

The Color of Crime

Second Edition

Katheryn Russell-Brown



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Introduction

In the heart of any individual, family, community or society, memory is of fundamental importance. It is the fabric of identity. At the heart of every oppressive tool developed by the apartheid regime was a determination to control, distort, weaken, even erase people's memories. . . . The struggle against apartheid can be typified as the pitting of remembering against forgetting.

—Nelson Mandela¹

Memory is a funny thing. We like to believe that our memories are an accurate reflection of the way things were. When it comes to historical memory, however, the truth of the matter is often fleeting, distorted, and incomplete. As it turns out, to tell the truth about the past is not so easy a task. Our collective memories are clouded in myths, in silences, and with a stubborn insistence to put on a happy face.

On issues involving race and crime, we consistently wring our hands, point fingers, and cover our eyes. Whether it is racial profiling, capital punishment, police brutality, rising incarceration rates, Barry Bonds, O.J. Simpson, or racial hoaxes, as a society, we are loathe to invoke the country's racial record. Our ever-ready attempts to run interference between the past and present reduce our racial history to a disembodied mass of curious data. The United States' racial history and its impact on the justice system, however, do not go away simply because we ignore them. The proverbial tree that falls in the forest while no one is present does make a sound—a loud, crushing one. Luckily there are many people who seek to give history its due weight in analyses of contemporary conditions. Count me in.

Ten years have passed since I wrote the first edition of *The Color of Crime*. I am pleased that I have had the opportunity to continue this research in the form of a second edition. Each of the chapters has been

updated and rewritten. For the chapter on racial hoaxes (the most popular one), I have included data on twenty-five new hoax cases, raising the total number to ninety-two. There are also two brand new chapters. One examines how the deviance associated with Black skin “bleeds” into other areas, including the images associated with certain names (e.g., “Black-sounding” names) and accents and how all of this is directly tied to racial disproportionality in the criminal justice system. The other new chapter makes the case for race and crime literacy. Two appendices are included. Appendix A reprints the Traffic Stops Statistics Study Act (proposed congressional legislation that would require police to gather race data at each traffic stop), and appendix B offers a brief summary of each racial hoax case.

Issues of race and justice persist. The iceberg’s tip includes cases such as the Jena Six, the Duke lacrosse Team, Amadou Diallo, Sean Bell, James Byrd, and the aftermath of Hurricane Katrina. The *criminalblackman* is still alive. Curator Thelma Golden has wryly observed that the African American male is “one of the greatest inventions of the twentieth century.”² Barry Bonds and Michael Vick remind us that Black men continue to be the public face of deviance. O. J. Simpson returned to the front pages in 2007, and once again the media went O. J. wild. Because race issues continue to be portrayed in hues of Black and White, this book focuses on African Americans.

For many years, academics have pushed to move race analyses beyond the well-entrenched Black-White dichotomy. Part of the difficulty in making assessments more inclusive is that groups of color cannot be accurately discussed as a single entity and then compared with Whites. Each racial group has had a unique experience with the American criminal justice system. For instance, Native Americans, from their early encounters with Whites, had their land stolen and were stripped of their language and lineage. A complex and contorted tripart legal system exists to adjudicate Indian legal affairs. In contemporary times, American Indians, who make up less than 1 percent of the U.S. population, have the highest rates of victimization. Although there are some common themes of racial oppression across Blacks, Latinos, Asians, and Native Americans, the way the criminal law has been used to marginalize each group is notably distinct. Latinos, the largest U.S. minority group, have disproportionately high rates of arrest and incarceration. They acutely face the inter-related issues of immigrant rights and racial profiling. Asian Americans, approximately 4 percent of the U.S. population, are typically cast as being

involved in human trafficking or gang-related offenses. Given these distinctions, lumping Blacks, Latinos, and Asian Americans together, when discussing crime, though desirable in theory, is problematic. More research must be devoted to each of these racial groups. To this end, work on Latinos by professor Ramiro Martinez is particularly impressive, as is work on American Indians by professor Marianne Neilsen.

The primary and unapologetic focus for this text is on the relationship between African Americans and the U.S. criminal justice system. In various instances, however, references are made and data is presented regarding other racial groups.

I wrote *The Color of Crime* to answer the many unanswered questions I had about race, as a law student and later as a graduate student. I went to law school hoping to learn about the intersections between law, race, and justice. Likewise, when I returned to graduate school for a doctoral degree in criminology, I presumed that my studies would focus in part on how and why race matters in the administration of justice. In both instances, I was frustrated with the slim pickings of assigned readings and the infrequent and uninformed discussions on these seminal issues. Beyond addressing my own queries, this book’s modest objective is to offer students and interested others a richer and fuller backdrop with which to understand and critique the workings of today’s criminal justice system. I have written the second edition to continue this—my academic expedition.

Chapter 1, “Media Messages,” looks at how Native Americans, Asian Americans, Latinos, and Blacks are portrayed by the media, including television and movies. As the chapter details, when it comes to people of color, it is the best of times and the worst of times. Today there are more faces of color that appear on situation comedies and dramas, but the substance of these roles raises interesting questions. The discussion identifies some remarkable trends in these portrayals, including how some minority groups (e.g., Native Americans and Asian Americans) are rarely seen or heard but are discussed without being at the table.

Chapter 2, “The Skin Game,” illuminates the issues raised in chapter 1, specifically, how the racialized media images of Black skin have become embedded within the American fabric. It traces how the widely accepted perception of Black skin as a representation of deviance manifests itself in popular culture and ultimately in the criminal justice system. The discussion of various forms of racial assaults, including microaggressions and macroaggressions, identifies some of ways that Blackness is interpreted and talked about publicly. The chapter details how race is “found”—via

“Black-sounding” names and accents—and used as a way to marginalize and block access to the mainstream.

Chapter 3, “History’s Strange Fruit,” sets out the historical role of race in the development and operation of the U.S. criminal justice system, from the slave codes to Jim Crow legislation. This history is used to determine which operating principles are necessary for a racially fair criminal justice system. These “fairness principles” lay the groundwork for the book’s assessment of whether the criminal justice system is racially biased.

Chapter 4, “Discrimination or Disparity?” offers a detailed look at Black involvement in the criminal justice system. It examines how racial discrimination is understood and assesses the value of traditional tools of analysis. The chapter also takes a close look at the relationship between Black men, the law, and the police and considers why this relationship continues to be a problematic one.

