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978-1-107-02297-3 - The Political Roots of Racial Tracking in American Criminal Justice

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Excerpt

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Racial Tracking

Two Law Enforcement Modes

Scholarly assessments of the black experience in American criminal justice tend to center on numerical disparities in arrests, sentencing, and incarceration. With few exceptions, little to no attention is devoted to the many ways in which the substantive elements of the average black law enforcement experience systematically diverge from that of whites.¹ The fact that blacks encounter the very worst treatment the system has to offer is most often the stuff of newspaper headlines. High-profile incidents such as those involving Rodney King, Amadou Diallo, the Scott sisters, Professor Henry Louis Gates, and Oscar Grant are occasions on which civil rights leaders, organizations, and demonstrators sound the alarm to expose what they see as a system rife with callousness and low regard for blacks and their civil liberties.² The infamous ordeals of the Rodney Kings and Oscar Grants of the world, in their view, are symptomatic of a much deeper and more widespread pathology – one that lurks behind the much talked about statistical overrepresentation. The rare emergence of such high-profile incidents, however, makes it difficult to assail the notion they are nothing more than isolated incidents or, at best, the kind that occur only in places like Los Angeles, Chicago, New York, and other hotbeds of policing controversy. The preoccupation with racial disparities thus continues to dominate the already limited discourse on experiential differences in the criminal process.³

National data help prove it is actually the “processing” differential that is the most persistent and pervasive feature of the black–white divide in criminal justice. These data show that for the average black citizen, arrestee, and convict, their modes of interface with criminal justice actors diverges in notable ways from their white counterparts’. Blacks can

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reasonably expect a markedly different brand of justice. More precisely, the chances they will receive harsher, more intrusive, more injurious, more demeaning, and generally disadvantageous treatment *during* their encounters with officials within the system far outweigh the chances they will receive leniency or special consideration. Virtually the opposite is true for whites. The version of justice they encounter is more consonant with law enforcement's "serve and protect" pledge. What scarce compassion the system parcels out is allocated in large measure to whites, not blacks. More so than differences in degree, then, it is differences in kind that chiefly distinguish the average black law experience from the white law experience. In fact, national data actually do not bear out certain of the more common accusations lodged against law enforcement, such as racial profiling, overzealous prosecution, starkly different sentencing, and the like, though such allegations have been proven in various cities and other localities. At the same time, there is much systematic evidence to corroborate the more egregious treatment-related allegations often made by or on behalf of blacks and thus ample reason to look beyond the problem of overrepresentation when weighing the significance of race in American criminal justice.

Whether concretized in terms of numerical imbalances or processing differences, racially disparate outcomes exist at every stage of the criminal process, including the arrest and investigation, prosecution, adjudication, and imprisonment stages. Inasmuch as racial differentiation is pervasive throughout the system, it is arguable there are two racially distinctive law enforcement modes – one that operates among blacks and another for whites. In this study, I refer to this phenomenon of dual processing and unevenness as "racial tracking."

In what follows, we examine a wide range of nationally representative data to demonstrate the existence of racial tracking in the American criminal justice system. Taken together, the selected indicators establish the system is fundamentally structured along racial lines. Much of the data are primary, quantitative, drawn from several national databases, and representative of state (not federal) criminal justice systems.⁴ They permit a concise yet uniquely in-depth and comprehensive perspective on the extent of divergence between the average law enforcement experience of black and white Americans on a national scale, to complement existing analyses of local and state law enforcement trends.⁵ We also learn from the data in this chapter that the pervasive racial dualism in law enforcement is not new but has existed for decades. A look at the broader social and economic impact of racial tracking is reserved for Chapter 2.

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The discussion here begins with a look at the arrest and investigation stage, where the actions and decisions of police officers are front and center. Next examined is the prosecution stage. Following this is a probe of the decisions rendered by state criminal courts, from pretrial through final disposition. Then, a look at the prison experience of black and white convicts. Last, we probe the long-standing history of racial tracking.

