Kentucky Law Journal

Volume 105 | Issue 4 Article 5

2017

Taking a Step Back. Racial Injustice in America

Mark Peffley
University of Kentucky

Jeffrey Mondak
University of Illinois

ESSAY

Taking a Step Back: Racial Injustice in America

Mark Peffley[I] *& Jeffery Mondak*[II]

TABLE OF CONTENTS

[I] Department of Political Science, University of Kentucky, m.peffley@uky.edu. Paper prepared for the *Kentucky Law Journal* Symposium on *Batson v. Kentucky*, January 30, 2017.
[II] Department of Political Science, University of Illinois, jmondak@illinois.edu.

INTRODUCTION

As contributors to this Book have noted, even though the Supreme Court decision in *Batson v. Kentucky* helped to prevent a more blatant form of racial discrimination in jury selection procedures, the case essentially left the door open for prosecutors to use subtler discriminatory methods to remove black jurors in trials of black defendants.[1] A similar trajectory holds for the justice system as a whole in the United States. Clear progress has been made in reducing discrimination against racial and ethnic minorities in the justice system over the past fifty years.[2] At the same time, however, "almost every nook and cranny of the criminal justice system" remains riddled with varying degrees of discrimination.[3] In their comprehensive review of empirical evidence in *The Color of Justice: Race, Ethnicity, and Crime in America*, for example, Walker, Spohn, and DeLone conclude that "[p]ersuasive evidence indicates that racial minorities suffer discrimination at the hands of police. . . . [and] within the court system," and as a result face much more punitive treatment than whites.[4] This is particularly true in the most consequential and troublesome areas of "police use of deadly force and the application of the death penalty."[5]

One of the casualties of persistent racial inequities in the justice system is the tendency for "[b]lacks and [w]hites [to] inhabit 'separate realities'" in evaluating the fairness of the system.[6] Survey studies over the last twenty years consistently find that most blacks view the system as unfair and discriminatory, while most whites view the system as fair and "color blind."[7] Even after the raft of controversial police

---

[1] *See* Batson v. Kentucky, 476 U.S. 79, 82–100 (1986); *see also* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Preemptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 57, 60–86 (2009) ("These [Batson] proceedings have become rituals that sanction continued bias in the jury selection process and ultimately affect the outcome of capital trials."); Nina Totenberg, *Supreme Court Takes on Racial Discrimination in Jury Selection*, NAT'L PUB. RADIO (Nov. 2, 2015, 5:00 AM), http://www.npr.org/2015/11/02/452898470/supreme-court-takes-on-racial-discrimination-in-jury-selection [https://perma.cc/H8LY-PL3D] (as heard on Morning Edition).

[2] *See, e.g.*, MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 24–25 (2011) (discussing efforts to reduce racial bias and stereotyping in the justice system); FRANK R. BAUMGARTNER ET AL., THE DECLINE OF THE DEATH PENALTY AND THE DISCOVERY OF INNOCENCE 7–13 (2008) (examining the historic decline in use of the death penalty which has a disproportionate impact on minority communities).

[3] Mark Peffley et al., *Racial Attributions in the Justice System and Support for Punitive Crime Policies*, AM. POL. RES. (forthcoming 2017) (manuscript at 2) (on file with author).

[4] SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 358–59 (3d ed. 2004).

[5] *Id.* at 359.

[6] Peffley et al., *supra* note 3 (manuscript at 2–3, 8–11).

[7] Daniel Cox & Robert P. Jones, *Deep Divide Between Black and White Americans in Views of Criminal Justice System*, PRRI (May 7, 2015), http://www.prri.org/research/divide-white-black-americans-criminal-justice-system/ [https://perma.cc/3EWX-JSJB]; Frank Newport, *Gulf Grows in Black-White Views of U.S. Justice System Bias*, GALLUP (Jul. 22, 2013), http://www.gallup.com/poll/163610/gulf-grows-black-white-views-justice-system-bias.aspx [https://perma.cc/PH38-8NZ8].

shootings of unarmed blacks in 2012 and beyond, most whites continued to deny discrimination exists in the justice system because they viewed the shootings as "isolated incidents," while most blacks viewed them as part of a "broader pattern."[8]

The purpose of this Essay is to review recent research by Peffley, Hurwitz, and Mondak that investigates both the sources and the consequences of the race gap in evaluations of the justice system. As we show below, black Americans' experience with the courts and police are far more negative than those of whites, and, not surprisingly, their negative experiences shape their more negative evaluations of discrimination in the justice system. We also show that the race gap in evaluations of the justice system has important consequences: it fuels the racial divide in support for punitive crime policies like the death penalty and reactions to potentially incendiary incidents of police brutality and racial profiling.