Chapter 5, “Are We Still Talking about O.J.?” looks back at the Simpson criminal case and details why the case was so racially charged—how the case tapped our greatest fears and hopes about race and crime. The chapter examines “Black protectionism” as the reason for the steadfast support that Simpson received from African Americans. The media treated the case as a “Black v. White” issue, to the exclusion of Latinos, Asian Americans, and Native Americans, even though together these three racial groups total almost one-fifth of the nation’s population.

Chapter 6, “Racial Hoaxes,” examines cases involving a false allegation of crime against someone based on his or her race. Some of the more well-known cases include Jennifer Wilbanks (“the runaway bride”), Susan Smith, Charles Stuart, and the Duke lacrosse case. False allegations of crime, particularly against Black men, are not as uncommon as we might hope. The chapter evaluates the phenomenon of racial hoaxes and details more than ninety cases, concluding that perpetrators should be subject to greater criminal penalty.

Chapter 7, “White Crime,” examines how crime committed by Blacks is labeled “Black crime,” yet crime by Whites is not accorded a similar race label. The chapter considers crimes that would fall within the category of “White crime.” It also considers whether racial labels should be attached to crime and, if so, which crimes it should encompass. The chapter concludes with a critique of professor James Q. Wilson’s argument that White racism is caused by high rates of Black crime.

Chapter 8, “Race Literacy,” makes the case that there is an identifiable body of material that is required for a working knowledge of race and

crime issues. This progressive extension of professor E. D. Hirsch Jr.’s arguments for a “cultural literacy” rests on university president Judith Shapiro’s writings on “sociological illiteracy.” The chapter identifies important names, terms, phrases, and concepts that should be considered part of this body of knowledge.

The Color of Crime is devoted to remembering. The task of remembering is work indeed. As Nelson Mandela cautions, vigilance is required to fight against practices that dismiss or disappear histories. Through an analysis of cases, ideological and media trends, issues, and practices that resonate below the public radar, this text “remembers” race. *The Color of Crime* acknowledges and explores the tacit and subtle ways that deviance is systematically linked to people of color, particularly African Americans.

A Note on Racial Terminology

Throughout the book, I capitalize both “Black” and “White” when used as a racial reference. I use “Black” and “African American” interchangeably. “Latino” is the preferred term for people of Spanish descent, but when I refer to research that uses another racial term, such as “Hispanic,” I use that term.

Discrimination or Disparity?

Study after study shows that Blacks and Whites hold contrary viewpoints about the fairness of the criminal justice system. Blacks are more likely to believe that the justice system works against them, and Whites are more likely to believe that the justice system works for them. Two common expressions capture these opposing viewpoints: "The system works" (Whites) and "Justice means 'just us'" (Blacks). Like Blacks, Latinos believe that they are more likely to experience racial profiling. Interestingly, where Blacks and Hispanics see racial bias, Whites see "rational discrimination." Higher numbers of Blacks and Hispanics than Whites say that they have been unfairly treated by the police. In the wake of the September 11 attacks, Muslims have reported being increasingly subject to racial targeting by law enforcement officials. They have received heightened scrutiny and attention—in their homes, in their cars, and at the airport—as "potential terrorist threats." These experiences influence race-based perceptions of how well the police do their job.¹

Research on racial discrimination tends to support the view that isolated pockets of racial discrimination exist (e.g., drug-related offenses, capital punishment). The prevailing view, however, is that racial discrimination is not a serious problem. This "no discrimination" conclusion is largely based on research that focuses on select stages of the justice system, such as arrest, charge, sentencing, and conviction. Unfortunately the potential for racial bias exists at many points along the criminal justice system's continuum. An expanded analysis would include, for instance, a consideration of prearrest actions, courtroom language, and postconviction decisions. By focusing on the bright lines of discrimination, criminal justice research tends to overlook these critical points. Until these other unmeasured stages are included within mainstream analyses, no conclusion can be drawn that the justice system is free of racial bias.

This chapter provides an overview of the current research on racial discrimination, outlines the criticisms of this research, and demonstrates

why the most important informal stage—prearrest contacts with police—should be subject to official measurement. The findings challenge the mainstream view that racial discrimination exists only at certain points along the criminal justice system continuum. Without expanding our assessment of racial bias, we miss and therefore cannot accurately determine its prevalence. The other points need to be measured and included within the calculation of how race affects justice.

Hysterical Blindness

Depending on your vantage point, the existence of racial discrimination in the justice system might be considered a historical relic, an entrenched present-day reality, something that happens to the poor, a random and rare event, something that happens to the guilty, or a nagging side-effect of an otherwise well-working system. These varied takes on the presence of racially fair treatment make it difficult to “see” racial discrimination and, thus, hard to hear an SOS call to fix it. Further, consensus on what to do is hard to achieve because so many different standards are being used to evaluate whether racial justice exists. All told, these soup-to-nuts perspectives create a kind of hysterical blindness about the workings and viability of the justice system.

There are many causes for the wildly varying viewpoints on the racial equity of the justice system. Criminal justice researchers have some responsibility for this state of affairs. In the post-civil-rights era, mainstream research has largely concluded that racial discrimination in the justice system is, with few exceptions, neither intentional nor widespread. What follows is a four-part critique of this research, which makes a strong argument for reconsidering a “no discrimination” thesis.

Single versus Multistage Research

Many studies that purport to examine the existence of racial discrimination evaluate a single phase of the justice system. These studies are fairly characterized as being marred by tunnel vision. Research that analyzes race discrimination at a single stage of the criminal justice system cannot detect racial discrimination that exists in other parts of the system. For example, a study of how race influences sentencing in State A may

find no racial disparity. This finding, however, does not mean that State A does not have a racially discriminatory criminal justice system. Racial discrimination may not exist at sentencing but may permeate other stages (e.g., prosecutorial charging, plea bargaining).

Further, a study involving several criminal courts that finds that no racial discrimination exists may mask discrimination that exists in a few of the courts. For instance, an aggregate analysis of the sentencing decisions of ten courts might indicate that there is very little racial discrimination. A look at these ten courts individually, however, might reveal the existence of sizeable discrimination in two of them. Aggregate studies, therefore, may minimize the existence of race discrimination in sentencing. At best, single-stage studies provide important, though limited, information about the role race plays in the criminal justice system; they cannot reliably answer the broad question of whether racial discrimination exists in the American criminal justice system.

