

# RACIAL AUDITORS AND THE FOURTH AMENDMENT: DATA WITH THE POWER TO INSPIRE POLITICAL ACTION

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## I

### INTRODUCTION

In the winter of 2002, the Enron scandal dominated the mass media.<sup>1</sup> Enron, a Houston-based energy giant and purportedly the seventh-largest company in America, was, it turned out, more like Tom Thumb than the Jolly Green Giant.<sup>2</sup> Much of the media commentary bemoaning Enron's fall into bankruptcy, however, attacked not Enron but its auditor, Arthur Andersen.<sup>3</sup> The public auditor's job is to collect and verify information, disseminating it to two audiences: corporate managers, who can act on sound data to improve a company's performance, and the stock-purchasing public, who have confidence that audited financial statements are accurate and can therefore serve as

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1. See, e.g., Felicity Barringer, *Enron's Many Strands: Early Scrutiny, 10 Months Ago, Questions on Enron Came and Went with Little Notice*, N.Y. TIMES, Jan. 28, 2002, at A11; Lanny Davis, *Enron? We're Missing the Point*, WASH. POST, Jan. 6, 2002 at B1.

2. Enron had engaged in a variety of allegedly deceptive transactions and accounting practices designed to boost its reported profits and minimize its reported debts, thereby artificially inflating its stock prices. See Davis, *supra* note 1; Editorial, *Investigating Enron*, WASH. POST, Jan. 6, 2002, at B6 [hereinafter *Investigating Enron*]. For example, Enron created outside entities—investment companies where liabilities and losses were hidden and thereby excluded from Enron's accounting statements. See Davis, *supra* note 1; *Investigating Enron, supra*. On October 17, 2001, Enron was forced to announce that it had hidden \$1 billion in losses in the outside entities alone, the next day reducing its reported assets by \$1.2 billion. See Davis, *supra* note 1. Less than two months later, on December 2, Enron filed for bankruptcy. Its stock promptly fell from the ninety dollars a share it had reached during the previous year to a mere eighty-seven cents. See *id.* Thousands of company employees lost jobs and pension plans, while banks, investors, and trading partners who had advanced money to Enron faced the prospect of massive losses. See *id.*

3. See, e.g., Floyd Norris, *Big 5 Accounting Firm to Pay Fine in Fraud Case*, N.Y. TIMES, June 20, 2001, at C1.

reliable guides in stock-purchase decisions.<sup>4</sup> Auditors may also specifically advise companies on how to improve their performance effectiveness in specified tasks.<sup>5</sup> As the Enron scandal unfolded, much of the media concluded that Arthur Andersen had failed spectacularly in doing its job.<sup>6</sup> The pundits did not argue, however, that Enron's collapse demonstrated the uselessness of financial auditors. To the contrary, they opined, Enron collapsed because there was insufficient "transparency," a word that became the mantra for reform.<sup>7</sup> More and better information was the way to change a deceptive and greedy corporate culture, of which Enron was but a very visible symptom.<sup>8</sup>

This article explores the current practice of "racial auditing" as a method of police regulation. Enron's collapse and the accompanying calls for improved auditing have surprising lessons to teach society about how to better regulate police search and seizure practices—especially those with a disparate racial impact. The analogy between financial or quality auditing and racial auditing is far from perfect, but the flaws in the analogy teach their own lessons as well. Both racial auditing and financial auditing rely on a strategy of using independent investigators to disseminate data about an organization to broader publics. Both strategies thus rely on sunshine as a method of institutional control.<sup>9</sup> Racial auditors, however, are not accountants but rather human rights

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4. See O. RAY WHITTINGTON & KURT PANY, *PRINCIPLES OF AUDITING AND OTHER ASSURANCE SERVICES* 6, 776–99 (13th ed. 2001); *Investigating Enron*, *supra* note 2.

5. See WHITTINGTON & PANY, *supra* note 4, at 776–99.

6. See *e.g.*, Norris, *supra* note 3. Said the *Washington Post*:

The regulatory failures begin with the auditing profession. Over the past four years, Enron's accounts overstated its real earnings by half a billion dollars. At the end of 2000, Enron reported debts of \$10.2 billion; in its bankruptcy filing last month, it listed debts of almost \$40 billion. This sort of deception is supposed to be prevented by a firm's outside auditor, whose job is to certify the accuracy of accounts. But Arthur Andersen, the auditor in the case, knowingly certified misleading financial statements. In 1997 Andersen identified \$51 million of problems in Enron's books. It suggested that these should be put right. But when its advice was ignored, it went ahead and certified Enron's accounts anyway.

*Investigating Enron*, *supra* note 2.

7. See Davis, *supra* note 1.

8. See A. LARRY ELLIOT & RICHARD J. SCHROTH, *HOW COMPANIES LIE: WHY ENRON IS JUST THE TIP OF THE ICEBERG* 12–13 (2002) ("Managed mendacity, systematically applied to the investing public, has become the new science of publicly traded corporations."); Davis, *supra* note 1. Proposed reforms included: barring auditors from getting lucrative consulting contracts with their clients, thus minimizing auditor conflicts of interest; creating more effective disciplinary systems for the accounting profession (in effect, auditing the auditors); and tightening legal loopholes and Securities and Exchange Commission oversight of auditors. See, *e.g.*, David Hilzenrath, *Auditors Face Scant Discipline; Review Process Lacks Resources, Coordination*, *Will*, WASH. POST, Dec. 6, 2001, at A1; William Safire, Editorial, *Andersongate*, N.Y. TIMES, Jan. 14, 2002, at A15. Lanny Davis, former special counsel to President Clinton, urged the mandatory creation of a group of "auditing whistleblowers," a small number of truly independent members of boards of directors who would "have the authority to provide strict oversight of outside auditors and to ensure the integrity of financial reporting." Lanny Davis, *The Rules Are There, So Learn to Live By Them*, WASH. POST, Feb. 24, 2002, at B3. Only then, he claimed, would there be sufficient investor confidence in the accuracy and completeness of financial information to enable market discipline to do its work. *Id.*

9. I (and others) have previously written about sunshine strategies as ways to regulate police search and seizure practices, albeit in other contexts. See, *e.g.*, Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 16 GA. ST. L. REV. 709 (1999) [hereinafter Taslitz, *Slaves No More!*] (describing the historical

organizations, usually non-governmental organizations such as Amnesty International, Human Rights Watch, and the American Civil Liberties Union.<sup>10</sup> Under some circumstances, governmental entities can also serve as effective auditors; the United States Commission on Civil Rights is the most obvious example.<sup>11</sup> All these organizations have done major investigations, issued critical reports, or pursued lawsuits that disseminate information about abusive police search and seizure practices. These efforts have helped to inform decision-making and create incentives for reforming certain police departments and practices.<sup>12</sup>

I add the word “racial” to the term “auditors” to highlight several features of these organizations’ activities. First, their investigatory efforts have often revealed overt or covert racial discrimination by the police.<sup>13</sup> Second, even when no conscious racial animus or stereotyping is involved, abusive police conduct is likely to have a disparate impact on racial minorities simply because minorities are disproportionately represented in the criminal justice system and among the poor.<sup>14</sup> Moreover, police conduct may have a disproportionate impact on minority communities even when police interactions do not result in arrest.<sup>15</sup> Third, for reasons to be explained later in this article, encouraging auditors initially to focus on racial animus and impact can make sense even when reforms ultimately address matters other than race.<sup>16</sup> A race-based focus can provide a particularly effective strategy both for monitoring and deterring police misconduct and for serving other political functions of the Fourth Amendment that are consistently ignored by commentators.<sup>17</sup>

Political functions are what set racial auditors most starkly apart from financial and other traditional auditors. A successful republic must create institutions that foster certain character traits and political emotions in its

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basis for this strategy); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000) (describing the empirical basis). No one has previously written, however, about the special contribution that “racial auditors” can make to sunshine strategies nor about the value of such strategies in sparking the best of the “political emotions.” *See infra* Part IV (defining this term).