I. THE RACIAL DIVIDE IN PERSONAL EXPERIENCES

Personal experiences with legal authorities—the police and courts—have a profound effect on individuals' more general evaluations of the fairness of the justice system.[9] And due to a general tendency for negative experiences to carry more weight than positive ones,[10] the fact that black Americans are far more likely to report unfair or disrespectful treatment by the courts and police means that they are also more likely to generalize their negative experiences to evaluations of the wider justice system.[11] Figure 1 presents the results of a survey of blacks and whites in Washington State conducted in 2012 that extended an earlier nationally representative study of blacks and whites in 2001.[12] As in 2001 (not reported here), the 2012 survey shows clearly that blacks are far more likely to report negative encounters with the courts and police than whites.[13] In 2001, blacks in the United States were twice as likely to report being treated unfairly by the police because of

---

[8] Joanna Piacenza & Robert P. Jones, *"Isolated Incidents" or "Broader Pattern"? Deep Racial Divides on Police Killings of Black Men*, PRRI (Aug. 7, 2016), http://www.prri.org/spotlight/blacks-nearly-four-times-likely-say-police-mistreatment-major-problem-whites/ [https://perma.cc/WC7T-4CC4]; *see also* Newport, *supra* note 7.

[9] *See* Tom R. Tyler, *Justice Theory*, *in* 2 THE HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY 344, 344–59 (Paul A. M. Van Lange et al. eds., 2011).

[10] *See, e.g.*, Roy F. Baumeister, Ellen Bratslavsky, Catrin Finkenauer, and Kathleen D. Vohs, *Bad is Stronger than Good*, 5 REV. OF GEN. PSYCHOL. 323 (2001) (discussing the significant effects of negative events (such as trauma) versus positive events on one's mental wellbeing).

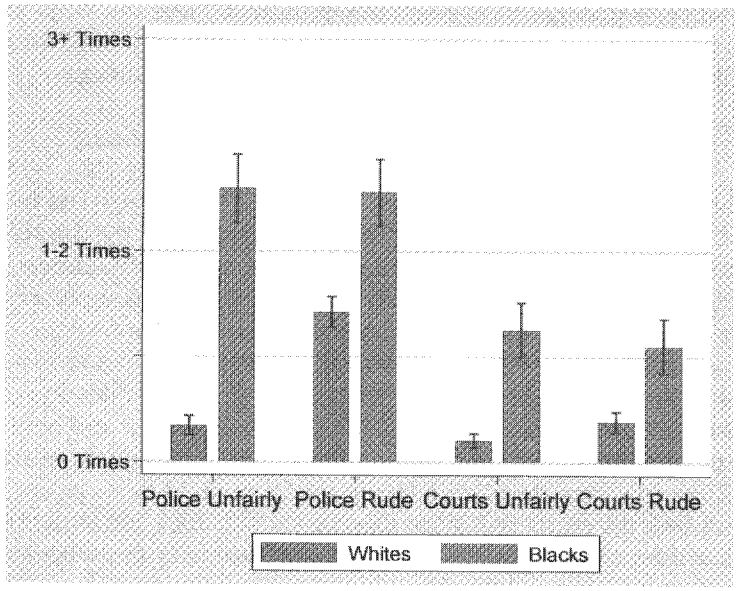
[11] MARK PEFFLEY & JOHN HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 31–43, 90–100 (Dennis Chong & James H. Kuklinksi eds., 2010).

[12] Mark Peffley et al., *Justice in Washington State Survey*, WASH. ST. MINORITY & JUST. COMMISSION 1, 5–6, 13 (June 2, 2014), http://www.courts.wa.gov/content/publicUpload/News/Justice%20in%20Washington%20Report.pdf [https://perma.cc/WL8C-ZN83].