Officer Un-Friendly to Blacks: Race at the Arrest and Investigation Stage

The version of policing that the average black citizen encounters is one that, to an unusual degree, involves him being suspected of criminal activity, stopped for unarticulated reasons, subject to intrusive investigatory tactics, subject to excessive physical force, and at greater risk of being killed by a police officer. There is also the well-studied surer prospect of being arrested. Police officers' decisions have a ripple effect throughout the formal criminal process as well, insofar as they launch the official process of assigning criminal culpability by way of an arrest. However, their impact extends well beyond this. Because police officers' contact with citizens in general is more frequent than that of other actors in the criminal justice system, what officers do and how they behave also has wider and potentially deeper racial impacts than that of other law enforcement officials. In fact, the international human rights watch organization Amnesty International cited the United States in 1998 for human rights violations precisely because of repeated allegations of domestic police brutality, specifically police shootings, restraint techniques, and civil liberties abuses.⁶ Thus, for citizens, scholars, and critics alike, the actions of police officers are a critical window into how the overall criminal justice experience of blacks and whites compare to one another. We turn now to an analysis of statistical data on public-police contacts, traffic stops, police use of force, arrests, and arrest-related deaths in order to establish the existence of racial tracking at the police and investigation stage.

For black citizens, there is a greater chance their interactions with police officers stem from being viewed as suspects by the officers. The data in Table 1.1,⁷ from the Police-Public Contact Survey (PPCS) series administered by the U.S. Bureau of Justice Statistics, show that, compared to white citizens, the likelihood of face-to-face contact between a black citizen and an officer occurring because the officer suspects him of some kind of criminal activity is double that of whites'. Although being treated like a suspect right from the start is true of only 4.6 percent of

TABLE 1.1. *Citizens Who Had Face-to-Face Contact with Police, by Race, United States, 2005 (Percent within Race)*

Race of Citizen	Had Personal Contact (Number)	Reason for Contact					
		Police Initiated	Reported Crime	Police Assistance	Police Investigation	Suspected of Something	Traffic Stop (Driver)
Black	15.7 (4,377,317)	60.0	26.3	5.6	5.5	4.6	38.1
White	19.7 (31,664,301)	57.9	25.0	6.7	5.2	2.3	39.6
B-W Ratio	0.8	1.0	1.1	0.8	1.1	2.0	1.0
U.S.	18.5 (42,794,940)	58.8	25.1	6.4	5.4	2.6	40.1

blacks who reported at least one face-to-face contact, this percentage translates into more than 200,000 black citizens, hardly an insignificant number from a political and policy standpoint. In contrast, moreover, the chances of a black encounter with the police resulting from the officer providing help or assistance is slightly smaller than is the case for white encounters. Conversely, Table 1.1 also reveals blacks are as likely as whites to cooperate with police officers, either by way of reporting crime or taking part in a police investigation. This fact hints at a willingness on blacks’ part to be partners in the fight against crime, which should not be surprising given the prevalence of criminal victimization in black communities (something detailed in Chapter 6). However, the potential for mutual partnership between black communities and police officers is arguably minimized by the fact that the latter disproportionately regards the former as criminal.

Those aspects of the black law enforcement experience that are comparable to whites’ mostly pertain to the issue of frequency. According to the national data in Table 1.1, blacks’ rate of contact with the police is not substantially different, something that runs counter to allegations of over-policing. As well, the police are just as likely to initiate contact with a black person as they are a white person, an important fact given police-initiated contacts dominate all citizen–police contacts. On the whole, then, what we can definitively say about the national portrait of the black law enforcement experience in the United States is that it does not necessarily entail over-policing, but rather a far less helpful version of policing.

TABLE 1.2. Reason for Traffic Stop Contact, by Race, United States, 2005
(Percent within Race)

Race of Citizen (Number)	No Reason Given	Speeding	Vehicle Defect	Record Check	Stop Sign/ Light Violation	Illegal Turn/ Lane Change	Roadside Check (Dui)	Seatbelt Violation
Black (1,667,758)	4.2	45.2	12.8	14.6	8.1	5.5	1.0	3.9
White (12,539,103)	1.5	55.7	8.7	10.2	6.7	5.6	2.4	4.8
B-W Ratio	2.8	0.8	1.5	1.4	1.2	1.0	0.4	0.8
U.S. (17,160,770)	1.8	53.7	9.4	10.5	7.3	5.8	2.2	4.7

Note: PPCS data pertain to stopped drivers only.

