently more receptive to mitigation than their male counterpart on the jury (unstandardized regression coefficients ranged from .091 to .102, $p < .05$). Two variables significantly decreased receptivity. The first such variable was the respondent's attitude regarding the heinousness of the crime (unstandardized regression coefficients ranged from $-.147$ to $-.158$, $p < .01$). The more heinous the crime was perceived to be, the less respondents considered mitigation. A second limiting factor was a juror's premature decision that death was the appropriate sentence. Respondents who reported that they had settled on death as the appropriate sentence at the conclusion of the guilt trial were less likely to consider mitigation (unstandardized regression coefficients ranged from $-.197$ to $-.206$, $p < .001$). However, a premature sentencing decision in favor of a life sentence had no statistically significant effect on receptivity. Other control variables included in each model were the location of the trial in a southern jurisdiction, and the respondent's attitudes regarding the defense attorney. Neither of these variables were found to be significantly related to receptivity. For the sake of parsimony, the control variables will not be presented and discussed with each model below.

The results and analysis discussed are limited to the Black and White jurors, defendants, and victims separately and in combination. Dummy variables for Hispanic, Asian, and "other race" trial actors were included in each model to control for the effect of race for non-Black minorities. For practical reasons relating to space and ease of presentation as well as substantive reasons which will be discussed below, the results of the first six models will be presented together in Table 1.⁹ The first series of regression estimates show a significant relationship between the race of juror and receptivity. Black jurors (BJ) are significantly more receptive to mitigation than their White counterparts and more receptive overall. By definition, White jurors (WJ) would then be less receptive than Black jurors and they are also less receptive

⁹A total of 39 individual models were actually estimated for this first table and 67 separate models for all the results reported in this paper. Multiple models were necessary because of the fact that there are two types of estimates computed for each individual trial actor and combination of trial actors. For example, there were three models estimated for the race of juror differences in receptivity. One model estimates the explicit difference between Black jurors and White jurors only. This was done by excluding the Black race dummy variable from the regression model and including dummy variables for the White and non-Black minority jurors. The coefficient on the White dummy variable would be the explicit difference between White and Black jurors. There was no need to estimate a second model excluding the White race dummy as its coefficient would be equal but opposite in sign (e.g. $-.223/+ .223$). A second type of model is a general difference between White jurors and all others. This was estimated by including only the White juror dummy variable in the model thus making the reference category jurors of all other races. The process of estimating explicit and general differences becomes more complicated as the number of possible combinations increases. The single actor differences (juror, defendant, and victim) required 3 models, the paired differences (juror/defendant, juror/victim, and defendant/victim) required 10 models, and the triple combinations were estimated with 28 models. General differences in receptivity were estimated for both Black and White jurors and all control variables discussed above were included in each model.

Table 1. Multiple Regression Analysis Predicting the Effect of Race on Receptivity to Mitigation Evidence

Trial actors	Reference category	B
Black jurors	All other jurors	.225**
White jurors	All other jurors	-.144*
Black jurors	White jurors	.223**
Black victims	All other victims	.100*
Black jurors/Black defendants	All other juror/defendant combinations	.342**
Black jurors/White victims	All other juror/victim combinations	.299**
White defendants/Black victims	All other defendant/victim combinations	.253*

Note. Only significant relationships reported.

* $p < .10$. ** $p < .05$.

overall. This finding tends to support the hypothesis that Black jurors and White jurors differ significantly in their overall receptivity to mitigation. All jurors were significantly more receptive in Black victim (BV) cases. There were no race-based effects evident in the race of defendant models. The two-way racial combination also show evidence of racial variation. Black jurors appear to be more receptive to mitigation evidence when the defendant is of the same race than all other juror/defendant combinations. Black jurors are also more receptive when the victim is "other," in this case White. All jurors, regardless of race, tended to be more receptive to mitigation in White defendant/Black victim (WD/BV, $n = 16$, 1.85%) cases. No significant effects were found for defendant, victim, or defendant/victim combinations.