10. *See infra* Part III.

11. *See infra* Part III.C.

12. *See infra* Part III.

13. *See infra* Part III.

14. *See* DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); MARC MAUER, *RACE TO INCARCERATE* 164 (1999) (noting a direct relationship between poverty and elevated crime rates). *See generally*, MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

15. *See* COLE, *supra* note 22, at 16–62 (discussing the disparate impact of “consensual” and pretextual searches, racial profiling, and quality-of-life policing on minority communities); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002) (offering an extended defense of the proposition that racial profiling harms more of the innocent and misses more of the guilty than do alternative policing strategies).

16. *See infra* Parts IV.A–B (on racial enthusiasm and racial anxiety as emotions helpful in prompting progressive political change).

17. *See infra* Part IV (discussing raced political emotions and their role in sound republican governance).

citizenry.<sup>18</sup> For example, most political activity is habitual. Democrats usually vote for Democrats and Republicans for Republicans; these voters generally feel little need to learn much about the candidates or the issues.<sup>19</sup> But novel information or data that causes anxiety prods citizens into study, debate, and deliberation, and leads them to depart from habitual behavior.<sup>20</sup> Appeals to race are often used to create white anxiety and competition among minority groups that balkanize the nation.<sup>21</sup> But the sort of information disseminated by racial auditors can, at its best, create anxiety that unifies rather than divides by stimulating white empathy and action.<sup>22</sup> Racial auditors can also foster a sense of “political honor,” a sort of principled but passionate self-interest that requires risk and sacrifice.<sup>23</sup> Only certain sorts of individuals respond to appeals to political honor, but those most likely to respond are usually among those persons best able to bring about social change.<sup>24</sup> In post-Fourteenth Amendment America, encouraging one sort of political honor—one committed to racial equality—is a particular imperative.<sup>25</sup> Racial auditors act as specialized citizen representatives, giving the most marginalized members of the political community an effective voice in the political process.<sup>26</sup> Voice, in turn, promotes a sense among the marginalized that they are true members of a broader political community.<sup>27</sup> The net effect of these appeals to political emotions is to

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18. See, e.g., Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1284 (2000) [hereinafter Taslitz, *Mutual Indifference*] (explaining the importance of encouraging racial empathy among the citizenry).

19. See *infra* Part IV.A.1 (elaborating on this example).

20. See *infra* Part IV.A.2 (reviewing the relevant social science).

21. See, e.g., Joseph P. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829 (2000) (explaining the self-defeating nature of white efforts to promote shared solidarity around common social norms via harsh criminal justice enforcement rules and the perhaps unintended resulting racial balkanization of American society).

22. See *infra* Part IV.A–B for an explanation of how this can be so.

23. See *infra* Part IV.C.

24. See *id.*

25. See *id.* The sort of honor I have in mind is in many ways the antithesis of the Southern “honor” that defined antebellum slave society. See Taslitz, *Mutual Indifference*, *supra* note 18, at 1317–22. The Thirteenth, Fourteenth, and Fifteenth Amendments represent a decisive rejection of that version of honor, but an alternative, post-Reconstruction form of American honor has an important role to play in our modern polity, a role that racial auditors can help to advance. Cf. Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 773–77 (1999) [hereinafter Taslitz, *Racist Personality*] (explaining that Northern victors in the Civil War sought to condemn the Southern racist personality, proudly defining the Northern character as the lazy and violent racist’s antithesis, although Northerners continued to embrace their own less violent version of racist thought).

26. I make this point here largely by example and by considering voice as an implicit corollary to emotions of racial enthusiasm, anxiety, and honor. See *infra* Part IV. For illustrations of the mutually reinforcing relationship between voice and Fourth Amendment privacy rights in gay and ultra-poor, black, inner-city communities, see Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy and Human Emotions*, 65 LAW & CONTEMP. PROBS. 125, 158–69 (Spring 2002) [hereinafter Taslitz, *Twenty-First Century*]. For illustrations of the connection between voice and respect for individuals and groups under the Fourth Amendment, see Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257 (2002) [hereinafter Taslitz, *Stories*].

27. See Taslitz, *Stories*, *supra* note 26, at 2283 (summarizing illustrative Fourth Amendment doctrinal changes to promote voice); Taslitz, *Twenty-First Century*, *supra* note 26, at 158–65 (exploring how

help constitute an engaged citizenry.<sup>28</sup> But this citizen activism has a particular purpose: To forge disparate individuals and groups into a “people” capable of helping to define and protect their Fourth Amendment rights to privacy, freedom of movement, and property.<sup>29</sup>

The Fourth Amendment embraces an informed citizen ideology that requires monitorial citizens to guard against governmental abuses.<sup>30</sup> In the complex and busy modern world, it is impossible for all citizens to monitor all government activity.<sup>31</sup> Accordingly, that task falls to groups of specialized citizens who watch for danger, then sound the alarm to the wider citizenry when necessary.<sup>32</sup> Racial auditors are important actors among those citizens who help to monitor police conduct. They recognize that “societies serve from the bottom up—that an alert, vigilant, and properly informed citizenry is the front line of a democracy’s struggle” and that “nations become paralyzed when they cannot understand, much less trust, what they are being told.”<sup>33</sup>

Yet even when the alarm is sounded, not all citizens will initially respond. Indeed, it is likely that the most immediately affected sub-groups—here, racial minorities—will initially organize for action.<sup>34</sup> But their very conduct—building coalitions and appealing to shared republican principles—helps to reconstitute Americans as a “people” who live a shared narrative of evolving, but fundamental commitments.<sup>35</sup> Exploring racial auditors’ actions therefore highlights the respective roles of individuals and groups in making Fourth Amendment freedoms real.

Although I will, along the way, suggest ways to improve the effectiveness of racial auditors, my primary goal in this article is a different one: to use them as a jumping off point for exploring the too-often-neglected political functions of the Fourth Amendment. This article therefore concludes by suggesting illustrative ways in which the judicial, executive, and legislative branches might encourage institutional changes that better serve these functions.

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voice helped to advance gay rights under and via the Fourth Amendment); *cf.* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 134–45 (1999) (explaining the importance of voice in resolving First Amendment free speech and related Fourteenth Amendment equal protection issues at rape trials) [hereinafter TASLITZ, RAPE AND CULTURE].

28. *See infra* Part IV.B.

29. I examine “peoplehood”-promotion here largely through example and as a corollary of promoting certain political emotions. I explore “peoplehood” in the Fourth Amendment context at a more theoretical level in a number of forthcoming pieces.

30. *See* Taslitz, *Slaves No More!*, *supra* note 9, at 757–61 (defending the point that the Fourth Amendment embraces an informed citizen ideology).

31. *See id.* at 757–59. *See also* MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 310–13 (1998).

32. *See* SCHUDSON, *supra* note 31, at 310–13; Taslitz, *Slaves No More!*, *supra* note 9, at 757–61

33. Jim Hoagland, *If It's War, Spread the Sacrifice*, WASH. POST, June 13, 2002, at A37 (noting the importance of an informed, activist citizenry in the war against terrorism).

34. *See infra* text accompanying notes 386–420.

35. *See* Taslitz, *Twenty-First Century*, *supra* note 26, at 158–65 (gay rights struggle and coalition-building is helping to bring gays closer to a reality in which they are equal members of the American people); *infra* text accompanying notes 385–420 (illustrating and explaining how racial auditors help to promote the activism and cross-racial dissent necessary to advance the cause of peoplehood).

Part II compares the respective characteristics of traditional and racial auditors. Part II.A describes what traditional auditors do, while Part II.B explores in more detail the two primary kinds of data—numbers and narratives—on which traditional auditors rely and their respective probative value. Part II.C describes the two roles played by racial auditors: information-dissemination and information-based advocacy. These roles show the power of what I will call “information politics,” the conscious use of data to enhance political power. Part III.A specifically illustrates the work that racial auditors do, drawing on selected efforts made by Amnesty International, the American Civil Liberties Union, and the United States Commission on Civil Rights. Part III.B examines the symbiotic relationship between racial auditors and the mass media, explaining why auditors need the media, but also why the media alone are not up to the job of policing the police.