Further separating the black law enforcement experience from whites’ is the unusual degree of seeming randomness in officers’ decision whether to zero in on individual black citizens. The uncertainty and unpredictability we often hear voiced by blacks is partly borne out by data on what is the second most common catalyst for citizen–police encounters, namely traffic stops (which account for roughly 40 percent of all such encounters). Presented in Table 1.2,⁸ traffic stop data unequivocally show that the likelihood of a black driver being stopped by a police officer for no reason at all is almost three times that of a white driver. Again here, the absolute percentage is small, only 4.2 percent. But, in real life this is the equivalent of more than 70,000 black drivers each year whose daily commute to work, home, or school is disrupted by a police officer for no apparent reason. This number takes on even greater significance when we consider what transpires during these stops.

The unsettling aspect of black drivers’ experience with police is that of what more often happens to them during the traffic stops. As with all contacts, less concerning here as well is the frequency with which officers conduct traffic stops involving blacks, in that there is only a 1 point difference in the percentage of black and white police encounters tied to traffic, according to Table 1.1. According to Table 1.2, there is also minimal difference in the likelihood of each group of drivers being stopped as a result of citations that are somewhat easier to dispute in court, such as stop sign/light violations, illegal turn/lane change, and seat belt violations. Citations based on objective indicia⁹ actually involve white drivers

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to a greater degree. At least according to national data, as far as traffic stops are concerned too, at the core of the “driving while black” phenomenon is not how often black drivers are stopped by the police. Rather, it is the officers’ disproportional use of heavy-handed and intrusive tactics during stops involving black drivers and passengers.

For black drivers, being pulled over by the police entails risks and consequences that extend far beyond a traffic violation citation. Russell-Brown recounts the story of the first black female astronaut’s encounter with police in her hometown, Nassau Bay, Texas. Mae Jemison was arrested, handcuffed, pushed face-down onto the pavement, and forced to remove her shoes and walk barefoot from the patrol car into the police station – all because of a traffic infraction.¹⁰ Not only Mae Jemison, but all black drivers can reasonably worry that the worst that could happen to them will happen to them. For starters, black drivers are twice as likely to be handcuffed or arrested during the course of a traffic stop. They are anywhere from two to three times more likely to have either their vehicle or their person searched by a police officer. Fully 6 percent of traffic stops involving black drivers result in the vehicle being searched and better than 5 percent involve a physical search of the driver himself. This translates into more than 100,000 searched vehicles and more than 90,000 black drivers who are physically searched and/or patted down by police officers. One might be inclined to make much of the fact that Table 1.3 shows the rate of consent for black drivers is also greater. Except that “consent” under these circumstances may be more aptly presumed the making of fear, pressure, or a desire to expedite the stop and avoid being detained for a period of time.¹¹

There is a measure of public humiliation that accompanies officers’ greater use of intrusive tactics against blacks. Traffic stops usually take place in full public view where others can see, unlike most other kinds of police-initiated contacts. Any moderately observant adult living in the United States could scarcely escape witnessing at least once in their lifetime the spectacle of black drivers and/or passengers sitting on the curb-side, squatting on the roadside, bent over the side or back of the car, or in handcuffs, while police officers search their personal belongings. For some black drivers, these searches also infringe on their civil liberties. As much is suggested by the data in Table 1.3,¹² which expose a gap between the number of black drivers who are subjected to a police search and the number that give their consent to such searches.

