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

Nina M. Moore

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## The Political Roots of Racial Tracking in American Criminal Justice

The race problem in our criminal justice system persists because we enable it. The tendency of liberals to point a finger at law enforcement, racial conservatives, the War on Drugs, is misguided. Black as well as white voters, Democrat as much as Republican lawmakers, President Obama as much as Reagan, both Congress and the Supreme Court alike...all are implicated. We all are “The Man.”

Whether the problem is defined in terms of blacks’ overrepresentation in prisons or in terms of the disproportional use of deadly police force against blacks, not enough of us demand that something be done. The absence of public outrage stems from the belief that blacks are prone to violence, that there is a serious violent crime problem in the country and that, as a result, racial unevenness in criminal law enforcement is understandable, even if regrettable.

Mass media plays a key role in this fictional narrative, despite mountains of social science research to the contrary. Ultimately, however, politicians continually leverage it for electoral gain through anti-crime policies and strategies that scarcely promote public safety, yet virtually debilitate large portions of black America. The *Political Roots of Racial Tracking in American Criminal Justice* is the story of how the race problem in criminal justice is continually enabled in the national crime policy process, and why.

Nina M. Moore is a political science professor at Colgate University. She was recently named in The Princeton Review’s *The Best 300 Professors* in the United States. Her research, teaching, and writing focus on racial inequality, public policy, and governance processes. Moore was appointed by Governor David Patterson to a four-year term on the New York State Commission on Judicial Conduct (2009–2013) and by the New York State Senate to the Advisory Council on Underage Alcohol Consumption and Youth Substance Abuse (2010–present). She is the author of *Governing Race: Policy, Process, and the Politics of Race*.

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NINA M. MOORE

*Colgate University*



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*For my parents,  
Charles L. and Nora L. Moore*

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## Preface

In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive to wish for a government which will protect all parties, the weaker as well as the more powerful.

James Madison  
*Federalist No. 51*

The race problem in the American criminal justice system endures because the public and policymakers enable it. Racial justice advocates' tendency to point the finger of blame chiefly at police officers, prosecutors, and criminal court judges is, therefore, misguided. The same can be said of the conventional wisdom that traces the root of the problem to racist politicians, racial conservatives, Republicans, Presidents Reagan and Bush, and the like. Regardless of whether we define the problem as having to do with unequal treatment in the process or with the gross overrepresentation of minorities in the process, the bottom line is that very few American citizens and policymakers care enough to mobilize around it. It can be argued that the disinterest is not entirely unfounded, even if its foundation is faulty. Considering the steady flow of informational cues in the public arena about blacks and crime, there is little wonder why most voters and lawmakers are convinced the current state of affairs is reasonable, even if regrettable. The story told in this book is the story of

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how racial concerns are consistently ignored in the national crime policy process, and why.

Seldom do we consider at length the part played by the body politic as a whole – that is, the combined influence of average citizens, courts, lawmakers, lobbyists, academics, and mass media. Instead, the black law enforcement experience is typically examined by way of a legal, sociological, or criminological lens. The usual take-away from these angles is that discriminatory law enforcement is to blame, or that criminal law is structured in ways that disproportionately ensnare minorities, or that blacks commit more crime due to structural and cultural causes. This book endeavors to extend the scope of the study of race and criminal justice to include a systematic probe of the national political context within which the intersection of race, crime, and criminal justice is negotiated. From a political science perspective, the necessity of probing the political context of a public policy problem is a virtual given. That is where we usually find the primary reason some policy problems are allowed to persist while others are redressed. Logically, then, that is where we should also expect to learn of the national political forces that help sustain the racial status quo in American criminal justice. Thankfully, the public policy process literature provides extremely helpful insights.

It is important that we come to grips with the full range of forces that enable racial tracking in criminal justice, given that the problem has broader implications not only for the black community but for the country as a whole. The costs to blacks are incalculable in economic, social, political, psychological, and emotional terms. How does one even concretize, let alone tally, the entire range of losses that stem from the fact that criminal law is disproportionately enforced against blacks and that the treatment that blacks receive in the criminal process is devoid of the leniency and consideration accorded their white counterparts? Add to this the many decades the problem has persisted, the many ways in which it has manifested itself, and the many lives affected directly and indirectly, and it becomes apparent that the issue figures rather largely in the fabric of black life in the United States.