Multistage research poses the same basic problem as single-stage research. Although multistage research covers more ground than single-stage studies, the fact that discrimination is not evident at two or three stages (e.g., bail and sentencing) does not mean that it is absent from other stages. Additionally, single and multistage studies cannot be generalized across states. In other words, a finding that there is no racial discrimination at the prosecutorial charging and sentencing phases in five states does not prove that there is no racial discrimination in the court systems of the remaining forty-five states. State variations, including differences in criminal code statutes, prosecutorial charging practices, jury-pool eligibility, and judicial selection, mean that the empirical findings for one jurisdiction do not necessarily apply to another. Many researchers have failed to acknowledge the limitations of single- and multistage research, and this has led to an unreliable assessment of the degree and amount of racial discrimination in the criminal justice system.

Defining “Disproportionality.” Another criticism of the discrimination research is that it does not provide an accurate definition of “disproportionality.” The term has been used to refer to whether a group is involved in the criminal justice system at a rate that exceeds its rate in the general population.² Using this formula for disproportionality, Blacks, who comprise about 13 percent of the U.S. population, are grossly overrepresented in arrest and incarceration figures. Blacks account for almost 30 percent of all arrests and approximately one-half of the correctional population.

TABLE 4.1
*Indicators of Social Marginality, Proportional
 Representation by Race, 2006*

	White	Black
Arrests	69.8%	27.8%
Incarceration	35.2%	41.0%
Nonmarriage births	23.0%	68.4%
Female head of household	64.8%	29.2%
Unemployment*	4.4%	10.0%
Below poverty line	10.8%	24.7%

Sources: National Urban League, *The State of Black America* (2006); FBI, Uniform Crime Reports, 2005, Bureau of Justice Statistics (2006).

* Reflects within-race percentages of the unemployed.

Conversely, Whites are said to be underrepresented in arrest and incarceration figures because their rates are below 75 percent, their percentage in the U.S. population.

Some researchers reject this conventional formula for disproportionality, preferring a more complex analysis. They ask the question, *why* should a group's percentage in the population determine disproportionality? Specifically, some criminal justice researchers state that we should expect arrest rates to mirror more closely indicators of social marginality. Accordingly, the conventional measure of disproportionality is useful only if we assume that all racial groups are on equal social footing.

Table 4.1 provides data on select social indicators for Blacks and Whites. When compared with Whites, Blacks have much higher percentages of out-of-wedlock births, infant mortality, illiteracy, unemployment, female-headed households, and poverty. On almost every measure of social disadvantage, the Black rate exceeds the White rate. Notably, Black figures for out-of-wedlock births, female-headed households, unemployment, and poverty are more than twice the White rates. Given these data, is it surprising that Black arrest and conviction rates follow a similar pattern? Almost fifty years ago, noted criminologists Marvin Wolfgang and Bernard Cohen reached a similar conclusion:

[I]f a careful detached scholar knew nothing about crime rates but was aware of the social, economic and political disparities between whites and Negroes in the United States . . . what would be the most plausible hypothesis our scholar could make about the crime rate of Negroes? Even this small amount of relevant knowledge would justify the expectation that Negroes would be found to have a higher crime rate than Whites.³

Indicators of social marginality, such as high rates of unemployment and crime, are interdependent, and we would reasonably expect them to be positively correlated: as unemployment rates rise, so do arrest rates.

The current definition of disproportionality is not so much misleading as it is incomplete. Perhaps it is best thought of as one of the many indices of social status, rather than as a definitive measure for crime rates. For instance, understanding why Blacks offend at rates that exceed their percentage in the population requires a consideration of other factors that may have a direct or less obvious effect on crime. The empirical reality is that race, poverty, employment, crime, and education are interacting variables. Whether a group offends at a high or low rate generally indicates how it will fare with other social indices.

Researchers have also considered other baselines for racial profiling. Some have suggested various measures, including the racial group's percentage of the driving population, percentage of those with automobiles, percentage of the population (in a particular area), and percentage of licensed drivers. Although there is no clear consensus among researchers as to the best measure, at least the question is being asked.⁴

Disproportionality and Discrimination. Another important issue is how racial discrimination and racial disparity are analyzed, comparatively, in the research. They are typically discussed as if they are competing, antithetical phenomena, when in fact, they coexist. Those who are left-of-center tend to focus on racial discrimination, and those who are right-of-center tend to focus on the disproportionately high rate of Black offending. For example, liberals are more likely to focus on the law (e.g., selective enforcement, disparate impact), and conservatives are more likely to focus on the criminals (e.g., crime rates and the increasing number of repeat offenders). Despite these political distinctions, research shows evidence of racial discrimination against Blacks in the criminal justice system *and* evidence that Blacks disproportionately offend. The precise relationship between disparity and discrimination is unclear: the two may be correlated, be causally related, or operate independently of each other.

It may be that the high rate of Black offending has caused many researchers to deemphasize, to the point of ignoring, racial discrimination in the criminal justice system. It is almost as if disproportionate Black offending is viewed as a justification for race discrimination or as an acceptable social fact. The problem of racism in the justice system is too important to play second fiddle to other criminal justice system realities, including disproportionate offending rates. Researchers on either side of

the disparity-versus-discrimination debate have been hesitant to acknowledge that both racial discrimination and racial disproportion exist *and* that both are problems that must be addressed.

Even some researchers who embrace a “no discrimination” thesis concede that the high rate of Black incarceration is not completely explained by disproportionate rates of offending. For instance, in a seminal article, professor Alfred Blumstein readily acknowledges that 20 to 25 percent of the incarceration rate for Blacks is *not* explained by disproportionate offending. He surmises, however, that a 20 to 25 percent gap is no great cause for alarm, because eliminating this gap would not change the incarceration picture dramatically. By Blumstein’s calculation, the 20 to 25 percent of unexplained disparity between arrest and incarceration figures represents about ten thousand Black prisoners.⁵ Although ten thousand prisoners is a statistical drop in the bucket of the overall prison population (less than 1 percent), socially it is no small number. Ten thousand Blacks, who may have been treated more harshly by the criminal justice system *because* of their race, is proof of an enormous social problem. If ten thousand Blacks have been subjected to discrimination, this means that some were unjustly convicted and unjustly sentenced to lengthy prison terms.