[13] *Id.* at 1, 5–8.

their race than whites.[14] In the 2012 survey, we also found dramatic differences in the number of negative encounters with police and courts across race in Washington, although in this survey we asked respondents whether they had been treated disrespectfully as well as unfairly by the courts and police.[15] Interestingly, negative encounters with criminal courts were much less frequent than negative encounters with police for both blacks and whites.[16]

Figure 1. Average Number of Personal Negative Encounters with Police & Courts, by Race[17]



[14] Jon Hurwitz & Mark Peffley, Racial Polarization on Criminal Justice Issues: Sources and Political Consequences of Fairness Judgments 12 (2001) (unpublished manuscript), http://www.uky.edu/AS/PoliSci/Peffley/pdf/PeffleyHurwitzAPSAPaper_8-22-01_.PDF [https://perma.cc/A2RM-D37G].

[15] Peffley et al. *supra* note 12, at 5–8.

[16] *Id.* at 6–7. In addition, in other research, we show that because whites and blacks also rely on their vicarious experiences with racially homogeneous circles of acquaintances, because blacks primarily learn of the more negative experiences of other blacks, and whites of the more positive experiences of other whites, vicarious experiences, along with personal experiences, help widen racial disparities in views of the justice system. Jeffery J. Mondak, Jon Hurwitz, Mark Peffley, and Paul Testa, *The Vicarious Bases of Perceived Injustice*, AM. J. OF POL. SCI. (2017).

[17] To assess "Courts Unfairly" and "Courts Rude," respondents were asked, "'Some people have had encounters with the criminal courts (that deal with crimes such as house burglary and physical assault); others have not. How many times have you ever': [f]elt you were treated unfairly [or disrespectfully] by court officials [just because of your race or ethnic background]?" *Id.* at 5–6. Never (coded 0), 1–2 Times (coded 1), 3+ Times (coded 2)? *Cf.* Jeffery J. Mondak et al., *The Vicarious Bases of Perceived Injustice*, AM. J. POL. SCI. (forthcoming 2017) (manuscript at 5) (on file with author) (providing a similar scale for range of responses to how often a person was treated unfairly or disrespectfully by police); Peffley et al., *supra* note 3, at 9, 20.

The more important question, however, is whether people generalize their experiences to form more global evaluations of the criminal courts and police in the United States. In the Washington survey, we asked respondents to make general assessments of the courts by asking the following questions: 1) "[H]ow often would you say the courts generally treat all people with respect?" and 2) "How often do you think the courts make fair and impartial decisions based on the evidence made available to them?"[18] Both questions were measured on a scale from 0 ("Never") to 5 ("Always").[19] To assess respondents' views on the police, we asked similar questions about treating people with respect and the impartiality and fairness of police decision making.[20] After controlling for ideology, partisanship, and other demographic characteristics, we found that blacks and whites generalized their negative personal encounters with courts and the police to the overall justice system.[21] The impact of one's negative experiences, though, varied across race and legal authority.[22]

Figure 2, which displays the coefficients for the regressions described above, shows that, as might be expected, more negative general evaluations of United States criminal courts were based primarily on whether people reported negative experiences with the courts. Among whites, however, negative experiences with the police were even more important in shaping negative evaluations of the criminal courts.[23] Moreover, while experiences with the police shaped more global evaluations of the courts, experiences with the courts had no "spill over" impact on general evaluations of United States police.[24] Therefore, while white persons, more so than persons of other races, tended to "over-generalize" their experiences with police to the courts, a person's court experiences did not have a reciprocal influence on evaluations of police. This suggests that the courts exert limited control over the way people assess the fairness of the institution. The court's perceived legitimacy is also dependent on the frequency of one's negative encounters with the police.[25] Consequently, it is reasonable to conclude that criminal courts have a strong interest in not only preventing negative encounters with court personnel, but also in changing police practices that leave people feeling as if they were treated unfairly or disrespectfully.

---

[18] Peffley et al. *supra* note 12, at 7, 15.

[19] Mondak et al., *supra* note 17 (manuscript at 5).

[20] Peffley et al. *supra* note 12, at 7.

[21] *See id.* at 7–8, 20, 27–28 (discussing study findings on how personal experience affected one's characterization of courts and police); Peffley et al., *supra* note 3, at 7, 9–11, 20–21 (noting that experiences of unfair police treatment vary greatly across racial groups after controlling for idealogy, partisanship, and other demographic factors).