Racially uneven enforcement of criminal law is important also because it gives rise to fundamental questions about democratic process and minority interests. What are the conditions under which minority concerns will be advanced or protected in a political system based on majority rule? What are the most effective political strategies for securing policy change that improves the lot of disadvantaged racial minorities in a democratic setting? What can be expected when minority policy interests are, or at

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least are perceived to be, in conflict with those of the majority? It is questionable whether a democratic society founded on principles of liberty and equality can legitimately claim to be so when its greatest power – the power to punish, imprison, and exterminate – is used in ways that chiefly debilitate already marginalized minority communities on a continual and widespread basis. This is precisely why striking a balance between minority interests and majority interests lay at the heart of the Founders' plan for a limited constitutional democracy. This balancing of interests was of utmost concern to the father of the U.S. Constitution, James Madison, in his classic statements on American democratic governance in *Federalist Nos. 10* and *51*.

Our collective responsibility to discover how best to achieve such balance – in this case, how to maintain “law and order” without crippling the black community in the process – inheres regardless of the proximal cause(s) of racially disparate outcomes. If the problem stems partly from excessive black criminality brought on by socioeconomic disadvantage, it is no less of a problem in that millions of young lives are destroyed before they begin. If racially discriminatory enforcement plays but a minuscule role, its relevance to any degree means the life course of potentially thousands of citizens is negatively impacted due, at least partly, to the color of their skin. The mere fact that minority groups are disproportionately the aggrieved in police brutality complaints, yet jails and prisons are mostly filled with these same groups, speaks volumes about both the perception and the reality of “liberty and justice for all” in the United States. For these reasons and more, discovering the political pathway to a more evenhanded approach to criminal law enforcement is as much a matter of protecting treasured American ideals as it is one of improving the plight of blacks in the criminal justice system.

This book contends that a critical first step toward fully understanding racial tracking is to grasp its political roots. It presents a two-part research analysis that carefully highlights, first, the extent and nature of racial differences in American criminal justice and, second, the national political undercurrents that help sustain it. This book undertakes a systematic examination of a wide range of mostly primary quantitative and qualitative data stretching across several decades. The analysis advances two basic conclusions. The first is that there are two racially distinct modes of criminal law enforcement in the United States: one white, one black. Meaning, the manner in which law enforcement officials interface with black citizens differs in striking ways from that with similarly situated whites. The distinctive nature of the black law enforcement experience

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consists of much more than the numerical imbalance in traffic stops, arrests, sentencing, and imprisonment that often dominates scholarly and popular discussions of race and policing. On average, when black citizens (including those never arrested) encounter law enforcement, they can expect to receive more intrusive, physically harmful, and unsympathetic treatment than would white citizens. A key point of this book, then, pertains to the many ways in which the *nature* of the black law enforcement experience departs from that of whites with respect to everything from initial contact with police officers, to plea negotiations with prosecutors, to pretrial criminal court decisions, to the behind bars prison experience, and more. It documents a form of racial tracking within the American criminal justice system whereby one track is reserved mostly for whites and a separate track for blacks.

The second, more central, argument of the book is that the American public and policymakers play a pivotal role in fueling this dualism in law enforcement. Without their tacit consent, its proximate structural causes would have been dismantled or at least seriously tackled long ago. The handful of lawmakers who champion the cause of criminal justice reform along racial lines have yet to muster the political support and resources needed to score a transformative legislative victory. They have not done so because Americans – black and white alike – are unconvinced racial tracking should be a top criminal justice policy priority. Their stance is not entirely attributable to a lack of clarity as to what the underlying causes are or whether the problem is amenable to public policy reform. Scholars have supplied massive empirical insight into the problem and ample reason for the public to believe it is fixable. The public and policymakers' relative indifference is partly fostered, instead, by a scripted message transmitted by mass media about black criminality. The message supplies compelling reasons for the public and policymakers to conclude that racially uneven criminal justice outcomes are not a fundamental public policy concern, and most certainly not as concerning as the need to fight crime. Helping make the message that much more palatable is the public's already ingrained predisposition toward individualist explanations over and above structural determinism.