The harmful impact of the activities that occur during traffic stops involving black drivers are magnified still further by the fact that such

TABLE 1.3. *Police Actions During Traffic Stops, by Race, United States, 2005 (Percent within Race)*

Race of Citizen (Number)	No Action Taken	Verbal Warning	Written Warning	Traffic Ticket	Speeding Ticket	Arrested	Handcuffed
Black (1,667,758)	17.4	14.6	8.1	55.1	76.3	4.8	3.9
White (12,539,103)	13.4	19.1	9.3	56.1	69.8	2.2	1.9
B-W Ratio	1.3	0.8	0.9	1.0	1.1	2.2	2.1
U.S. (17,160,770)	13.3	18.1	8.7	57.3	43.1	2.5	2.2

Race of Citizen	Police Ask to Search Vehicle	Police Ask to Search Driver	Police Search Vehicle	Police Search Driver	Consent to Vehicle Search	Consent to Personal Search
Black (1,667,758)	4.6	3.6	6.1	5.4	4.8	3.8
White (12,539,103)	2.2	1.2	2.7	1.9	2.5	1.6
B-W Ratio	2.1	3.0	2.3	2.8	1.9	2.4
U.S. (17,160,770)	2.7	1.6	3.5	2.6	2.9	1.9

Note: PPCS data pertain to stopped drivers only.

stops occur under a cloud of uncertainty. A black person is not in a position to predict when or why a traffic stop will occur, at least not with the same degree of confidence as his white counterpart. The earlier discussion noted data in Table 1.2 that indicate blacks are three times more likely than whites to be stopped for no stated reason. Table 1.3 provides additional evidence on the random nature of black law enforcement encounters. It shows a noticeably higher percentage of traffic stops involving blacks result in no action at all being taken by police. Furthermore, although stopped black drivers (45.2 percent) are slightly less likely than whites (55.7 percent) to be stopped for speeding, they are slightly more likely (76.3 percent) to be ticketed for speeding as compared to whites (69.8 percent). Finally, the fact that government data show police officers are less likely to retrieve criminal evidence in searches of black drivers and passengers (3.3 percent), and substantially more likely to find incriminating evidence in searches of whites (14.5 percent),¹³ underscores the

TABLE 1.4. *Police Use of Force in Traffic and Non-Traffic Contacts, by Race, United States, 2005*

Race of Citizen	In Traffic-Related Contacts		In Non-Traffic Contacts	
	% Within Race (Number)	% Within Contacts	% Within Race (Number)	% Within Contacts
Black	1.2 (25,295)	19	6.2 (138,222)	34
White	0.5 (83,911)	62	1.3 (193,469)	48
B-W Ratio	2.4		4.8	
U.S.	0.6 (135,318)		2.0 (404,840)	

Note: PPCS data pertain to police use of force during respondent’s most recent contact.

conundrum blacks face in any effort to avoid such stops through law abidance alone.

Taken together, all of these findings related to traffic incidents – unexplained stops, no action taken, incongruent ticketing, and unfruitful searches – point to the conclusion the average black driver cannot exactly gauge whether, when, or why he or she will be added to the class of drivers stopped by the police, among other things.

To the higher level of uncertainty surrounding black citizens’ interface with police we can add also greater physical harm, including a higher rate of fatalities. Irrespective of whether they encounter officers while driving, walking, or standing, the use of police force against blacks is markedly higher than it is for whites. This is depicted in Table 1.4.¹⁴ In traffic-related contacts, the use of force against blacks is more than double that of whites. PPCS data also establish that, when adjudged against their share of the residential population in the United States, blacks are overrepresented among persons subject to police force. For non-traffic contacts, their share of police force is almost three times their share of the residential population. Finally, not shown in the table are PPCS force data that prove for the majority of respondents who reported the use of force in their most recent contact, actual physical force was used more often than other, verbal forms of force encompassed by the survey’s definition of force, such as shouting, cursing, or threatening.