Further, the impact of the race discrimination would extend beyond those Blacks who were direct victims of discrimination. This would include the economic and social impact on their families (e.g., children, spouses, and parents) and their communities (e.g., social services). By what logic could we excuse or, worse, ignore this unexplained 20 to 25 percent gap? Blumstein states that the high rate of Black incarceration is “not so much due to racial discrimination.”⁶ How could he know this to be true? Can the issue of discrimination be dismissed so easily? It is likely that Blumstein did not intend to downplay the impact of racial discrimination. His analysis, however, serves to illustrate a serious weakness of aggregate analysis.

Some researchers studying the disproportionately high rate of Black arrests have questioned whether it is caused by crime rates or whether other factors are at work. A few have suggested that the workings of the legal system may enhance Black disproportionality. For instance, national studies show that a higher percentage of Whites than Blacks state that they have used drugs during their lifetime. The 2005 National Survey on Drug Use and Health reports that approximately 9 percent of Whites admitted to using illicit drugs (in the previous month). For Blacks the percentage for illicit drug use in a large metropolitan area was 10 percent; for Asians

it was 3 percent; and for Hispanics, 7.2 percent. The group with the highest figure, 11.2 percent, was American Indians. Although the percentage for Whites is relatively low (given their numbers in the overall population), in actual numbers, there are many more Whites who use drugs than American Indians or Blacks.⁷

A look at the racial impact of the cocaine laws provides even further evidence of racial disparity. Studies indicate that two-thirds of all crack-cocaine users are White or Hispanic. Blacks, however, are most likely to be crack-cocaine defendants. In 2005, 82 percent of all crack-cocaine defendants were Black, 8.2 percent were White, and 8 percent were Hispanic. This racial disparity continues in sentencing. Not only do Blacks have a 20 percent greater chance of receiving a prison sentence than Whites; they also are more likely to serve a longer sentence than Whites.⁸ These racial disparities illustrate one of the problems with current measures of racial discrimination in the criminal justice system.

The U.S. Supreme Court’s decision in *United States v. Armstrong* highlights how certain kinds of race discrimination can elude traditional checks and balances.⁹ In the 1996 case, the Los Angeles federal public defender’s office argued that the U.S. Attorney’s office was selectively prosecuting Black defendants under the federal crack-cocaine statute. The public defender’s office, noting that the penalty for a crack conviction is much harsher under federal law than under California law, argued that Black offenders were being targeted for federal court. Under the mandatory federal crack law, a conviction for the sale of crack cocaine was punished one hundred times more severely than the conviction for the sale of powder cocaine (5 grams of crack resulted in a five-year prison term, whereas it took 500 grams of powder to result in a five-year prison term). In 1991, all twenty-four of the Los Angeles federal crack cases handled by the public defender’s office involved Black defendants. The public defender’s office requested records from the prosecutor’s office reporting how many Whites and Blacks had been prosecuted in state court. The U.S. Attorney’s office was also asked to state its criteria for deciding whether to prosecute a case in federal court. The public defender sought to establish that White crack offenders were being prosecuted in state court because the penalties were less harsh.

The Court held that the defense would have to offer some minimal proof of racial discrimination *before* the prosecution could be legally required to turn over its case records. Not surprisingly, without the records from the prosecutor’s office, the public defender’s office was unable to

meet this legal burden. The *Armstrong* decision does not mean that the U.S. Attorney's office is not selectively prosecuting Blacks in federal court. Rather, it means that the prosecutor can withhold evidence of it.

The Court's decision is just one example of a legal roadblock that makes it difficult to measure race discrimination in the criminal justice system. The legal reasoning indicates that forms of discrimination that are difficult to measure may escape penalty. *Armstrong* symbolizes the legal barriers to identifying race discrimination in the criminal justice system, but empirical barriers also exist.

This brings us to the fourth criticism of the racial disparity research: that researchers have failed to expand their examination of racial discrimination to include nontraditional measures. Researchers, in their attempt to measure race discrimination, usually confine their analyses to the formal stages of the criminal justice system. Formal stages are those that are subject to criminal justice record keeping, such as arrest, bail, sentencing, and parole.

Petit Apartheid. Criminologist Daniel Georges-Abeyie observes that mainstream measures of racial bias begin with arrest. He notes, however, that there are numerous opportunities for racial bias to occur prior to arrest. One example is the point at which a police officer decides whether to make a traffic stop. Georges-Abeyie argues that unmeasured stages, such as prearrest actions by law enforcement, have causal consequences. They signal a gateway for entry into the justice system. He uses the term "petit apartheid" to describe race-affected practices that are not included within mainstream analyses of racial bias.¹⁰

Beyond prearrest, petit apartheid encompasses trial court processes, including decisions made during bench conferences, during jury deliberations, and in judges' chambers. This would include a look at the use of race in courtroom language, for instance, an examination of how the terms "black" and "white" are used in closing arguments by prosecutors—for example, as implicit and explicit references to guilt and innocence.¹¹ An analysis of petit apartheid opens the door to the "backstages" of the criminal justice system.¹² This sheds light on previously closed processes and allows us to see *how* race matters in criminal law.

Postconviction racial bias is yet another large area of bias that until recently was barely discussed in the mainstream research. The Innocence Project, founded in 1992, assists prisoners who seek to prove their innocence through DNA testing. Through the work of The Innocence Project,

more than two hundred people have been exonerated after DNA tests revealed their innocence. Of these, fifteen had served time on death row, 60 percent were African American, 28 percent were White, and less than 10 percent were Latino.¹³ The bottom line of Georges-Abeyie's analysis is that an analysis of the informal phases of the criminal justice system would reveal a stark pattern in which people of color consistently and unfairly receive harsher treatment from legal officials (e.g., police and judges) than Whites receive.¹⁴

A thorough assessment of race effects within the justice system requires that we focus on the bookends of the justice system—that is, racial profiling and postconviction—as well as those stages that have been ignored in earlier research. Only then can we purport to have a more accurate picture of our court system's racial viability. The next section examines how police treat Black men prior to arrest. The discussion shows how this informal stage should be measured and the social, economic, and criminal justice consequences of failing to measure it.