It is my sincere hope that this book, together with existing works, helps generate and sustain a serious public dialogue about the considerable role mainstay national politics play in continually enabling racial tracking in American criminal justice. Unfortunately, space and time limitations make it impossible to address every important question on the subject; so, necessarily, more than a few go unanswered. Not taken



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up here is the law enforcement experience of other marginalized groups in the United States besides blacks, particularly those that other studies have shown also to diverge substantially from whites'. Differences along the lines of ethnicity, immigration status, religion, and sexual orientation also exist; sometimes one form of group disadvantage is compounded by another. The fact that Latinos constitute the largest ethnic minority in the United States as of the 2000 census makes a comprehensive analysis of the national political backdrop of their law enforcement experience indispensable to a full understanding of race-ethnicity, criminal justice, and politics in the United States. Remarkably few policing incidents in recent years involving individual Latino suspects and arrestees have dominated national headlines, let alone spurred federal legislative action or wide-scale public reaction. And, when there is a rash of controversy surrounding treatment of Latinos by law enforcement officials, the issue is often conflated with immigration politics and only loosely connected to the embedded tension between minority status and criminal law enforcement. Hopefully, this book will contribute in some way to the vibrant current of literature on the Latino law enforcement experience. It uses the black law enforcement experience as a basis for developing an integrative theoretical framework, which helps explain the dynamic interplay between identity and national trends in judicial, legislative, partisan, interest group, and voters' crime policy positioning.

Given that the chief aim of this book is to explore at length the political factors that sustain racial tracking in criminal justice, it does not join the longtime debate about the proximate causes that generate racial disproportionality in criminal justice. A fairly exhaustive review of the mainstream theories of racial disparity in criminal justice that have been put forth over the years is presented in Chapter 8, but this discussion is offered solely for the purpose of grounding the book's claims about the wealth of expert knowledge available on the subject and, more importantly, the intellectual wherewithal for the public and policymakers to act. No attempt is made here to settle the decades-old dispute as to whether police officers and other law enforcement agents engage in deliberate discrimination, whether the system is designed to entrap the poor and minorities, whether blacks commit more crime, whether structural or cultural factors are determinative, and so on. The sheer complexity of the causation question precludes its resolution in the space of a single work, and it is complicated further by the fact that existing studies are not mutually exclusive of one another. What the review in Chapter 8 does assert, nonetheless, is that within and across the vast

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literature on immediate causes, there is substantial evidence that validates macro-context theories of racial differences in criminal justice. Notwithstanding particularized scholarly disagreements over which societal factors matter most, there is a meeting of minds around the basic idea that they matter.

Rather than choose from among the many well-grounded macro-level theories of racial unevenness in criminal justice or endeavor to disprove any one of them, this study proceeds with the understanding they all have some credence. The underlying premise of this study is this: whatever the immediate institutional and structural factors that account for blacks' overrepresentation and differential treatment within the criminal justice process, all such factors are amenable to policy reform. Some more readily than others. Accordingly, this book takes up the next logical line of inquiry, which to date remains largely uncharted territory. It asks: Why the lack of policy reform in this area? Why so little political attention to the societal forces that enable racial unevenness in law enforcement? More precisely, what part do voters, lawmakers, and interest groups play in aiding and abetting racial tracking and its underlying drivers? To sum up, chiefly at issue in the pages to follow is the extent to which national politics are as much a piece of the puzzlement of race and criminal justice as are the remaining forces ably identified by scholars across the disciplines.

The book is divided into three parts, comprising eight chapters. The first part is composed of two chapters. The opening chapter presents a systematic descriptive analysis of what I term "racial tracking" in the criminal justice system. The term is intended to convey the fact that blacks are not only disproportionately entangled in the criminal process but are also subject to a less lenient form of criminal processing. Chapter 1 argues that in order to adequately comprehend the role of race in American criminal justice, we have to gauge both aspects of this duality. Blacks are more likely to be arrested, convicted, and sentenced to prison, *and* blacks are more likely to be on the receiving end of harsh, heavy-handed, and disadvantageous treatment during their encounters with law enforcement, compared to whites. In short, the average black citizen more often experiences the worst criminal law enforcement has to offer, including a sizable number who are never arrested, let alone found guilty of a criminal act. Thus, Chapter 1 establishes the fact that there are two racially distinct modes of law enforcement – one black, one white.

Qualitative and quantitative distinctions in the black law enforcement experience are evident at each of the major stages of the process, namely

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the police and investigation stage, the prosecution stage, the court stage, and the prison stage. (The broader societal impacts of these distinctions are taken up later in the book.) A range of nationally representative statistical data are used in Chapter 1 to construct a concise yet comprehensive profile of racial tracking. Much of the data are primary and drawn from several national databases. They permit a probe of more than 100 indicators of black and white interface with criminal justice, from the initial point of contact up to and including the behind-bars experience. Among the data sources chiefly relied on are Bureau of Justice Statistics databases and reports, the *Uniform Crime Reports*, the National Crime Victimization Survey, *Sourcebook of Criminal Justice Statistics*, National Association for the Advancement of Colored People (NAACP) reports, U.S. Civil Rights Commission reports, and several other government and non-government sources.