These percentages translate into more than 25,500 black drivers whose experience with law enforcement is relatable to that of the infamous Rodney King incident. More generally, though a majority of blacks

TABLE 1.5. *Arrest-Related Deaths, by Race, 2003–2005*

Race of Citizen	Number of Ards	% Share Ards	% Share U.S. Population	% Share Arrests
Black	639	31.9	12.1	27.8
White	879	43.9	69.5	69.8

are not physically beaten and kicked by four police officers, as in the case of Rodney King, or shot nineteen times, as in the case of Amadou Diallo, or shot in the back while face-down on the ground, as in the case of Oscar Grant, the fact that there is a very large number of such victims within the black community who are is crucial. There are thousands of Rodney Kings, Amadou Diallos, and Oscar Grants whose experiences are not memorialized on video footage or national news media.

The disproportionate use of deadly force against blacks is a game-changing feature of the black law enforcement experience. When a black person is killed by a police officer, the ripple effects in the black community are more jolting, wider, deeper, and longer-lasting. Police killings of blacks are such a penetrative phenomenon that they are the stuff of popular culture and folklore in the black community, starting with the 1960s chart-topping single “Inner City Blues” by late R&B singer Marvin Gaye. The song contains an infamous reference to “trigger-happy policing.” It is a quip with a firm empirical foundation, in two ways. First, 93 percent of police homicides involve the use of a firearm. Second, blacks die while in the custody of law enforcement officials at a rate nearly double that of whites in custody.

We gain a firmer grasp of the relative odds of blacks versus whites dying while in the custody of law enforcement by examining data drawn from the most comprehensive of the three available databases on police homicides in the United States,¹⁵ namely the Bureau of Justice Statistics’ Deaths in Custody Reporting Program (DCRP). The DCRP maintains a record of all types of deaths that occur during the process of arrest. The data from these records, shown in Table 1.5,¹⁶ reflect considerable racial unevenness in arrest-related deaths (ARDs). The context of the killing does not matter as much as one might think, at least not in terms of whether they are officially deemed a criminal suspect. Blacks’ share of ARDs (32 percent) exceeds their share of persons arrested (27.8 percent). It exceeds even more so their share of the U.S. residential population (12 percent). Meanwhile, a very different story unfolds for whites, whose

TABLE 1.6. *Arrest-Related Death Rate, by Cause of Death, Race, 2003–2005 (Per 100,000 Arrests)*

Race of Citizen	Homicide	Intoxication	Suicide	Accident	Illness	Other
Black	11.7	3.6	1.2	2.1	1.5	2.5
White	7.0	1.2	1.9	0.7	0.7	0.9
B-W Ratio	1.7	3.0	0.6	3.0	2.1	2.8

share of ARDs (43.9 percent) is more than 25 percent lower than their share of persons arrested (69.8 percent). Finally, the ARD rate of roughly 22.6 for every 100,000 black U.S. residents is almost twice that (12.4 ARD) for whites.

The observed racial unevenness in arrest-related deaths maintains irrespective of the cause of death. No matter the method, blacks emerge as the most prone to die in law enforcement custody, according to Table 1.6.¹⁷ They face an increased chance of dying due to intoxication, accident, illness, and even unspecified causes. Police homicide in particular is the cause of black ARDs at a rate nearly double that of whites. Viewed from a practical standpoint, the ARD data for the three-year 2003–2005 period showing 639 black deaths essentially mean that every other day, somewhere in America, a black person dies during an encounter with law enforcement. As we learned is true of traffic stops, there is a noteworthy “X” factor that figures into the picture of arrest-related deaths as well. Approximately one out of every ten black ARDs is classified under “other.”

So, much like the data presented earlier, which indicate black drivers are more frequently stopped by law enforcement for no apparent reason, these data show they also die in the custody of law enforcement for no apparent reason as well.

Finally, the fact that black citizens are officially converted into criminal defendants by police officers at rates far greater than those of whites is so well known as to barely require elaboration. Even so, to lay out more fully here the racial divide in criminal justice and set the stage for the rest of the book, it is worth establishing the unevenness in arrest rates maintains no matter the angle from which it is viewed. Data from the Federal Bureau of Investigation’s Uniform Crime Reporting Program (UCR), shown in Table 1.7,¹⁸ reveal that no matter where they are – in the city or the suburbs, in metropolitan or non-metropolitan areas – the same story emerges. Whether young or old, being arrested by a police officer is