Part IV examines the ways in which racial auditing can stimulate relevant political emotions, including racial enthusiasm, racial anxiety, and racial political honor. It also explains how such emotions can lead to effective political action as well as to struggle.

Finally, Part V concludes the article by examining some concrete lessons for Fourth Amendment regulation beyond that already undertaken by racial auditors. These lessons include admitting evidence of patterns of racial abuse in suppression hearings, expanding discovery about such abuses prior to those hearings, creating police racial mediation panels, and creating citizen oversight panels to monitor the expanded use of video surveillance cameras in the fight against terrorism in our cities. These “lessons” are not fully defended, serving more as illustrations of the implications for institutional design that stem from recognizing the Fourth Amendment’s embrace of power to “the People.”

## II

### TRADITIONAL AUDITORS AND RACIAL AUDITORS EXPLAINED

#### A. What Traditional Auditors Do

A classic auditing text links the growing need for auditors to the rise of the information society:

Dependable information is essential to the very existence of our society. The investor making a decision to buy or sell securities, the banker deciding whether to approve a loan, the government in obtaining revenue based on income tax returns, all are relying upon information provided by others. In many of these situations, the goals of the providers of information run directly counter to those of the users of the information. Implicit in this line of reasoning is recognition of the social need for independent public accountants . . . .<sup>36</sup>

“Independent” public accountants, who do much of society’s auditing, are not quite as independent as their title suggests. The client being audited pays

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36. WHITTINGTON & PANY, *supra* note 4, at 2.

the public accountant for his auditing services.<sup>37</sup> The accountant understands, of course, that he has an obligation to parties outside the client, and that he may face legal liability and ethical discipline if his audits are done negligently or fraudulently.<sup>38</sup> Nevertheless, from a common person's perspective, an auditor's reliance on those whom he monitors creates at least the appearance of a conflict of interest.<sup>39</sup> That conflict becomes far greater when, as is often the case, accounting firms are also hired to provide lucrative consulting services to the very clients they audit.<sup>40</sup>

Many other sorts of professionals, however, provide auditing services. Audits may be done, for example, of jail operations or university research productivity efforts.<sup>41</sup> In such cases, former jail administrators and former-academics-turned-Deans may be the most qualified members of the auditing team.

Among the most important categories of audits are: (1) audits of financial statements to verify their accuracy; (2) compliance audits to ensure the consistency of organizational behavior with legal standards; and (3) operational audits, which study a unit of an organization to measure both its effectiveness and efficiency in meeting its goals and responsibilities.<sup>42</sup> Many corporations, governmental agencies, and nonprofit organizations also have internal auditors

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37. *See id.* at 6–8.

38. *See id.* at 63–121 (describing the ethical obligations of auditors).

39. One analogy supporting this point might be the dispute over campaign finance laws. One side of that dispute argues that our elected representatives—who are to regulate businesses—owe fealty to the wealthy entities that finance them. *See* GARY HART, RESTORATION OF THE REPUBLIC: THE JEFFERSONIAN IDEAL IN 21ST-CENTURY AMERICA 9, 59, 69–70, 192, 232–33 (2002). Such fealty results in the corruption of the government watchdogs, who now empower special interests, subsets of the “People,” rather than the People as a whole. Similarly, where independent accountants derive their income from those they monitor, at least one eyebrow is raised in the suspicion that these financial auditors do not always serve the public.

40. *See* Arthur Levitt, Editorial, *Who Audits the Auditors*, N.Y. TIMES, Jan. 17, 2002, at A29 (arguing that corporate boards should rarely approve consulting contracts with those whom they audit); *cf.* ELLIOT & SCHROTH, *supra* note 8, at 170:

If auditor independence is truly the way to produce accurate audits, let's give them independence. What if corporations paid an *audit tax*, which created a pool of funds for the payment of auditors' fees? Auditors would not have contracts with corporations; they would report to the SEC and be independent of corporations who pay them for services. The SEC would select auditors for assignments to companies for a reasonable period, say, up to five years. The SEC would hold the contract directly with the audit firm, thereby breaking the tie between corporations and “their” auditors. This is real independence. The consulting side of audit firms must still be separated from audit and cannot interfere with this new form of independence. Auditors, under this concept, could also become the extensions of the SEC presence in public companies.

*Id.*

41. I have some indirect personal familiarity with both sorts of audits. First, one of my closest friends, David Bogard, former Director of the Arlington County Jail, is the leading provider of operational auditing services to jails and prisons in the United States. Second, at my University, I serve on the Research Think Tank Committee, which has the task of articulating a comprehensive University-wide research plan to aid in the University's attaining Tier I research status. As part of that Committee's efforts, the University has explored the possibility of an audit of its current research programs and productivity.

42. *See* WHITTINGTON & PANY, *supra* note 4, at 11.

to apprise them of how well they are doing their jobs and how to do them better.<sup>43</sup> Internal auditors generally report the results of their investigations to high managerial officials in the organization, rather than to the broader public as external auditors do, though internal governmental audit reports go well beyond the organization itself.<sup>44</sup> “Inspectors General” offices in government agencies and departments are an example of a sort of internal government auditor, reporting results both to agency or department heads and to Congress.<sup>45</sup> By statute, Inspectors General (“IGs”) have free access to information needed to do their jobs and may engage in inquiries ranging from traditional financial audits to individualized criminal investigations, program evaluation, and policy analysis.<sup>46</sup>

A focus on collecting, verifying, and disseminating information is the common characteristic for all the different types of audits and auditors. The goals of verification are to promote organizational honesty, efficiency, and effectiveness.<sup>47</sup> In the case of private (as opposed to governmental) internal audits, these goals are achieved by alerting management to problems that require action.<sup>48</sup> Internal government audits and external audits reach a wider audience, bringing marketplace pressures (such as from investors who will not buy stock in a financially shaky company) and political pressures (from legislative oversight, the media, and interested members of the public) to bear on poorly performing institutions.<sup>49</sup>

Auditors rely on a wide range of evidence for their reports, much of it measurable data that must first be collected.<sup>50</sup> But even measurable data must be verified, which requires auditors to act as detectives.<sup>51</sup> Detectives are necessarily skeptical, and their inquiries require them to craft sensible stories to sort fact from fiction.<sup>52</sup> Much like Ms. Marple and Hercule Poirot, the famous detectives of Agatha Christie mystery novels, the auditors must interview “suspects” (relevant employees or officials) to achieve an accurate sense of what has happened.<sup>53</sup>

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43. *See id.* at 12–13.

44. *See id.* at 12.

45. PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 24 (1993).

46. *Id.* at 17, 24.

47. *See* WHITTINGTON & PANY, *supra* note 4, at 2–13, 742–77, 783, 787.

48. *See id.* at 776–82.

49. *See* ELLIOT & SCHROTH, *supra* note 8, at 44–50 (explaining that market forces depend on hard-to-find accurate financial information); *infra* Part III (illustrating how auditors’ exposure of information can unleash political forces that improve governmental responsiveness, efficiency, and fairness).

50. *See* WHITTINGTON & PANY, *supra* note 4, at 135–66.

51. *See* RONALD BLANK, *THE BASICS OF QUALITY AUDITING* 17–18 (1999).

52. *See* BARBARA NORVILLE, *WRITING THE MODERN MYSTERY* 4–14, 124–28 (1986).

53. *See id.* at 7–8 (discussing Ms. Marple, who often uses the police to do her legwork); AGATHA CHRISTIE, *MURDER ON THE ORIENT EXPRESS* (1933); *see also* BLANK, *supra* note 51, at 17–18 (describing in part a narrative-building process in auditing).