A series of models were estimated for testing the effects of all possible three-way racial combinations of juror/defendant/victim. Both specific and generalized differences in receptivity were estimated. Table 2 presents the significant generalized differences for three-way combinations. The results of the three-way effects suggest a same-race defendant/other-race victim effect. Both Black and White jurors are more receptive to mitigation in cases where a same-race defendant is charged with killing an other-race victim. These results are consistent with the previous discussion of intergroup bias which favors the in-group (same-race defendant) while derogating the out-group (other-race victim). The Black juror/Black defendant/White victim (BJ/BD/WV, $n = 24$, 2.8%) effect is particularly strong and highly significant. This finding is also not surprising given the results presented in Table 1. Black jurors overall are more receptive than other jurors, they are more receptive in Black defendant cases, and more receptive in White victim cases. The question then becomes, are the three-way effects the cumulative result of the constituent combinations or are the single and two-way effects an artifact of the powerful three-way combination?

To test this question a series of regression models were estimated in which the BJ/BD/WV dummy variable was included in each model and dummy variables

Table 2. Multiple Regression Analysis Predicting the Effect of Three-Way Race Combinations on Receptivity to Mitigation Evidence

Trial actors	Reference category	B
White juror/White defendant/Black victim	All other juror/defendant/victim combinations	.303*
Black juror/Black defendants/White victim	All other juror/defendant/victim combinations	.535***

Note. Only significant relationships reported.

* $p < .10$. *** $p < .001$.

Table 3. Multiple Regression Analysis Predicting the Stability of the BJ/BD/WV Effect

Model	<i>B</i>	Sig.
Model 1		
BJ/BD/WV	.538	.000
Model 2		
BJ/BD/WV	.497	.003
BJ	.064	.591
BD	-.012	.851
WV	.040	.520
Model 3		
BJ/BD/WV	.456	.032
BJ/BD	.093	.614
WV	-.030	.581
Model 4		
BJ/BD/WV	.453	.021
BJ/WV	.082	.612
BD	.009	.876
Model 5		
BJ/BD/WV	.509	.003
BJ	.064	.588
BD/WV	-.038	.620

representing the constituent parts of the condition (BJ; BJ/BD, $n = 45$, 5.2%; BJ/WV, $n = 50$, 5.8%; BD/WV, $n = 182$, 21.0%) were successively stepped into the models. The rationale for this procedure is that if the observed difference in receptivity for the BJ/BD/WV condition is due to the variation in the individual parts, the coefficient on that variable should fade when variables representing the individual parts are entered into the models.¹⁰ Table 3 summarizes the results of these models.

These models suggest that the variation in receptivity to mitigation found in the single and two-way analysis above is an artifact of the three-way BJ/BD/WV condition. The coefficients for the BJ/BD/WV cases remained stable in the presence of dummy variables representing its constituent parts. Similarly, the significance of the BJ, BJ/BD, and BJ/WV variables disappeared in the presence of the BJ/BD/WV variable. These findings seem to indicate that variation in receptivity to mitigation by Black jurors in capital cases is highly focused in cases where a Black murders a White. Given the relative rarity of the WJ/WD/BV condition ($n = 15$, 1.7%) this effect was not explored further.

DISCUSSION

Limitations of the Study

The most pronounced limitation of this study is the relatively low number of cases in theoretically significant variables. For example, there are only 21 BJ/BD/WV cases

¹⁰Multicollinearity among the independent variables, particularly the racial dummy variables, is an obvious concern in such models. To test for the effects of multicollinearity, the Variance Inflation Factor (VIF) was calculated for each model. The value of the VIF never exceeded 2.5 for any variable suggesting that collinearity was not a problem.

in the dataset. This is due in part to the relative rarity of these cases in actual practice. The entire Capital Jury Project dataset contains only 31 such cases. In an effort to remedy this situation and gather more reliable data on these rare but important cases, a second phase of the Capital Jury Project is now underway in nine states that is purposefully over sampling minority jurors in interracial capital cases.

Implications for Future Research

The current findings, particularly with respect to the race of victim, also suggest that Blacks alter their receptivity to mitigation in situations that have traditionally been, or at the very least widely perceived to have been, bastions of racially discriminatory sentencing practices in the past. Whether consciously or not, Blacks seem to demonstrate an ameliorative bias in capital sentencing situations when the danger of racial discrimination is highest. This ameliorative bias demonstrated by Blacks is evident when the theoretical potential for racially discriminatory sentencing is highest, cases involving a Black defendant and White victim. Further research focusing on the role played by the victim is also warranted. Are Black jurors less able to respond empathetically to White victims? Does empathy toward the victim affect receptivity? Also, if Black jurors increase receptivity as a protective measure for Black defendants when they have crossed social boundaries and murdered a White, would this protection increase if the leap were greater such as cases involving a White female victim or a White victim of higher social status?