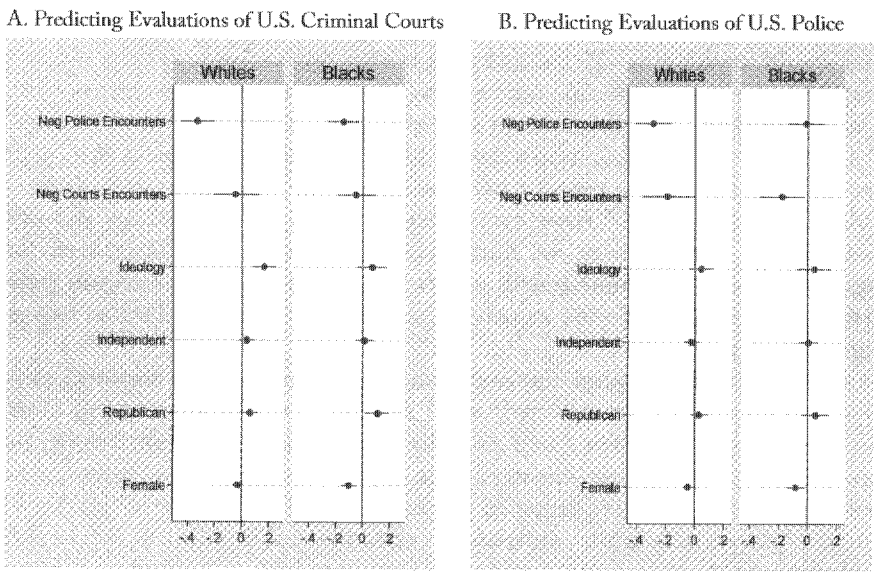
[22] *See* Peffley et al *supra* note 12, at 7–8, 27–28 (demonstrating that blacks were more likely than whites to be critical of courts and police, while all races reported more negative experiences with police than courts).

[23] *Id.* at 28, 34–35.

[24] *See id.* at 27–29, 34–35 (demonstrating that the study failed to show that one's experiences with the court affected one's perception of police).

[25] *Id.* at 28, 34–35.

Figure 2. Generalizing Personal Negative Encounters with the Courts and Police, by Race[26]



[26] The point estimates in the graphs correspond to ordinary least squares (OLS) regression coefficients with 95% confidence intervals. *Cf.* Mondak et al., *supra* note 17, at 7–9 (discussing use of OLS regression); Peffley et al., *supra* note 3, at 8–11 (discussing use of OLS and 95% confidence interval in a similar study). If the confidence interval touches the red reference line at 0, the regression coefficient is not statistically significant at the .05 level. The estimates are generated from regressions predicting more general assessments of criminal courts and police in the U.S. based on respondents' personal experiences with the courts and police (see Figure 1 for survey items), along with controls for ideological and partisan identification, gender, as well as other demographic characteristics that are suppressed in the figure (e.g., age, education). *See* Peffley et al. *supra* note 12, at 5–6, 13–15 (providing assessment of respondents personal encounters with courts and police and displaying results); *cf.* Peffley et al., *supra* note 3, at 9, 11 (regressing "[d]iscrimination and [d]ispositions scales on reports of [u]nfair [p]olice [t]reatment . . . as well as several control variables, including ideological and nominal partisan identification, and a set of standard demographic factors (including education, gender, income, age, and news interest). General evaluations of U.S. courts were based on an additive index of two items: (1) "Based on what you have heard or your own experience, how often would you say the courts generally treat all people with respect?" and (2) "How often you think the courts make fair and impartial decisions based on the evidence made available to them?", where Never = 1 and Always = 6. Peffley et al *supra* note 12, at 7, 7 n. 3, 15; *cf.* Peffley et al., *supra* note 3, at 8, 12 (discussing study using analogous additive models). General evaluations of U.S. police were based on similar items. Peffley et al. *supra* note 12, at 7, 7 n. 3, 15. All variables are recoded on a 0 to 1 scale to make the coefficients comparable within and across graphs. *Cf.* Peffley et al., *supra* note 3, at 8–9, 11, 21, 23 n. 17 (using 0 to 1 scale in an analogous study).