For example, one novella meant to convey the life of an auditor describes the career of Jack Butler.<sup>54</sup> Jack's first major audit is of a cement plant. To know what information to seek, Jack reads widely about the cement industry before starting his audit, and then visits the plant to observe exactly how cement is made.<sup>55</sup> His interviews reveal that a clerk has been advancing herself funds from petty cash. In addition, Jack measures the content of cement silos to verify the quantity of their contents. Finding the silos' contents several feet short, Jack mentions the shortfall to Walt, the inventory manager. Walt explains that they routinely use a "dead-fill allowance" to adjust their measurements to get "the true reading" of the contents' quantity because structural features make it physically impossible to fill the silos to the top.<sup>56</sup> This assertion too is false, as Jack's interviews reveal, and Walt had a motive for lying: preserving his long-standing stellar reputation as a conscientious employee.<sup>57</sup>

Narrative plays a particularly important role in operational auditing. A story must be crafted to explain *why* an organization is not maximizing its effectiveness and efficiency. That "why" serves as the basis for recommending solutions for the future.<sup>58</sup> Audits of large, complex organizations may often require the examination of representative samples of information to verify accuracy. When these samples raise questions, the auditor must again craft a tale (fraud? negligence?) to explain the discrepancies.<sup>59</sup>

Audit ineffectiveness can stem not only from client efforts to subvert the audit, but from auditor failures to spot and adequately pursue leads.<sup>60</sup> In particular, governmental audits may suffer from a narrowness of vision. Federal IGs too often, for example, investigate small problems, "ignoring the larger systemic issues that produce the same small problems over and over."<sup>61</sup> They also too often describe problems without recommending an adequate, or even any, solution.<sup>62</sup> Furthermore, upon uncovering a problem, they may subsequently accept management's word that the flaw has been corrected.<sup>63</sup> Moreover, partly because the IG reports deal with small matters and because there may be political and financial obstacles to change, IG reports are often simply ignored, both by agency heads and by Capitol Hill.<sup>64</sup>

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54. JAMES K. LOEBBECKE, *THE AUDITOR: AN INSTRUCTIONAL NOVELLA*, at vii (1999).

55. *Id.* at 33.

56. *Id.* at 35–36.

57. *Id.* at 36.

58. *See* WHITTINGTON & PANY, *supra* note 4, at 785–86.

59. *See id.*

60. *See* MICHAEL C. KNAPP, *CONTEMPORARY AUDITING: REAL ISSUES & CASES*, at xix (4th ed. 2001); LIGHT, *supra* note 45, at 220.

61. *Id.* at 220.

62. *Id.*

63. *Id.* at 222.

64. *Id.* at 220.

## B. Racial Auditors and Their Data

Racial auditors are truly independent in a way that financial and other more traditional auditors are not. Racial auditors are always external to the organizations they audit.<sup>65</sup> None of their funding comes from the auditees, and the auditors themselves do not operate for profit.<sup>66</sup> Most racial auditors are nongovernmental organizations (“NGOs”), thus relatively free from political influence.<sup>67</sup> However, I include one government-affiliated entity, the United States Commission on Civil Rights, because of its renown, its wide (though arguably, and sadly, declining) impact, its substantial functional similarity to the NGOs in certain important respects, and its relative freedom (at least until recently) from partisan political pressures in the area of monitoring the police.<sup>68</sup>

Like most traditional auditors, racial auditors act as detectives. But their goal is to uncover human rights violations and their causes, rather than to uncover financial irregularities.<sup>69</sup> Racial auditors, again like traditional auditors, rely upon, verify, and generate numbers, such as the number of suspicionless stop-and-frisks of African Americans in poor neighborhoods or the number of allegations of excessive force against the New York City Police Department.<sup>70</sup> Generating these numbers requires conducting interviews, reviewing documents, and visiting the sites of alleged abuses to craft and evaluate narratives.<sup>71</sup> Racial auditors describe how things *are*, but also supply a vision of how they should be and a roadmap for getting there.<sup>72</sup>

Racial auditors may also draw “samples” believed to be representative of wider police operations.<sup>73</sup> Because most racial auditors do not have a statutory right of access to all information under police control,<sup>74</sup> such sampling may be

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65. This observation follows directly from my definition of racial auditors, which requires that they be external to, and independent from, those they audit. *See infra* text accompanying notes 109–135.

66. *See infra* text accompanying notes 109–35.

67. The primary examples examined here are Amnesty International and the ACLU. *See infra* text accompanying notes 109–35.

68. *See* Jocelyn C. Frye, et al., *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.–C.L. L. REV. 449 (1987) (tracing the history of the Commission and arguing that the 1983 changes in its structure have compromised the quality of its scholarship, weakened its influence, compromised its independence, and damaged its spirit of cooperative bipartisanship, all unfortunate developments that are nevertheless curable); *infra* text accompanying notes 269–391 (describing the structure of the Commission and its impact on policing practices).

69. *See infra* Part III (illustrating the work of selected racial auditors).

70. *See infra* Part III.A.3 (reviewing instances in which precisely such numbers were generated).

71. *See infra* Part III.A.2 (describing extensive investigatory efforts by Amnesty International concerning the New York City Police Department).

72. *See infra* Part III (describing illustrative reports on police conduct crafted by Amnesty, the ACLU, and the United States Commission on Civil Rights).

73. *See infra* text accompanying notes 151–55, 193–205, 254–69 (describing three instances of such sampling).

74. The United States Commission on Civil Rights is one illustrative exception. *See* Frye, *supra* note 68, at 456 (noting the Commission’s subpoena power, completely independent of any need to rely on the Justice Department’s power of subpoena). Nongovernmental auditors lack independent subpoena powers for assistance in writing reports, but can gain access to the courts’ subpoena power by filing lawsuits. *See infra* Part III.A.1 (describing the ACLU’s use of the subpoena power in a civil lawsuit to collect data on racial profiling).

more a result of what information victims and witnesses are willing to provide, even if anonymously, than of any “scientific” sampling method.<sup>75</sup> This observation may mean that racial auditors rely to a greater extent than do many traditional auditors on individual narratives and pithier anecdotes. Such individual stories also convey things that raw numbers cannot, such as the physical and emotional pain suffered by a man beaten by police or by a woman arrested in front of her children and jailed for a minor traffic violation.<sup>76</sup> Amnesty International’s use of “prisoners of conscience”—individual victims of torture or wrongful imprisonment—stands out as one such use of storytelling. These stories convey human pain and serve as vivid examples of more widespread suffering, as symbols to grab the public’s otherwise short attention.<sup>77</sup>

Yet narrative and more episodic anecdote can, much like raw numbers, provide important guidance for public-policy-setting and political action.<sup>78</sup> Anecdotes can be seen as analogous to ethnographies or case studies of individual persons or organizations by social scientists.<sup>79</sup> Such studies serve several functions. Interpretive social science, which often relies upon case studies, is concerned not so much with what causes a phenomenon as with its meaning; such social science therefore treats social phenomena as texts to be interpreted.<sup>80</sup> This “hermeneutics” of human action is based on conveying a “feeling for the individuality and uniqueness of persons; it is a way to

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75. See generally RICHARD A. WEHMHOFER, STATISTICS IN LITIGATION: PRACTICAL APPLICATIONS FOR LAWYERS 50–57, 258–60 (1985) (describing analogous social science sampling techniques); WHITTINGTON & PANY, *supra* note 4, at 325–69 (describing sampling techniques in traditional financial audits); *infra* Part III.A.3 (discussing an instance in which the NYPD refused to make certain data available to a racial auditor, and then describing the auditor’s necessarily incomplete report as based on unrepresentative samples, while continuing to withhold any supposedly more representative sampling data).