Black Men and the Police

As a group, Black men have an endless supply of stories of police harassment. These include being mistaken for a criminal, being treated like a criminal, being publicly humiliated, and in some instances, being called derogatory names. Often their encounters with the police arise from being stopped in their cars. They are subject to vehicle stops for a variety of reasons, some legal, some not:

- Driving a luxury automobile
- Driving an old car
- Driving in a car with other Black men
- Driving in a car with a White woman
- Driving early in the morning
- Driving late at night
- Driving a rented automobile
- Driving too fast
- Driving too slow
- Driving in a low-income neighborhood known for its drug traffic
- Driving in a White neighborhood
- Driving in an area where there have been recent burglaries

- Fitting the profile of a drug courier
- Violating the vehicle code (e.g., failure to signal, excessive speed, exposed tail light)

It seems that no matter what Black men do in their cars, they are targets for criminal suspicion. It is so commonplace for Black men to be pulled over in their vehicles that this practice has acquired its own acronym: DWB (Driving While Black).

Police harassment comes in many forms. One example is the number of times Black men are stopped, questioned, and assaulted by police as they go about their daily lives. Racial harassment is often a fact of life for Blacks. "Living While Black" has taken many forms, some mere inconveniences, some troubling, and others deadly. There are numerous cases involving Blacks who have faced police force while they were walking, standing in a vestibule, shopping, running, or sitting in an idling vehicle.

There are, however, clear distinctions between police harassment and police brutality. Police brutality typically refers to the unlawful use of excessive force. Harassment covers a range of police actions, some lawful, some unlawful (e.g., conducting a stop on less-than-legal cause). For many Black men, consistently negative encounters with the police have caused the line between harassment and brutality to become blurred. For Black men, who are more likely to be stopped by the police than anyone else, each stop has the potential for police brutality. The frequency of contact between Black men and the police has led a generation of Black men to teach their sons "The Lesson": instructions on how to handle a police stop without getting hurt.¹⁵ Studies attest to many black men's general fear of and loathing for the police.¹⁶ Professor Jerome McCristal Culp Jr. has called this "the rules of engagement of black malehood." According to Culp, these rules, taught to Black males over five years old, instruct that "at all times we [Black men] make no quick moves, remove any possibility of danger and never give offense to official power."¹⁷ Professor David Troutt offers "the law of mothers" to describe how Black women warn and worry about their Black sons' encounters with police.¹⁸

Many Black men have developed protective mechanisms either to avoid vehicle stops by police or to minimize the potential for harm during these stops. The primary shield they use is an altered public persona. This includes a range of adaptive behaviors, like sitting erect while driving, traveling at the precise posted speed limit, avoiding certain neighborhoods, not wearing certain head gear (e.g., a baseball cap), and avoiding

flashy cars. Vanity tags denoting professional status are another preemptive strike, though they are available to only a select few (e.g., "M.D." or "ESQ"). Of course, vanity tags can work as both a magnet and a deterrent for a police stop. Black men are used to structuring their encounters with police during car stops: placing both hands on the steering wheel, responding to an officer's questions with "sir" or "ma'am," and quite creatively, keeping the car radio tuned to a "non-Black" music station (e.g., classical or country). Black men are wise to take measures like these because studies consistently show that a suspect's demeanor affects whether he will be arrested.¹⁹

Groups' differing experiences with law enforcement and perceptions of those experiences may explain why impressions of the legitimacy and trustworthiness of police treatment vary by race. This is particularly true regarding public views of racial profiling. Studies indicate that one's perceptions about racial bias by police are affected by personal experience and by one's race. For instance, Blacks are more likely to believe that they receive harsher treatment at the hands of police, are more likely to be critical of police, and are more likely to believe that profiling is widespread.²⁰

In addition to the experiences of the larger Black citizenry, Black police officers present an interesting twist on the issue of police abuse. They too have stories of abuse and harassment at the hands of other police officers (of all races). Out of uniform they are Black, not blue. The long list of cases involving Black undercover officers who have been mistaken for criminals by White officers illustrates this point.

Black distrust of the justice system is not new. It is historically rooted in the role that police played in enforcing the slave codes, Black codes, Jim Crow segregation, and the ultimate form of vigilante justice, lynching. In his treatise on race in America, Gunnar Myrdal reported that between 1920 and 1932, White police officers were responsible for more than half of all the murders of Black citizens.²¹ Historical accounts also show that White policemen were often present at lynchings. Today, police brutality barely resembles its past forms. Many Blacks alive today, however, still remember the widespread, persistent, and inhumane abuse that Blacks suffered at the hands of police.

Further, it has been only within the past half century that Blacks have been allowed to police White communities on a wide scale. Into the 1960s, Black officers were viewed as second class and assigned to patrol only Black communities. "Separate but equal" meant that Black officers could not arrest White suspects. Police racial segregation was practiced

in most large cities, including Miami and Houston. A large percentage of the people alive today were alive during a time when Black officers were *de facto* barred from policing White communities. For most Blacks, police oppression is far from a distant memory. A consideration of this history helps to explain why Black skepticism and disdain for police is a continuing phenomenon.

The Police at Work

The number of famous Black men who report that they have been unfairly stopped and harassed by law enforcement offers one measure of the prevalence of police abuse. These men, allegedly immune from such discriminatory treatment, offer a high-beam spotlight on police practices. A wide range of Black male celebrities have had encounters with the police, including athletes (Marcus Allen, Dee Brown, Tony Dungy, Joe Morgan, Edwin Moses, Brian Taylor, Al Joyner, and Jamaal Wilkes); educators (Cornel West, Michael Eric Dyson, William Julius Wilson, and Roger Wilkins); businessmen (Earl Graves Jr.); attorneys (Johnnie Cochran and Christopher Darden); actors (Don Cheadle, LeVar Burton, Blair Underwood, Reginald Dorsey, Will Smith, Tico Wells, and Wesley Snipes); journalists (Michael Wilbon); authors (Walter Mosley); and musicians (Wynnton Marsalis). Legendary trumpeter Miles Davis had a unique method for handling police harassment. To avoid being stopped and questioned by police, Davis would call and notify the Beverly Hills police department *before* leaving his home.