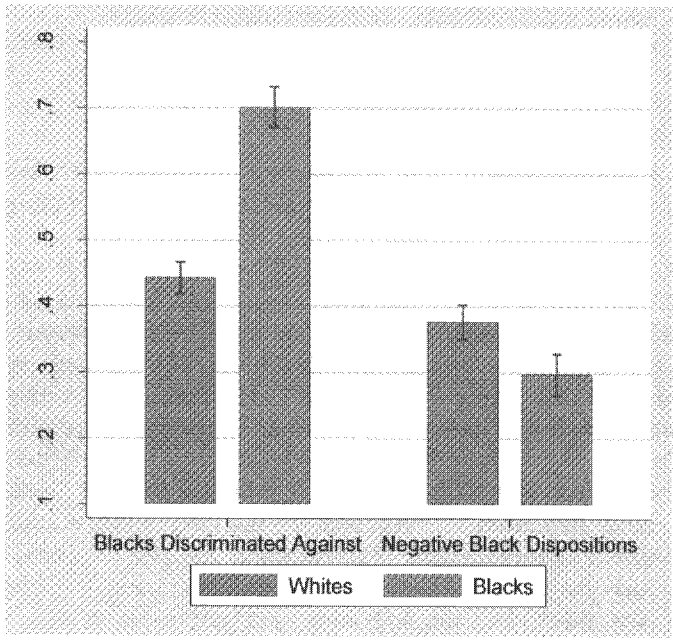
II. ATTRIBUTIONS OF RACIAL DISPARITIES IN PUNISHMENT

Other general beliefs and evaluations of the justice system also have important consequences. For example, in a recent study, Peffley, Hurwitz, and Mondak examine how race explains the large disparity in the way blacks and whites are treated by the criminal justice system in the United States and how each race's explanation of such disparities influences support for and against punitive crime control policies in America.[27] Specifically, respondents in the Washington state survey were read the question stem: "Statistics show that Blacks are more often arrested and sent to prison than are Whites."[28] Then, using a scale ranging from "None at all" (at point 1) to "A Great Deal" (point 4), respondents were asked to rate how likely certain statements were to account for the racial difference in arrests and prison sentences.[29] We included two internal or dispositional explanations, such as "Blacks are more aggressive by nature" and "Blacks are just more likely to commit crimes," and two external or systemic explanations, emphasizing the discrimination that blacks face from legal authorities, including "[t]he police are biased against Blacks" and "[t]he courts and justice system are stacked against Blacks and other minorities."[30] "We then formed two additive scales, labeled Blacks' Negative Dispositions and Discrimination Against Blacks by summing responses to each pair of external and internal attribution items."[31] Figure 3 shows that whites see much less discrimination and put more blame on blacks' dispositions than do black Americans.[32]

---

[27] *See* Peffley et al., *supra* note 3, at 3, 5.
[28] Peffley et al. *supra* note 12, at 10.
[29] *Id.* at 10, 10 n.6.
[30] *Id.* at 10–11; Peffley et al., *supra* note 3, at 8.
[31] Peffley et al., *supra* note 3, at 8.
[32] *Id.* at 9.

Figure 3. Average Ratings of Racial Attributions by Race[33]