76. *Atwater v. City of Lago Vista*, 532 U.S. 318, 346–47 (2001) (describing, though incorrectly ultimately discounting, the humiliation felt by a woman arrested in front of her children for not wearing a seatbelt); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 37–46 (2001) (explaining the advantages of storytelling as a form of academic discourse); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 404–39 (1996) (analyzing psychological and social processes that give stories persuasive power and exploring ways in which stories can be used or abused to aid legal reasoning); *cf.* Taslitz, *Stories*, *supra* note 26, at 2257–63, 2290 (explaining the value of individual and group stories in constitutional reasoning and recounting several powerful stories to convey the emotional pain experienced by the victims of racial profiling).

77. See Morton E. Winston, *Assessing the Effectiveness of International Human Rights NGOs: Amnesty International*, in NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE 25, 38–39 (Claude Welch ed., 2001) (discussing symbolic politics and prisoners of conscience) [hereinafter NGOS AND HUMAN RIGHTS].

78. See, e.g., Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence*, 5 MICH. J. GENDER & L. 1, 34–46, 57–68 (1998) [hereinafter Taslitz, *Feminist Approach*] (discussing the value of narrative and case study in setting evidentiary policy); Taslitz, *Stories*, *supra* note 26 (discussing the value of stories in crafting criminal procedure policy discussed and illustrated).

79. See generally A CASE FOR THE CASE STUDY (Joe R. Feagin et al. eds., 1991); MARTYN HAMMERSLEY, WHAT’S WRONG WITH ETHNOGRAPHY? (1992); DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES (1988); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993) [hereinafter Taslitz, *Myself Alone*].

80. See DANIEL LITTLE, VARIETIES OF SOCIAL EXPLANATION 68–69, 71 (1991).

understand the inwardness of the other,”<sup>81</sup> a task that can be fully accomplished only by hearing participants’ stories. What is true of individuals can also be true, however, of organizations, for organizational cultures can give human actions within the organization their own peculiar set of meanings.<sup>82</sup> Furthermore, sometimes we are more interested in fully understanding the unique history, meanings, and behaviors demonstrated within a single organization, such as a particular police department or a division or unit within that department. Such an understanding can ordinarily be accomplished in all its complexity only by exploring many converging, disparate types of data, including narratives.<sup>83</sup> Narratives and case studies can reveal psychological habits or preconceptions that render observers unaware of certain evidence and hypotheses or unwilling to adequately consider them.<sup>84</sup> Correspondingly, powerful narratives can sharpen investigators’ attention to details and their significance, which might otherwise go unnoticed.<sup>85</sup> Narratives may likewise foster novel lines of inquiry.<sup>86</sup> Additionally, case studies can sometimes offer generalizable insights. Thus, there may be theoretical reasons to believe that a number of naturally occurring (rather than research-created) cases may fairly be viewed as typical of a broader set of similar cases.<sup>87</sup> Repeated case studies and narratives culled from a variety of settings may be sufficient to infer typicality much in the way that sampling in statistical techniques supports inferences about a broader population.<sup>88</sup>

Professor Susan Bandes has summarized the critical function served by collecting anecdotal information about the police. Bandes did a detailed study of allegations made by more than sixty African-American men, citing physical abuse, even torture, at the hands of officers in the Area Two Violent Crimes Unit of Chicago’s South Side.<sup>89</sup> The courts had examined each of the incidents in isolation, failing to see a pattern and viewing them largely as aberrational and

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81. PAUL DIESING, *HOW DOES SOCIAL SCIENCE WORK?* 106 (1991).

82. *See* POLKINGHORNE, *supra* note 79, at 122 (“Narrative structures operate to give significance and unity to group events in a manner similar to the way they operate in the lives of persons.”).

83. *See, e.g.*, David A. Snow & Leon Anderson, *Researching the Homeless: The Characteristic Features and Virtues of the Case Study*, in *A CASE FOR THE CASE STUDY*, *supra* note 79, at 148, 152–62 (making an analogous point and recommending “multi-perspectival analyses”; “triangulated research” strategies exploring many data sources to focus on “persons, situations and context, and time”; and careful attention to changing social processes over time).

84. *See* Taslitz, *Feminist Approach*, *supra* note 78, at 64–65.

85. *See id.* at 59–60 (describing clinical social science studies as enabling the “acute observer”).

86. *See* Snow & Anderson, *supra* note 83, at 162 (“The final characteristic feature of case studies is that they tend to have an open-ended, emergent quality that facilitates the discovery of both unanticipated findings and data sources.”).

87. *See* Taslitz, *Feminist Approach*, *supra* note 78, at 65.

88. *Cf.* Florida Bar v. Went for It, Inc., 515 U.S. 618, 627 (1995) (holding sufficient evidence existed in a First Amendment free speech analysis to support the Florida Bar’s assertion that early lawyer contact with physically injured potential clients and their relatives caused significant social harm given the combination of statistical data and anecdotal data “noteworthy for its breadth and detail,” upon which the Bar relied); WEHMHOEFER, *supra* note 75, at 50–57, 258–60 (explaining sampling as a way to draw inferences about a broader population).

89. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1276 (1999).

“merely” anecdotal.<sup>90</sup> Bandes defines an anecdote as a “small, but polished story that emphasizes and even embellishes salient and evocative details and disregards those that might interfere with the moral or teaching point.”<sup>91</sup> Anecdote may “bring alive” what may otherwise be a dry point, by both being evocative and appealing to empathy.<sup>92</sup> But critics stress the dangers of anecdote: It may oversimplify, disregarding details that matter; it may present itself as representative of a broader truth when it is not; and it may distract listeners from weighing its weaknesses precisely by means of its powerful emotional appeal.<sup>93</sup> Critics worry that anecdote should not, therefore, guide legal policy.<sup>94</sup>

Yet a judgment about representativeness, says Bandes, is always necessary to structuring experience, a process hard-wired into our brains.<sup>95</sup> Moreover, the law’s reliance on anecdote—on the analogy and case studies that are the hallmark of the common law system—is especially unavoidable.<sup>96</sup> Furthermore, anecdote may be arresting precisely because it defies expectations, forcing us to question whether this vivid and new information is indeed representative of a broader truth.<sup>97</sup> Bandes explains:

Anecdote, when well deployed, may be an effective tool in challenging the authority or universality of the conventional narrative. The greatest danger of the grand narrative is that it ossifies. Without the pull of the anecdotal, there is no way to assess the accepted story’s continued viability in the face of new understanding and new information. Its structural choice and assumptions become invisible, and its narrative viewpoint masquerades as omniscient.<sup>98</sup>

Anecdote’s use in the law, as in social science, unsettles comfortable, often unrecognized assumptions that may stand in the way of our ability to see imminent patterns or alternative tales to explain police action and motivation.<sup>99</sup> When similar anecdotes accumulate, and especially when they converge on a similar conclusion suggested by other sorts of evidence, such as numerical data, anecdote’s value is amplified still further.<sup>100</sup>

In the case of police brutality, Bandes saw the detailed, intense descriptions of more than sixty alleged incidents of sometimes brutal physical abuse by Area

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90. *See id.* at 1275–81.

91. *Id.* at 1310.

92. *See id.* at 1311 for a more detailed analysis of the importance of empathy; *see also* Taslitz, *Mutual Indifference*, *supra* note 18; *infra* note 473.

93. *See* Bandes, *supra* note 89, at 1311–12.

94. *Id.* at 1313–14.

95. *See id.* at 1311–14. Our use of this “representativeness heuristic” often stands us in good stead in everyday life, but can also lead us into error if it is used in inappropriate settings or if the wisdom of its application is never questioned. *See* NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* 43, 46–49, 50, 57, 61–62, 67–68, 92–93, 185 (2000).

96. *See* Bandes, *supra* note 89, at 1314–15.

97. *Id.* at 1315–16.

98. *Id.* at 1316.

99. *See infra* text accompanying notes 6–9.

100. *See infra* text accompanying notes 146–170.