Mae Jemison, the first Black female astronaut, had a remarkable run-in with police in her hometown, Nassau Bay, Texas. The officer informed Jemison that she had made an illegal turn. After the officer discovered that Jemison had an outstanding traffic ticket, Jemison was arrested and handcuffed, and her head was pushed face-down onto the pavement. She was also forced to remove her shoes and walk barefoot from the patrol car into the police station. After her release, Jemison filed a police-brutality complaint against the White officer. He was cleared following an internal department investigation. The fact that at the time of the incident Jemison wore a close-cropped afro has caused some people to speculate that she was initially stopped because the officer mistook her for a Black man.

In too many cases, however, the encounters between Black men and the police have gone far beyond a minor inconvenience. In 2006, twenty-

three-year-old Sean Bell was gunned down by police outside a Brooklyn nightclub. Bell was at the club with friends celebrating his wedding, which was to take place later that day. Undercover officers shot at Bell and his passengers fifty times, as he pulled his car out of a parking spot. The police said that they thought he or one of his friends had been involved in an altercation at the club. Three officers were acquitted of criminal charges related to Bell's death.

In 2006, based on an informant's tip of drug activity, undercover police outside Atlanta approached the home of Kathryn Johnston, an eighty-eight-year-old grandmother. When they arrived to execute the search warrant, the police announced themselves, then broke down Johnston's front door. Johnston, who was alone in her home, responded by shooting her gun. Police returned fire, and Johnston was killed.

In 1999, Amadou Diallo was shot by undercover New York officers as he stood in the vestibule of his apartment building. Police believed that he was the rape suspect for whom they were searching. When Diallo, a Guinean immigrant, was ordered to halt, he held up his wallet. The police mistook this for a gun and shot at him forty-one times. The four officers charged with murder were acquitted.²²

These are just a few of the more well-known cases involving innocent people who were involved in deadly encounters with the police. Notably, each of these cases involved undercover law enforcement officers. Although the value of undercover law enforcement is well known, it is worth considering what a reasonable citizen's response is to an approach by what appears to be a stranger or group of strangers, at night in a high-crime area. For instance, what might have run through Sean Bell's mind when he saw an unknown man approach his car with a gun: carjacker, thief, troublemaker, drunk, police officer?

In recent decades, there have been numerous other national cases of police brutality. The list includes Arthur Colbert, Patrick Dorismond, Joseph Gould, Malice Green, Don Jackson, Donovan Jackson, Rodney King, Abner Louima, Arthur McDuffie, Desmond Robinson, Brian Rooney, and Ron Settles.²³ Notably, two of these cases, those of Don Jackson and Desmond Robinson, involved Black off-duty police officers who were assaulted by another officer.

Jackson's case is particularly compelling because he went undercover to expose the racism of the Long Beach, California, police department. Jackson invited a television news crew to videotape his drive through a high-crime area. He and another man traveled through the area at the posted

speed. They were pulled over by two White officers and told that their car had been weaving in traffic. Jackson politely questioned the basis of the stop but did nothing to escalate the encounter. After Jackson stepped out of the vehicle, one of the police officers bashed his head and arm through a plate-glass window. Jackson was ultimately charged with resisting arrest. The videotape of the incident called into question the statements made by the officers in their case report. Both officers were charged with use of excessive force and filing a false police report.

Is each of these an exceptional case? After all, most police officers, regardless of race, carry out their professional duties without resorting to racial harassment, abuse, or brutality. Some people suggest that most officers do not violate the law and that, therefore, police abuse is not a serious problem. The fallacy of this claim is made clear by applying it to another context. In most years, a fraction of the total population is arrested for criminal activity. We do not ignore the small fraction of law violators. By the same logic, we should not ignore the small fraction of police who abuse and mistreat citizens. Just as it is worthwhile to study offenders, it is worthwhile to study law enforcement officials who discriminate against Black citizens.

Legalized Racial Profiling?

The “out-of-place” doctrine gives police a legal support for stopping and questioning Blacks at a disproportionate rate. It allows police to use a person’s race as a factor in making a stop when someone is in an area where another race predominates. A number of courts have upheld the doctrine as a useful police practice to stem crime. The doctrine arguably encourages police to view Black men as *de facto* guilty, without regard to legal indicators of criminal activity (e.g., reckless driving, speeding, making a drug sale). It permits Blacks to be stopped at a disproportionate rate since there are far more White neighborhoods than Black neighborhoods. This practice also supports and perhaps encourages racial segregation—people should stay with “their own kind.” We can only speculate as to the toll—spiritual, psychological, and physical—exactd on a group whose freedom of movement is consistently challenged.

In 1996, the U.S. Supreme Court addressed the issue of pretextual vehicle stops. In *Whren v. United States*, the Court was asked to decide whether it is constitutional for the police to use a minor traffic violation

to stop a driver whom they suspect of criminal activity.²⁴ Michael Whren and another Black man, James Brown, were stopped in a “high drug area” in Washington, D.C. The undercover officers became suspicious of drug activity after observing Brown pause at a stop sign for more than thirty seconds, fail to use his turn signal, and take off at a high speed. One of the officers saw Brown looking in the direction of passenger Whren’s lap. At this point, the officers had probable cause to believe that there had been a violation of the vehicle code. After they pulled the car over, drugs were found, and the two men were arrested.

In a unanimous decision, the Court held that as long as a traffic stop is based on probable cause, the stop is valid. The individual officer’s motive for the stop is irrelevant. In this case a traffic law had been violated, thus establishing probable cause. Obviously Brown violated the traffic code. However, because the police do not stop most people who engage in the same conduct, the question arises whether Brown was stopped because he was Black. The direct and indirect experiences that Blacks have with the police affect their perception that the criminal justice system is skewed against them. Court decisions such as *Whren* bolster this viewpoint. A complete assessment of the role that race plays in police stops requires the scrutiny of the actions of Black men *and* the actions of the police—and an assessment of reasonable response by motorists when they are unknowingly approached by undercover officers.

Many people would argue that it is unfair to blame the police for being suspicious of Black men. After all, Black men are disproportionately engaged in crime. It is reasonable, then, that the police disproportionately suspect them of criminal activity. Black men do commit street crimes at high rates, rates far exceeding their percentage in the U.S. population (6 percent). The important question, however, is, Are Black men stopped and questioned by the police at a rate that greatly exceeds their rate of street crime? If so, the high number of police stops cannot be legally justified.