Also, as demonstrated by Lynch and Haney (2000), juror consideration of mitigation evidence may vary as a function of the type of evidence proffered. The receptivity measure used here is based on several different types of evidence such as drug/alcohol use, the defendant's childhood abuse, and mental illness. A deconstruction of this index into similar evidentiary themes would allow receptivity to specific types of evidence to be studied.

Conclusion

This analysis has demonstrated a relationship between race and receptivity to mitigation that is far more dynamic than was previously thought. The initial finding that Black jurors were more receptive as a group than Whites proved to be spurious and appears to be driven by the strong increase in receptivity when Black jurors find themselves empanelled on a jury in which a Black is accused of murdering a White. The assumption, based on this finding, is that Blacks and Whites actually seem to give mitigation the same level of attention in the bulk of capital cases. Similarly the increased receptivity by Black jurors initially indicated in Black defendant cases and White victim cases appears to be spurious. It is only when Black jurors are faced with a situation where an in-group member, Black defendant, is faced with killing an out-group member, White victim, that they become significantly more receptive to mitigation than their White colleagues on the jury.

These findings support previous research regarding the unique nature of BJ/BD/WV cases. Bowers et al. (2001) found that Black jurors in BD/WV cases were much more likely than jurors in other cases, including other Black jurors, to have lingering

doubts about the defendant's guilt in the commission of the capital crime and to regard these doubts as important considerations during sentencing deliberations. These same jurors were also more likely to view the defendant in BD/WV cases as remorseful and more likely to view this remorse as grounds for mercy during sentencing. Black jurors in these same cases also viewed the tenor of the sentencing deliberations differently. They were more likely to believe that the jury rushed to a verdict, was dominated by a few outspoken jurors, and was intolerant of differing opinions. Of particular interest given the theoretical development of the model used in this paper is Bowers et al.'s findings regarding empathy and the Black juror in BD/WV cases. They report Black jurors are much more able to identify with a Black defendant in White victims cases, even more so than with Black defendants in Black victim cases. If, as Perlin (1996) suggests, mitigation is truly "empathy evidence" the connection between empathy and receptivity deserves closer study.

The results of this research suggest that racial variation in capital sentencing may not be dominated by such nefarious forces such as overt prejudice. Subconscious attributions of behavior and a fundamental misunderstanding of life the lives lead by many capital defendants may play a greater role than previously thought. These findings should prompt those charged with presenting mitigation evidence to find better ways of presentation that make the quality of the evidence more apparent. Also, courts and legislatures should find ways to increase minority representation on capital juries particularly in cases where the killing crosses racial boundaries.

APPENDIX

Factors included in the receptivity to mitigation index are the following:

1. The killing was not premeditated but was committed during another crime, such as a robbery, when the victim tried to resist.
2. The killing was committed while the defendant was under the influence of alcohol.
3. The killing was committed while the defendant was under the influence of drugs.
4. The killing was committed while the defendant was under the influence of an extreme mental or emotional disturbance.
5. The victim was a known troublemaker.
6. The defendant had not previous criminal record.
7. The defendant was mentally retarded.
8. The defendant had a loving family.
9. The defendant was under 18 when the crime occurred.
10. The defendant was an alcoholic.
11. The defendant was a drug addict.
12. The defendant had a history of mental illness.
13. The defendant had a background of extreme poverty.
14. The defendant had been seriously abused as a child.
15. The defendant had been placed in institutions in the past but never given any real help or treatment for his problems.

16. The defendant would be a hardworking well-behaved inmate, and would make positive contributions in prison.
17. Although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that the defendant was the actual killer.

ACKNOWLEDGMENTS

I thank James R. Acker for his helpful comments on previous drafts of this paper. I especially thank William Bowers for his constant assistance and encouragement to look deeper into the story.

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