Two Officers as challenging five standard assumptions about the criminal justice system in this area:

1. *The status quo is essentially just*: This assumption manifests itself in the belief that those punished by the state have brought that pain upon themselves and that the police are, by and large, “dedicated police officers whose sole motivation is to serve the public good.”<sup>101</sup>
2. *Selective empathy*: The assumption is that those of different class, gender, race, and prestige backgrounds than the judge will act and think in ways consistent with the judge’s experience or, alternatively, that the judge will see those before him as so different, so “other,” that he is incapable of standing in their shoes or believing their tales, a failure of “imaginative empathy.”<sup>102</sup>
3. *The fear of destabilization and chaos*: This assumption reflects judges’ concern that acknowledging abusive patterns might require costly and uncertain revamping of an entire system. A judge may see the present police reality as working well to protect him and others like him, thus likely working well for most people—at least the most deserving ones—and therefore something dangerous to fiddle with.<sup>103</sup>
4. *The need for individual stories of motive, fault, and blame*: The idea here is that judges more readily accept explanations of deliberate, bad faith wrongdoing by individuals than of subconscious, organizational patterns reflecting covert institutional messages, willful blindness, and fuzzy lines of authority.<sup>104</sup>
5. *Private common-law attributes are the paradigm for public-law cases*: The private dispute common-law adversarial model assumes that a police brutality plaintiff “will be seen as motivated solely by greed or fear for his own well-being, that he can be easily bought off by money, that he has no long term concerns for good government or community, and that his adversary is an individual like him, of equal power and similar motivations.”<sup>105</sup> Yet, rather than being an isolated contest between two warring individuals, police brutality litigation may involve systemic failures, or actions by individuals acting in good faith.<sup>106</sup>

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101. See Bandes, *supra* note 89, at 1309, 1319.

102. *Id.* at 1309, 1319–20. See also Taslitz, *Mutual Indifference*, *supra* note 18, at 1362–68 (on imaginative empathy).

103. See Bandes, *supra* note 89, at 1320–21.

104. See *id.* at 1328–29.

105. *Id.* at 1338.

106. *Id.* at 1335. Bandes also addresses a sixth assumption: the “preference for judicial isolation,” *id.* at 1338, by which she means the “many devices [judges use] to assure themselves and others that they have no choice but to affirm the status quo.” *Id.* This sixth assumption boils down to a sense of “helplessness to which judges lay claim when they wish to deflect responsibility for a difficult choice,” *id.* at 1339, that is, a refusal to take a stand against injustice, such as police brutality. See *id.* at 1338–40. This assumption seems to me to be conceptually distinct from the other five assumptions. The first five explain why judges will be blind to injustice, while the sixth assumption explains judicial inaction in the face of the blatantly (even to the courts) unjust. However, the mere existence of the sixth assumption still has implications for racial auditors because auditors can help to circumvent the courts (by turning

The combination of these assumptions and of the fear of untoward political consequences—even impeachment, argues Bandes—makes judges reluctant to declare war on police brutality. Indeed, it makes the courts unwilling even to consider much pattern evidence, because the pattern may be too unsettling to view.<sup>107</sup> Had the courts embraced in each abuse case evidence of the many other instances of similar abuse by other officers in Area Two, Bandes implies, the courts would have had to reject the assumptions of the standard police narrative and be open to an alternative tale, one told from the perspective of those on society's margins looking in.<sup>108</sup> Racial auditors use anecdote as well as numerical measurement to press this systemic view of the police on courts and other resistant legal institutions, forcing them to hear, if not always accept, alternatives to the dominant narratives, as the examples in Part III will reveal.

### C. Racial Auditors and Information Politics

Although racial auditors do not usually involve themselves in partisan politics, they are nevertheless intensely political organizations. They exist to alter the distribution and use of power in society, specifically in government policy.<sup>109</sup> Their political purpose—to enhance the recognition and enforcement of human rights—combined with their frequent (though not universal) independence from the state and from partisan political processes sharply differentiates them from other auditor types.<sup>110</sup> Like all auditors, however, racial auditors use information as their primary tool, albeit for nakedly political ends.

The paradigm racial auditor is a nongovernmental organization that has a significant focus on combating both racial bias and police misconduct.<sup>111</sup> These NGOs play the politics of principle, using moral shaming to pressure

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to the legislature and to the executive); promote reformist settlement negotiations, *see infra* Part III.A–B; or shame courts into action. Racial auditors therefore help to explode the final assumption on Bandes' list.

107. *See id.* Excessive use of force by the police in investigating crime or enforcing the criminal law, the subject of Bandes' piece, is, of course, regulated by the Fourth Amendment. *See* ANDREW E. TASLITZ & MARGARET L. PARIS, *CONSTITUTIONAL CRIMINAL PROCEDURE* 267–76 (1997). But the protections of the Fourth Amendment, and the efforts of racial auditors, extend to many far less violent police–citizen interactions. *See id.* at 86–125.

108. *See* Bandes, *supra* note 89, at 1339–40.

109. *See generally* NGOs AND HUMAN RIGHTS, *supra* note 77 (collecting essays making similar points concerning many of the NGOs that I label as sometimes serving as “racial auditors” and assessing their overall effectiveness, including on numerous issues other than race).

110. *See infra* Part III (analyzing and illustrating racial auditors' nature and activities).

111. I am not suggesting that an entity's sole reason for being must be the pursuit of racial equality. On the contrary, including the many important broader-based human rights organizations is likely to foster more energetic coalition building around, and bring more resources to, the cause of racial justice. Rather, it is when an auditing organization brings its guns to bear on questions of racial equality that the organization adopts the *role* of a racial auditor. Restated, a racial auditor is more a role than an entity.

I focus on the auditors' involvement in racial issues because racial appeals are a particularly effective way to build political action around issues of human rights in the United States, for reasons explored in Part IV of this article. But many of the lessons taught here, with some modifications, can be generalized to political auditing roles other than racial auditing.

governments into living up to the promise of international human rights norms.<sup>112</sup> NGOs have been so increasingly effective that the language of international human rights and moral shaming has begun to make its way into American criminal courts and the everyday practice of criminal law in the United States.<sup>113</sup> NGOs “combine the grass-roots organizing strategies of social movements, the best versions of muckraking reportage in investigative journalism, and the shaming techniques of deeply religious small towns.”<sup>114</sup>

Importantly, NGOs play politics on behalf of the common people, those described in religious literature and in the Rolling Stones’ well-known call-to-arms as the “salt of the earth.”<sup>115</sup> NGOs marshal the “power of the weak” as a challenge to the conventional pillars of power.<sup>116</sup> Martha Minow put it this way:

Bypassing state-to-state international relations, the NGOs introduced a kind of human rights enforcement dependent on the beliefs of ordinary people and their power to pressure and shame governments. In a real sense, the broad vision of human rights imagined in the Universal Declaration [of Human Rights] previewed and required the development of some strategy of this ilk in order to tie human rights enforcement to ordinary people and to generate a sense of international community, quite different from that produced by an assembly of sovereign state representatives.<sup>117</sup>

International NGOs, though most often touted for their reliance on international human rights principles, also rely on more local declarations of rights, such as those in the United States Constitution.<sup>118</sup> In fact, some NGOs, such as the American Civil Liberties Union (“ACLU”), rely primarily on such local norms.<sup>119</sup>

112. See ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* 193 (2001) (“The moral power of groups like Amnesty International, Human Rights Watch, and the Lawyers Committee for Human Rights is considerable. Fully engaged in the mobilization of shame, they are relentless, persuasive, and pervasive.”). See generally JONATHAN POWER, *LIKE WATER ON STONE: THE STORY OF AMNESTY INTERNATIONAL* (2001) (recounting the history of the efforts of one of the leading NGOs to use shame as a weapon against power).

113. See, e.g., THOMAS GEOGHEGAN, *IN AMERICA’S COURT: HOW A CIVIL LAWYER WHO LIKES TO SETTLE STUMBLED INTO A CRIMINAL TRIAL* 198 (2002) (“Instead of the *Harvard Law Review*, you read the latest report of Human Rights Watch. It’s scary how it’s now a way to ‘keep up,’ with what’s happening in the law here, like having an advance sheet . . .”).