The available research suggests that Black men are stopped and questioned at a rate much higher than the level of their involvement in crime. The few studies on this issue indicate that Black men are significantly more likely to be stopped than anyone else, at a rate far above their rate of arrest. One way to determine the disparity is to compare the rate of police stops for Black men with the rate of Black men who are involved in criminal activity. For example, assuming that one-third of all young Black men are involved in crime, we would predict that about one-third of them would be subject to police stops.

Estimates are that anywhere from *one-third to one-half* of all Black men believe they have been unfairly stopped by the police.²⁵ Statistically, Black men comprise less than 7 percent of the population. Young Black men, between the ages of fifteen and forty, account for approximately 3 percent of the population. What accounts for this group's high encounter rate with police? Black men should be subject to police stops to a degree that more closely approximates their rate of offending.

The Big Picture

Police-Public Contact Survey. Since 1999, the Bureau of Justice Statistics has gathered annual data on contacts between the police and citizens. According to the 2005 study, White, Black, and Hispanic drivers were stopped by the police at similar rates (between 8 and 9 percent). However, Blacks (9.5 percent) and Hispanics (9 percent) were searched by the police at a rate three times that of Whites (3.6 percent). Overall, the figures show that 20 percent of Whites had contact with the police, compared with 16.5 percent of Blacks and 16 percent of Hispanics. Thus, Whites are under-represented in contacts with police, while the contact rates for Blacks and Hispanics approximates their percentage in the overall population. What happens after the stop is noteworthy. Black drivers are twice as likely to be arrested as Whites (4.5 percent versus 2.1 percent). For Hispanics the figure is 3.1 percent. Hispanics are more likely to be ticketed than are Blacks or Whites, and Whites are more likely to be issued a verbal or written warning than are Blacks or Hispanics.²⁶

Traffic Stops Statistics Study Act and Other Data. Each year since 1997, Congressman John Conyers has introduced the Traffic Stops Statistics Study Act.²⁷ The bill would direct the attorney general to gather statistics on all routine traffic stops made by law enforcement officials, including data on the number of traffic stops, identifying characteristics of the persons who were stopped (e.g., gender, race, age), reason for the stop, whether contraband was found, and whether an arrest was made. Data gathered under this bill would not reveal police or citizen identities, and statistics would be gathered directly from law enforcement officials (see appendix A).

Studies of racial profiling extend far beyond police stops. In 2000, the General Accounting Office (now called the Government Accountability

Office) released a report that reviewed the practices of the U.S. Customs Service. The study was conducted in response to numerous claims that customs officials were harassing Black female travelers. The study found that 95 percent of the passengers who were stopped were subjected to a frisk search, of whom 4 percent were strip-searched and 1 percent were subjected to x-ray screening. Black women were the group most likely to be profiled as drug couriers and searched; they were searched at a rate higher than the rate for Black men. Being stopped for "traveling while Black" was even more pronounced for Black women who were U.S. citizens. They were nine times more likely than White women to be x-rayed following a frisk search. Notably, these high search rates for Black women are not explained by the find rates: Black women were less than half as likely to be found carrying contraband as White women.²⁸

Lawsuits. Since the 1990s, a number of law enforcement agencies have been charged with racial profiling. *Wilkins v. Maryland* was a watershed racial profiling case. It was perhaps the earliest and best-known of the cases in the latest era of racial profiling litigation. In 1992, Maryland State police pulled over a vehicle on Interstate 68 in Cumberland, Maryland. Police said they stopped the vehicle because it matched a drug-courier profile (a law enforcement list of characteristics of someone believed to be likely engaged in transporting drugs within or across state lines). One passenger was Robert Wilkins, who at the time was a Washington, D.C., lawyer. Wilkins told the officer that he and his family were returning from a funeral in Chicago and that he had to make an early morning court appearance in D.C. The officer ordered everyone out of the car. Wilkins politely yet sternly objected. He questioned the basis for probable cause. Without answering, the officer informed the family that they would be detained until they exited the vehicle. Eventually they got out of the car, and a narcotics dog searched their vehicle. No drugs were found. Forty-five minutes after they had been pulled over and after a \$105 speeding ticket had been issued to the driver, the family was released.

The American Civil Liberties Union, which represented the Wilkins family, discovered evidence of a race-based policy in effect for the Maryland troopers. The policy was enacted to stem the entry of drugs into western Maryland. A confidential police memorandum referenced the increasing drug problem in the area and offered the following description of drug importers: "The dealers and couriers are predominantly black males and black females."²⁹ The implicit message was that the troopers would

get the biggest bang for their buck by targeting Black drivers. The memo did not mention other racial groups. The signal to the police officers was clear: because Blacks are responsible for much of the area's drug influx, they can be justifiably stopped, questioned, and searched. The race-based directive was problematic because it encouraged the police to suspect all Black drivers. Because "predominantly" is a vague term, each officer was allowed to have wide-ranging suspicion of Black motorists, depending on his subjective interpretation of the term. "Predominantly" could mean that Blacks were responsible for anywhere between 51 and 99 percent of the drug imports. No evidence was offered to show that Black motorists are more likely to violate traffic laws or are substantially more likely to transport drugs through the interstate. The Wilkins case was settled for just under one hundred thousand dollars.

As part of the settlement, the Maryland State Police were instructed to maintain computer records of all motorist stops over a three-year period. In 1995, Maryland troopers conducted 533 searches along the Interstate 95 corridor (a fifty-mile stretch of highway extending from Baltimore to the Delaware border). Of the searches conducted by Maryland troopers, 77 percent (409) involved vehicles driven by Black motorists, 18 percent involved White drivers, and 1 percent involved Hispanic drivers (table 4.2). Drugs were found on 33 percent of the Black motorists who were stopped and 22 percent of the White motorists.

Table 4.3 provides a breakdown of Maryland trooper searches by the Special Traffic Interdiction Force (STIF) unit. This enforcement team was formed to intercept interstate drug transport. In 1995, STIF troopers, all White, conducted a total of 202 searches, 76 percent of which (153) involved Black motorists. For five of the six STIF troopers, they were most likely to stop a car driven by Black motorists and conduct a search. STIF unit members searched Black motorists at rates ranging from 40 percent of all stops (Officer 5) to 100 percent of all stops (Officer 6) (table 4.3).³⁰ STIF troopers found drugs in 34 percent of the searches involving Black

TABLE 4.2
Maryland State Police Data, I-95 Stops, 1995

I-95 Stops	Black	White	Hispanic	Other	Total
Number	409	97	20	7	533
Contraband found	33%	22%	10%	42%	—

Source: ACLU of Maryland.