A layout of the policy process theory offered in this book to help explain racial tracking is in Chapter 2, where a delineation of its broader public policy impact is also found. Chapter 2 also contains an introductory overview of how the theory is applied in the remaining chapters, along with details on the analytic focus, data, and methodology of the analyses in Chapters 3 through 8. The second part of the book focuses on the institutional behaviors and policies that help sustain racial tracking. Chapter 3 considers the role of U.S. Supreme Court rulings on race and law enforcement from 1932 to 2005. Chapters 4 and 5 take us inside Congress. A detailed look at the substance and fate of the racial justice policy agenda from 1988 to 2012 is provided in Chapter 4. Chapter 5 examines modern crime laws enacted between 1968 and 1994, the demise of racial justice in the context of those proceedings, the impact of these policies on the racial divide in criminal justice, and the political motives driving Congressional adoption of these mainstay laws.

With special attention to the role of political parties, public opinion, scholarly research, mass media, and ideological traditions, the third part probes the political roots of the institutional responses examined in the second part. Chapter 6 highlights the partisan politics of race, crime, and criminal justice from 1968 to 2012. National public opinion and the degree to which it is conducive to racialized criminal justice are analyzed in Chapter 7. The discussion in Chapter 8 presents a relatively comprehensive cross-disciplinary review of scholarly studies put forth to explain racial disparities in criminal justice, media treatment of this expert knowledge, and how the American public's conception of individualism effectively mediates (and trumps) both.

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This book has been several years in the making and could not have reached the finish line without the help of many, more than I can list by name here. Any mistakes, misfires, or shortcomings in its pages are entirely my own. Funding from an institutional grant of the Mellon Foundation supported the fieldwork portion of the study. The Colgate University Faculty Research Council supplied monies for development and administration of the original national surveys used in this study. I am indebted to the legislative staff, attorneys, civilian review board members, and law enforcement officials who took time out of their busy schedules to meet with me, exchange e-mails, or send materials. Christine Demetros and Lydia Turnipseed of Syracuse University Law School were a great help during my search for hard-to-find court documents. Paige Harrison of the Bureau of Justice Statistics pointed me in the right direction for locating various prison data sources. I am enormously grateful also for the indispensable help of several student research assistants. Elise Aronson assisted with several parts of the project. At various junctures, the project benefited also from the excellent efforts of Li Zhou, Calla Yee, Carly Ackerman, Steffy Parver, Kathleen Shaughnessy, Michelle Cohen, and Samuel Flood.

During the early stages of the work, my thinking was sharpened enormously by the critical feedback of fellow panelists at the Midwest Political Science Association 2010 Annual Meeting and also Lani Guinier on the courts chapter. Michael Tonry and my ever-supportive colleague in the Political Science Department at Colgate University, Michael Johnston, were kind enough to chime in on the overarching message of the book. Their seasoned advice helped me develop a clearer framework and pitch for the book proposal. Michael Hayes took the time to provide an excellent preliminary lay of the land of the policy process literature. Also appreciated are the feedback comments of anonymous readers for sample chapters. My participation for a number of years in the hearings and deliberations of the New York State Judicial Conduct Commission afforded me a perspective on the inner workings of state courts and on judicial decision making that I could never have gained through reliance on academic research methods alone. To the following I am indebted for their critical feedback on select chapters: Tawanna Brown, Agber Dimah, Debra Earl, and Linda Upshaw.

A very special thank you is owed to my editor at Cambridge University Press, Robert Dreesen, who encouraged me to focus on producing my best. His supportive words eased my anxiety during the final phase of the writing process. For me, they were also a license to say what needed

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to be said in the book, and how it needed to be said. I sincerely hope he does not regret reassuring me that how long or how lengthy the project proved to be was not all that mattered. On the personal front, I have been blessed with parents, sisters, and brothers who supply a steady flow of good old-fashioned common sense. Sometimes without knowing it, they reminded me of the wholesomeness of family and good people at precisely those times when the research and writing for this book shined an almost blinding spotlight on all that remains undone in this policy sphere. I dedicate this work to my parents, Charles and Nora Moore, the two most conscientious people I will ever know. Finally, Dennis was always at-the-ready with a healthy dose of laughter, provocative questions, and philosophical musings. He is the best son in the universe.