114. Martha Minow, *Instituting Universal Human Rights Law: The Invention of Tradition in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* 58, 64 (Austin Sarat et al. eds., 2002).

115. See *Salt of the Earth*, on BEGGARS’ BANQUET (Olympic Studios 1968).

116. See generally ELIZABETH JANEWAY, *POWERS OF THE WEAK* (1980); Minow, *supra* note 114, at 64 (summarizing Janeway’s work).

117. Minow, *supra* note 114, at 65. For background on the Universal Declaration, see JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, & INTENT* (1999).

118. See *infra* Part III.B.

119. See *infra* text accompanying notes 138–45 (discussing the ACLU). Martha Minow reminds her readers of an important caveat to the assertion that NGOs tie the human rights movement to ordinary people:

The vast number of people in the world may be understandably too distracted by their own life circumstances to become engaged with problems in other parts of the world, so the “ordinary people” recruited by the NGOs typically fall in the small percentage of the world’s population that already enjoys relative material comfort and political freedoms.

Although NGOs' primary function is to collect and disseminate data, they also serve as advocates on behalf of the disempowered.<sup>120</sup> Such advocacy may include lobbying, providing legal assistance to the poor or oppressed, recommending specific policy changes and methods, and aiding in grass-roots organizing.<sup>121</sup> There is, however, no sharp division between these information and advocacy functions. Information is used as the spur for advocacy, and advocacy is used to uncover further information.<sup>122</sup>

Margaret Keck and Kathryn Sikkink have recently explained that NGOs use four primary tactics:

1. *Information politics*, or the ability to quickly and credibly generate politically usable information and move it where it will have the most impact;
2. *Symbolic politics*, or the ability to call upon symbols, actions, and stories that make sense of a situation for an audience that is frequently far away;
3. *Leverage politics*, or the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence; and
4. *Accountability politics*, or the effort to hold powerful actors to their previously stated policies or principles.<sup>123</sup>

Some or all of these tactics are at work in the brief case studies discussed below. As will be seen, organizations that embrace tactics of advocacy-based information politics are particularly likely to be effective in monitoring racially tinged police behavior in the United States.<sup>124</sup> Indeed, although this article may have comparative and international implications, my focus is a local one: exploring the effectiveness of NGOs and functionally similar organizations in controlling racially unfair police practices in this nation. I am, therefore, principally concerned more with the United States Constitution than the Universal Declaration of Human Rights in the pages that follow. Perhaps even more pointedly, I explore the actual and potential local political consequences, more than the legal doctrinal implications, of the work of the NGOs and their brethren in this area.

My measure of effectiveness therefore turns on two relevant NGO social functions: using sunshine to deter police abuses and giving effective voice to the

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Minow, *supra* note 114, at 75 n.18. The focus of this article, however, is on problems *in this part of the world*, namely, within the United States. Moreover, I argue shortly that racial auditors can play a role in stimulating more active political engagement by "ordinary people" than would otherwise be possible.

120. See Claude E. Welch, Jr., *Introduction*, in *NGOS AND HUMAN RIGHTS*, *supra* note 77, at 1, 10.

121. See *id.* at 6, 10; *infra* Part III.A–B (discussing grass-roots organizing).

122. See *infra* Part III.A.

123. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 16 (1998). See also Winston, *supra* note 77, at 36–51 (comparing Keck and Sikkink's model to other models and analyzing the effectiveness of these four tactics).

124. See *infra* Part II.A.1.

racially disempowered.<sup>125</sup> Routinely exposing police conduct to the light of day, what Erik Luna calls “transparent policing,”<sup>126</sup> is critical to deterrence precisely because the police so often operate under a code of silence.<sup>127</sup> They often work alone or in small teams, exercising wide discretion in the use of force or its threat to ferret out crime.<sup>128</sup> The code of silence prevents the few officer witnesses from revealing fellow officers’ misdeeds.<sup>129</sup> Furthermore, the officers’ primary incentive is often to find the wrongdoer by the most effective means necessary, even if that sometimes means bending the law.<sup>130</sup> This phenomenon is exemplified by “testilying,” the widespread practice in certain police departments of lying about how evidence was seized, thus “beating” suppression motions.<sup>131</sup> Perhaps more often, the police culture of political darkness leads to constitutional abuses stemming from negligence, ignorance, and ennui rather than from nefarious officer scheming.<sup>132</sup> Yet such ignorance and laziness can lead to wrongful seizures, unreliable confessions, and tainted lineups.<sup>133</sup>

Race plays a particularly important dual role. Racial stereotypes and subconscious biases can negatively affect police perceptions of danger and of suspicious behavior.<sup>134</sup> For example, African Americans might be stopped and frisked and subjected to excessive police force more often than whites, as is probably the case.<sup>135</sup> But, if properly done, appeals to common racial interest and unity can serve as a powerful motivating force among racial minorities to

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125. See *infra* Part IV.

126. Luna, *supra* note 9 (coining the term “transparent policing”).

127. See Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (presenting a detailed analysis of the police code of silence and previous failures to crack it).

128. See ANTHONY BOUZA, *POLICE UNBOUND: CORRUPTION, ABUSE, AND HEROISM BY THE BOYS IN BLUE* 213 (2001) (“Policing is mainly an individualistic pursuit, undertaken by the lone entrepreneur or, more likely, with his or her partner. It is the one cop, or pair, entering upon a wide variety of unknowns, that marks the genre and produces the need for initiative and independent action.”); SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990* 21–53 (1993) (discussing sources of, and efforts to control, police discretion, especially in the areas of search and seizure).

129. See Chin & Wells, *supra* note 127, at 242–44.

130. See BOUZA, *supra* note 128, at 13–46 (summarizing social and bureaucratic forces pushing the police to bend, sometimes to break, the law to enforce it).

131. See Taslitz, *Slaves No More!*, *supra* note 9, at 761–69 (summarizing the causes of, and potential solutions for, the phenomenon of testilying).

132. See, e.g., EDWIN J. DELATTRE, *CHARACTER & COPS* 51 (2d ed. 1994) (“Few actions erode the confidence of the public or the police in their own department as much as the indifference of command officers to misconduct by their personnel.”); *id.* at 52–53 (arguing that law enforcement must adequately train officers in handling constitutional ambiguities and not trust to luck).

133. See BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (collecting ten stories of wrongful convictions, often stemming from sloppy police work).

134. See TASLITZ & PARIS, *supra* note 107, at 404–09 (summarizing the literature).

135. See, e.g., COLE, *supra* note 14, at 16–55 (discussing the disparate impact of searches and seizures); HARRIS, *supra* note 15, at 48–90 (offering a more detailed analysis of statistical data); CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM*, NYU Press (forthcoming June, 2003) (discussing race and excessive force claims against the police).

press for change, and, in the context of an appeal to more widely shared political principles, can lead to coalition-building both among racial minorities and with members of the white majority.<sup>136</sup> This process of struggle will itself give the disempowered a voice and aid in bridging gaps among groups otherwise divided by race, income, gender, religion, or sexual orientation.

When NGOs serve in the role of monitoring police racial abuses to deter state wrongdoing and to empower the marginalized of this country, the NGOs act as racial auditors. But, some organizations that are clearly not NGOs can, under specified circumstances, serve a similar social role in regulating American police forces.<sup>137</sup> These non-NGOs thus also deserve the “racial auditors” label. Racial auditors have been responsible for some of the most creative and effective changes in the apparatus offered for minority involvement in monitoring the police.