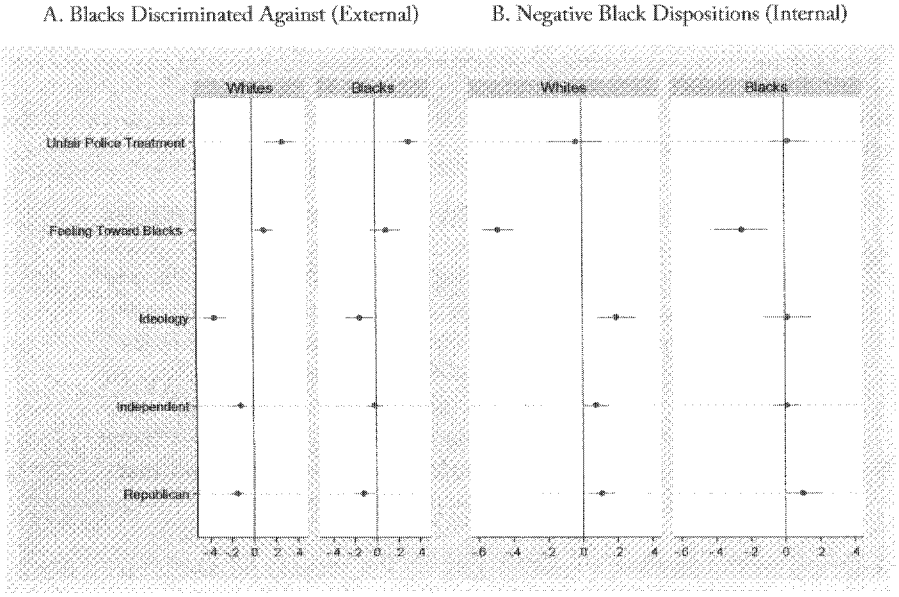
In Figure 4, we investigate the *sources* of the two scales, Blacks' Negative Dispositions and Discrimination Against Blacks. As might be expected, given that dispositional judgments focus on blacks, while judgments about discrimination focus more on judgments about the police and the courts, we found that attributions of discrimination are strongly tied to respondents' personal experiences of being treated unfairly by police, but not to negative feelings toward blacks.[34] By contrast, we found that attributions of blacks' dispositions are tied to feelings toward blacks, but not personal experiences with law enforcement.[35]

[33] *Id.* (noting Blacks Discriminated Against is based on an additive scale constructed from responses to two items ("[T]he police are biased against blacks," and "the courts and justice system are stacked against Blacks and other minorities?" recoded to range from 0 ("None at all" for both items") to 1 ("Great deal" for both items)) and Negative Black Dispositions is based on two items ("Blacks are just more likely to commit crimes?" and "Blacks are more aggressive by nature?") on the same 0 to 1 scale).

[34] *See* Peffley et al. *supra* note 12, at 28 (discussing study findings on how personal experience affected one's characterization of courts and police).

[35] *Id.*

Figure 4. Predicting Attributions of Racial Disparity in Punishment[36]



In the remaining portion of this essay, we report findings that use the attributions to predict people's support for the death penalty as well as arguments against it.[37] There is a long line of scholarship documenting persistent racial bias in the implementation of capital punishment.[38] The most striking disparity is that blacks are far more likely to be executed for killing whites than are whites who have killed whites.[39] Since 1976, less than 10% of all persons executed for interracial (black on white or white on black) murders were whites who killed blacks, while 90% were blacks who killed whites.[40] Disparities in executions and death row sentencing are far greater for blacks than whites.[41] For example, blacks comprise

[36] *See id.*, at 9–11 (noting that plots are OLS coefficients with 95% confidence intervals). All variables are coded on a 0 to 1 scale, where higher values indicate: greater attribution to Blacks Discriminated Against and Blacks' Negative Dispositions, reporting more personal encounters of Unfair Police Treatment, more conservative, Independent and Republican identification (Democratic omitted), warmer thermometer ratings of black Americans.

[37] *Id.* at 11–12.

[38] *See* Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1976–2013*, 3 POL., GROUPS, & IDENTITIES 209, 209 (2015).

[39] *Id.*

[40] *Id.* at 210.

[41] *Id.*

13% of the population but 42% of the current death row population, whereas whites are 62% of the population but only 42.34% of the death row population.[42]

To measure support for the death penalty, we conducted a survey experiment in the Washington survey similar to the one reported in Peffley and Hurwitz's 2010 book.[43] Respondents were randomly assigning to three argument conditions—a baseline (No Argument) condition where the respondent was simply asked the standard Gallup question:

> "Do you favor or oppose the death penalty for convicted murderers?" (reversed), or one of two argument conditions questioning the fairness of capital punishment, where the baseline question was preceded by either a *Racial Argument* ("Some people say that the death penalty is unfair because African Americans convicted of the same crimes as Whites are much more likely to be executed. What about you?") or a nonracial argument termed the *Innocent Argument* ("Some people say that the death penalty is unfair because too many innocent people are being executed. What about you?").[44]

Responses to the baseline condition give us the support for capital punishment usually reported by Gallup and other polling agencies. Responses to the Racial Argument condition indicate how support for the death penalty is affected by arguments against the death penalty based on racial justice. The Innocent condition allows us to compare responses to non-racial arguments against the fairness of the death penalty to those in the Racial Argument condition.