The audience will, hopefully, find the discussion and analysis in this book are grounded in a firm empirical foundation, but I concede it is not a purely academic exercise for me. My having lived in the largest housing project in the United States during my teenage years undoubtedly influenced my thinking about race, crime, and justice. After spending one night in one of the twenty-eight sixteen-story concrete buildings that composed the Robert Taylor Homes, then-U.S. Housing and Urban Development Secretary Henry Cisneros declared Chicago public housing likely the most violent in the country.<sup>1</sup> William Julius Wilson used the Robert Taylor Homes in his groundbreaking study of the urban underclass to illustrate the growing problems of social dislocation in the inner city. In *The Truly Disadvantaged*, Wilson observed that in 1983, “only a little more than 0.5% of Chicago’s more than 3 million people lived in the Robert Taylor Homes”; however, “11 percent of the city’s murders, 9 percent of its rapes, and 10 percent of its aggravated assaults were committed in the project.”<sup>2</sup>

One cannot come of age under such severe circumstances and settle on a reductionist perspective on race and criminal justice. A black-versus-white paradigm will not do, and neither will an us-versus-“the man” perspective or any other version of us-versus-them. “Project kids,” as we were called, grow up as part of a multi-tiered minority. We were a minority (black), within a minority (segregated by race: 99.99 percent black), within a minority (poor), within a minority (mired in concentrated poverty). There was still yet another layer of minority identity for me beyond these, as my family was a two-parent, devoutly religious household in a sea of so-called broken homes, my father gainfully employed, and our tenancy shorter than most. As to the overall Robert Taylor community, we lived quite literally at the intersection of race, crime, and the American

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version of justice during the 1980s. The greater visibility of drug use and trafficking, the rapid emergence of violent splinter gangs, and the launch of the national War on Drugs all converged on our small section of the city like a perfect storm during the 1980s. And as with any perfect storm, those at the center were subject to multiple cross-pressures.

On the one hand, I experienced up close and personal my friends being forced to submit to random police pat-downs and searches and – in full view of the public – pull down their pants or spread-eagle on the concrete ground. Several years after my family's exodus came the police sweeps proposed by a Democratic president and coordinated by Chicago Housing Authority police; Chicago city police; Illinois state police; the Federal Bureau of Investigation; the Drug Enforcement Administration; the Bureau of Alcohol, Tobacco, and Firearms; and the U.S. Marshals. The sweeps subjected entire households to unannounced, warrantless police searches, during which residents were forced to remain seated and still in their living rooms while the police rifled through their bedrooms and personal belongings in hopes of finding criminal evidence. Widespread arrests for petty offenses were typically all that resulted. None of the humiliating dragnets made so much as a dent in the infamously high violent crime rate in the area. They did, however, manage to fortify the wedge between residents and law enforcement officials – black and white officials alike.

Just as impactful as my firsthand observations of police excess and ineffectiveness was having experienced the devastating loss of a childhood friend to violent crime. Viewed from a strictly personal vantage point, it is the kind of experience from which one never fully recovers. From an analytical perspective, the murder of my friend Alfreda Creekmore symbolized many of the recurring themes that preoccupy studies of race, crime, and justice. She was brutally raped and beaten to death with a steel pipe, virtually beyond recognition. Freda, the victim, was young, gifted, and black. Her assailant, Michael Madden, was also black and was deemed a serial offender, according to court papers.<sup>3</sup> His pattern of criminal activity was known beforehand to local police and to his victims but not published to the community at large until after the fact. News of Freda's brutal murder occupied all of a few sentences in local newspapers. There were no marches, demonstrations, or name-brand civil rights leaders demanding anything, neither in regard to the perpetrator nor the police. Following seventeen hours of interrogation and forced injection of a tranquilizer used to treat psychosis, police obtained a confession from Madden, a conviction, and a forty-five-year

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sentence. Madden's appeal alleging Fifth and Sixth Amendment violations was eventually rejected.

In the wake of my friend Freda's murder and Madden's conviction, things returned to abnormal. Violent crime in the area continued on course. So did the intensity of intrusive but scarcely effective policing. And so did the widespread arrests and, eventually, mass prison commitments. In time, this vicious cycle reached the point where the only viable solution local, state, and federal policymakers could fathom was to completely demolish the Robert Taylor Homes projects and, in the process, dismantle what community had managed to survive more than thirty years in the midst of it all. Looking back, there is no question in my mind that we were all complicit. We all played a role in perpetuating the vicious cycle, if only by virtue of our failure to mobilize and actively demand meaningful change. It is my belief that, as a country, we all continue to play much the same role, with much the same dire consequences, but on a much wider scale. My personal and professional goal in writing this book is to help shed light on what we all bring to the table, to expose our collective obligation to do more, and to bring into sharper focus why we have not.