TABLE 4.3
Maryland State Police, Individual Trooper Stops,
Special Target Interdiction Force, I-95 Stops, 1995

	Total Stops	% Black	% White	% Hispanic
Officer 1	38	84	13	0
Officer 2	55	87	11	2
Officer 3	44	64	23	4
Officer 4	30	93	7	0
Officer 5	30	40	47	10
Officer 6	5	100	0	0

motorists and 13.5 percent of those involving White motorists. No drugs were found in their searches involving Hispanic motorists.

It is unclear why the Maryland State Police stopped Black motorists so frequently. As noted, no studies indicate that there are more Black motorists driving on the interstate, and there is no evidence that Blacks are responsible for more than one-half of interstate crimes or interstate trafficking. One study done at the time showed that along I-95 Blacks account for approximately 17 percent of the motorists and 17.5 percent of traffic-law violators. Notably, even after the settlement in the Wilkins case, with knowledge that their stops were being monitored, STIF troopers continued to stop and search Black motorists at a disproportionately high rate (more than 70 percent).

As a direct result of racial profiling lawsuits, a number of jurisdictions collect and report data on police-citizen interactions. In the wake of Amadou Diallo's death, the New York Police Department (NYPD) was required to compile a quarterly report of police stops. According to the 2006 stop-and-frisk report, 86 percent of the people who were stopped by police were Black (52 percent) or Latino (33.6 percent). Notably, only 10 percent of these stops resulted in arrests or issuance of a summons. Whites accounted for 12 percent of the stops, and Asian Americans and American Indians accounted for less than 1 percent each.

Racial profiling lawsuits provided limited insight into the prevalence of profiling. Justice Department figures on the number of lawsuits it brings against police departments represent only a fraction of the total number of police abuse and brutality incidents. The lack of national statistics has forced researchers to rely on a range of other indicators, including newspaper reports of police abuse, the number of judgments entered against police departments (civil and criminal), the number of police

departments under investigation for corruption, and the number of brutality complaints filed against police departments.

Conclusion: A Costly Enterprise

Numerous costs are associated with race-related police abuse. Blacks individually and as a community are psychologically harmed. Each case of police abuse or police harassment involves an individual officer and an individual citizen, but the cases do not exist in isolation. For example, one Black man's painful encounter with the police is negatively reinforced when he learns that other Black men have had similar experiences with the police. The impact of police harassment is cumulative. Each negative experience creates another building block in the Black folklore about police.

It is unreasonable to expect that the net of the criminal justice system will capture only the guilty. We would expect that *some* Blacks who are not involved in crime would be mistakenly suspected of criminal activity. It is not reasonable, however, to expect that close to half of all Black men believe they have been wrongly suspected of criminal activity when less than one-third are involved in criminal activity. To more fully explore this issue, research on racial disparity must be expanded to include analyses of prearrest police contacts.

Police practices that allow law enforcement officials to act on negative Black stereotypes will continue to expand the gap between Black and White experiences and perceptions of police. For Blacks, race-based policies raise questions about the legitimacy of the police and further alienate them from the criminal justice system. Robert Wilkins, the successful plaintiff in the Maryland State Police case observed, "[There] is no compensation for the type of humiliation and degradation you feel when for no other reason than the color of your skin . . . you're charged and placed in a category of drug trafficker."³¹

Citizens who do not face the daily threat of being detained largely because of their race are unable to appreciate just how burdensome these stops can be: they become a heavy weight. To someone who is pulled over by the police once a month for no apparent reason other than his race, the stops take on an onerous feel. Race-based policies pit law enforcement against minorities and create an unbreakable cycle. Racial stereotypes may motivate police to arrest Blacks more frequently, but the fact that

Black men are disproportionately engaged in crime is not a justification for racial discrimination. High rates of Black arrests generate statistically disparate arrest patterns, which in turn form the basis for further police selectivity by race. What many Whites view as the police "doing their job" is viewed by many Blacks as harassment.

Beyond causing harm to Black men, race-based police stops also harm the larger society. There is the societal cost of perpetuating inaccurate stereotypes, which produces exaggerated levels of fear and more-pronounced levels of scapegoating—such as racial hoaxes (detailed in chapter 5). Although Blacks are responsible for a disproportionate share of crime, they are not responsible for the majority of crime.

Police harassment of Black men operates as a denial of their civil rights. Jerome McCristal Culp explains:

[T]he police and citizens have to figure out ways to allow me to have rights as a black male too. Every time there is a conflict between the rights of the majority and my rights as a stereotypical black male, my rights cannot always be subordinate, or else I have no rights at all.³²

Treating Whites as if their constitutional rights are worth more has negative long-term consequences. Law enforcement is legitimately concerned with crime by Blacks. The strategies it employs, however, should not end up causing greater racial damage, such as increased crime.

Racial targeting and abuse by police is costly. U.S. taxpayers have paid tens of millions of dollars in police-brutality lawsuits. Many of the nation's cities are in need of greater police services. The huge sums of money paid out in legal damages should instead be available to protect and serve the people. Police abuse, harassment, and brutality exact a tremendous social and financial toll on society.

Many Blacks believe that their antipolice sentiments are justified by the racially discriminatory practices of the police. Particularly for young Black men, the police represent public enemy number one. Dismissing the problem of excessive targeting of Black men hampers our efforts to reduce crime and reinforces the perception that "the police don't like Black people."³³ For example, the perception that Black men are unfairly targeted by the police may make some Black jurors less likely to believe police testimony. It may also make some Blacks less likely to report crime and others less likely to cooperate with police investigations. Perhaps the issue of police abuse is downplayed because national data are not available. Also,

the issue of disproportionality has blurred many people's ability to see the problem of racial discrimination. The reality of racial targeting can be dismissed, rejected, or trivialized. However, the problem is a real one and imposes enormous costs, both social and financial, on the effective working of the criminal justice system.