Figure 5 displays the percentage of blacks and whites who support the death penalty in the three conditions of the experiment. As can be seen in Figure 5, blacks and whites support the death penalty at about the same level in the baseline condition.[45] In both the Racial and Innocent Argument conditions, however, blacks move in the expected direction as they become less supportive of the death penalty when arguments are raised that question the fairness of the policy.[46] Whites, on the other hand, do not move at all in response to the Racial Argument, and become only slightly less supportive in the Innocent Argument condition.

---

[42] SONYA RASTOGI ET AL., CENSUS BRIEFS 3 (2010); DEBORAH FINS, DEATH ROW U.S.A.: A QUARTERLY REPORT BY THE CRIM. JUST. PROJECT OF THE NAACP LEGAL DEFENSE AND EDUC. FUND, INC. 1 (2016); D'Vera Cohn, *Future Immigration Will Change the Face of America by 2065*, PEW RES. CTR. (Oct. 5, 2015), http://www.pewresearch.org/fact-tank/2015/10/05/future-immigration-will-change-the-face-of-america-by-2065/ [https://perma.cc/5874-KD76].

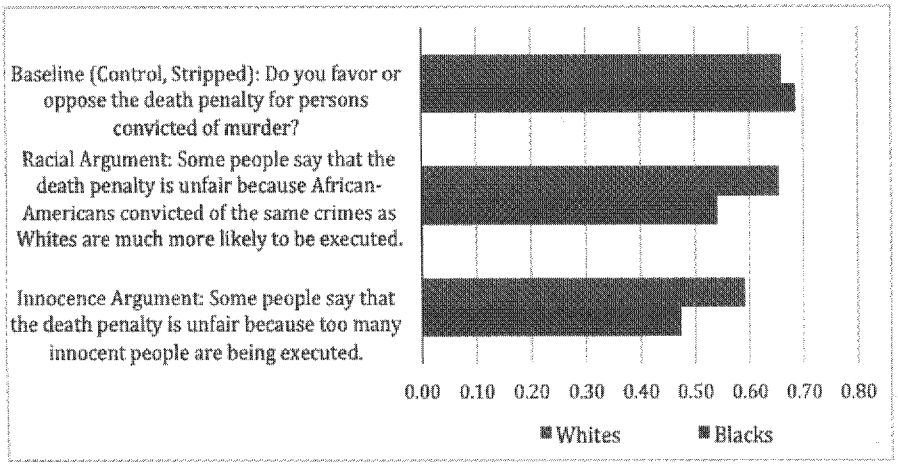
[43] *See* Peffley et al. *supra* note 12, at 23–24; *see generally* MARK PEFFLEY & JON HURWITZ, JUSTICE IN AMERICA: THE SEPARATE REALITIES OF BLACKS AND WHITES 151–160 (2010).

[44] *See* Peffley et al., *supra* note 3, manuscript at 12.

[45] *See id.* at 14, 21.

[46] *See id.* at 15.

Figure 5. Death Penalty Experiment. Proportion Favoring Death Penalty by Condition & Race[47]



The important question is: why are whites so steadfast in the face of arguments against the death penalty that emphasize racial justice? The answer to this question can be seen by regressing support for the death penalty (1 = favor, 0 = oppose) in the three conditions on the two racial attribution measures and various control measures. Figure 6 displays the predicted probabilities of favoring the death penalty across the Black Dispositions scale for white and black American respondents based on the six regressions (six regressions, 3 conditions for each race of respondent). By focusing on the gap in support for the death penalty between the baseline and the racial argument conditions in the graphs, we can see how individuals' placement on the Black Dispositions scale increases or decreases their support for the death penalty when confronted with an argument against the death penalty based on racial justice.[48] Among whites who blame blacks' dispositions for the greater punishment they receive in the justice system (at the far right end of the Dispositions scale), there is a clear tendency to respond to the racial argument against the death penalty by *increasing*, not decreasing, their support for the death penalty.[49] By contrast, among blacks, the largest gap between the baseline (no argument) and racial argument condition is at the other end of the black dispositions scale, where blacks who place little or no weight on blacks' dispositions in explaining racial disparities in punishment become far less likely to support the

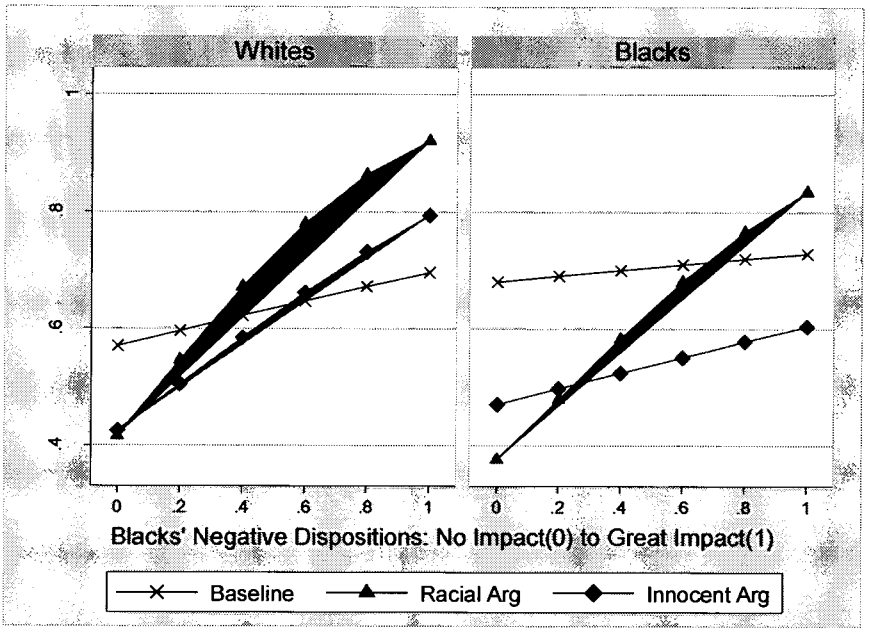
[47] *Id.* at 14 (noting the scale as Oppose = 0, Favor = 1. Percentage favoring death penalty = proportion * 100).

[48] *See id.* at 15.

[49] *See id.*

death penalty when given the racial argument compared with the baseline condition.[50]

Figure 6. Predicting Support for the Death Penalty From Attributions of Blacks' Dispositions, by Race[51]



CONCLUSION

Because blacks and whites have dramatically different personal encounters with the police and the criminal courts, there exists a huge gulf between the races in their general evaluations of justice in America. Racially polarized views of unequal justice and discrimination also exert a powerful impact on support for punitive policies designed to deal with crime in America. Because a majority of whites views the justice system as fair and color-blind and is more likely to view racial disparities in arrests and sentencing as being due to the more aggressive nature of blacks, whites express far more support than blacks for a whole raft of punitive anti-crime policies, including stop-and-frisk police practices, stiff, mandatory minimum prison sentencing, and, as reviewed here, the death penalty. Unfortunately, because more punitive crime policies tend to be directed at minorities and minority communities, the far more negative encounters that black Americans have with the police and

[50] *See id.*

[51] *See id.* (noting that predicted probabilities for death penalty support are based on logistic estimates from regressing death penalty support on experimental condition * dispositional attributions and various controls).

courts contribute to the "separate realities" that blacks and whites inhabit when it comes to their evaluations of whether the justice system is fair or discriminatory.

Racially disparate policies and racially polarized perceptions of justice undermine public safety. As Ghandnoosh points out, for example, '[r]acial minorities' perceptions of unfairness in the criminal justice system have dampened cooperation with police work and impeded criminal trials."[52] On the other hand, many whites' continuing denial of racial discrimination in the justice system makes it extremely difficult to seriously address problems of discrimination and restore minorities' flagging faith in the justice system.

To return to *Batson v. Kentucky*, blacks and whites do often differ strikingly in their perceptions of justice, and when black Americans are summarily dismissed from jury pools without proper justification, such a practice can only reinforce the separate and unequal realities of justice experienced by the races in America.[53]

[52] Nazgol Ghandnoosh, The Sentencing Project: Research and Advocacy for Reform, Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies 4 (2014).

[53] *See generally* Batson v. Kentucky, 476 U.S. 79 (1986).