### III

#### THE WORK OF RACIAL AUDITORS

##### A. Three Case Studies

###### 1. *The American Civil Liberties Union*

The American Civil Liberties Union (“ACLU”), established in 1920, is a private voluntary organization committed to defending the Bill of Rights.<sup>138</sup> The ACLU includes a national office in New York City, a legislative office in Washington, D.C., and staffed independent affiliates in almost every state.<sup>139</sup> It vigorously advocates a sometimes absolutist position on constitutional rights, especially concerning freedom of speech and the separation of church and state.<sup>140</sup> The organization is especially committed to protecting the rights of dissenters, even those opposed to the liberal principles for which the ACLU stands.<sup>141</sup> Consequently, the ACLU has even defended communists and Nazis, alienating itself from both the political left and the political right.<sup>142</sup> The ACLU

136. *See infra* Part IV.A (defending this point).

137. *See infra* Part III.C.

138. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 4 (2d ed. 1999) [hereinafter WALKER, ACLU].

139. *Id.* at 4.

140. *See id.* at 5. These absolutist positions have led some commentators, especially conservative ones, to heap fiery condemnation upon the ACLU and its affiliates. *See, e.g.*, WILLIAM DONOHUE, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU (2001); F. LAGARD SMITH, ACLU: THE DEVIL’S ADVOCATE: THE SEDUCTION OF CIVIL LIBERTIES IN AMERICA (1996).

141. *See* HAIG BOSMAJIAN, THE FREEDOM NOT TO SPEAK 143 (1999) (discussing the investigation of the ACLU as a “subversive” and “un-American” organization by the House Un-American Activities Committee, during its 1940s and 1950s anti-Communist witch hunt); WALKER, *supra* note 138, at 5, 323–27; SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA 100–02 (1998) (discussing ACLU representation of the Ku Klux Klan) [hereinafter, WALKER, RIGHTS AND COMMUNITY].

142. On the ACLU’s representation of Communists and Nazis, *see* WALKER, ACLU *supra* note 138, at 63–65, 118–19, 208–11, 323–27. On the ACLU’s alienation from the political left, *see*, for exam-

uses a variety of advocacy methods, from litigation, to lobbying, to selling topical books on individual rights.<sup>143</sup> The organization has a long history of successfully defending minorities against majority power; its strongest advocates boldly declare that, “With some justification, the ACLU can claim to have shaped contemporary values. Principles of individual freedom, protection against arbitrary government action, equal protection, and privacy have pervaded our society [because of the ACLU].”<sup>144</sup> While some might consider this praise an overstatement and question the wisdom of many of the ACLU’s positions, the ACLU has unquestionably played an important modern role in expanding the rights of criminal suspects, the broader civil rights of racial minorities, and the legal protections at the intersection of race and equality in the justice system.<sup>145</sup>

The ACLU is the racial auditor most closely fusing the data-dissemination and advocacy functions. One telling example is its war on racial profiling.

*a. Driving while black.* One major battle has been over the phenomenon of “driving while black” (“DWB”), the police use of race, consciously or not, as a weighty factor in deciding whom to stop for traffic violations and whom thereafter to search.<sup>146</sup> One of the major claims of the opponents of DWB is that the traffic violations are but a pretext for fishing expeditions for illegal drugs.<sup>147</sup>

One victim of DWB in Maryland, Robert Wilkins, brought suit against the Maryland State Police after they had stopped and searched his rental car as he and his family were returning from a funeral.<sup>148</sup> The ACLU represented Wilkins in an action claiming that the stop was based on a racial profile, violating several civil rights and other statutes.<sup>149</sup> Although the police initially denied the allegation, they settled when a document, the “Criminal Intelligence Report,” containing an “explicit profile targeting African Americans,” was discovered.<sup>150</sup> The most important part of the settlement agreement was that the state police would “keep data on every traffic stop that resulted in a search, and submit the

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ple, RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* 149–62 (1997) (sneering at and debunking the ACLU’s absolutist defense of the “speech we hate” to protect racist and sexist insults and harassment and some forms of on-campus racial and gender intimidation); CATHERINE A. MACKINNON, *ONLY WORDS* 51, 130–31 n.28 (1993) (criticizing what she sees as the ACLU’s willingness to defend some forms of sexual harassment as protected free speech).

143. On litigation and lobbying, see WALKER, *ACLU supra* note 138, at 4–5. To illustrate the ACLU’s other efforts, a search on Amazon.com performed April 7, 2003, brought up twenty books by the ACLU directed at laypersons on a wide variety of civil liberties topics.

144. See WALKER, *ACLU supra* note 138, at 3.

145. See *id.* at 237–78, 355–58.

146. See, e.g., KENNETH MEEKS, *DRIVING WHILE BLACK: WHAT TO DO IF YOU ARE A VICTIM OF RACIAL PROFILING* 4–20 (2000).

147. See HARRIS, *supra* note 15.

148. See *Complaint Wilkins v. Md. State Police* (D. Md. 1993) (Civ. No. MJG 93–468) [hereinafter *Wilkins* Complaint]; HARRIS, *supra* note 15, at 8–10, 35–37, 60–61 (summarizing the *Wilkins* case).

149. See HARRIS, *supra* note 15, at 60–61; *Wilkins*, Complaint, *supra* note 148.

150. HARRIS, *supra* note 15, at 61.

data to the court for a period of three years so that it could monitor whether the state police had in fact changed their ways.”<sup>151</sup>

The ACLU retained Dr. John Lamberth of Temple University to analyze the newly-collected data.<sup>152</sup> Lamberth compared the state police statistics with his own road population and violator surveys that he had conducted on Interstate 95, the main route covered by the state police’s drug interdiction efforts.<sup>153</sup> Lamberth found that blacks and whites violated traffic laws at the same rate, with blacks constituting only seventeen percent of the driving population on that road.<sup>154</sup> Yet African Americans constituted seventy-two percent of those stopped and searched.<sup>155</sup> This disparity was 34.6 standard deviations from the mean, a measure of statistical significance that, said Lamberth, was “literally off the charts.” Lamberth concluded:

While no one can know the motivation of each individual trooper in conducting a traffic stop, the statistics presented herein, representing a broad and detailed sample of highly appropriate data, show without question a racially discriminatory impact on blacks . . . . The disparities are sufficiently great that, taken as a whole, they are consistent and strongly support the assertion that the state police targeted the community of black motorists for stop, detention, and investigation within the Interstate 95 corridor.<sup>156</sup>

The data collection and dissemination strategy used by the ACLU in its lawsuit against the Maryland State Police is one model that the ACLU has used in similar fashion elsewhere in the country, particularly in one suit involving the Illinois State Police<sup>157</sup> and another against the Philadelphia Police.<sup>158</sup> But the ACLU has also sought to reach broader audiences through issuing an overarching Special Report examining the DWB problem nationwide.<sup>159</sup> Importantly, the Special Report made extensive use of narratives in addition to numerical data. Twenty-six narratives of racial discrimination involving at least twenty-six separate cities were recounted to demonstrate the nationwide scope

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151. *Id.*; see also Settlement Agreement, *Wilkins v. Md. State Police* (D. Md. 1993) (Civ. No. MJG 93-468) [hereinafter *Wilkins Settlement Agreement*].

152. See HARRIS, *supra* note 15, at 61.

153. See *id.*

154. See *id.*; DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION’S HIGHWAYS: AN AMERICAN CIVIL LIBERTIES UNION SPECIAL REPORT 18–20 (1999), available at <http://www.aclu.org/profiling/report/index.html> [hereinafter ACLU SPECIAL REPORT] (giving a more detailed and precise summary of Lamberth’s data and methodology).

155. Report of Dr. John Lamberth (plaintiff’s expert) 4, 6, *Wilkins v. Md. State Police* (D. Md. 1993) (Civ. No. MJG 93-468) [hereinafter Lamberth Report].

156. See *id.* at 9; See also HARRIS, *supra* note 15, at 62.

157. See *Chavez v. Ill. State Police*, 27 F. Supp. 2d 1053 (N.D. Ill. 1998), *aff’d* 251 F. 3d 612 (7th Cir. 2001). ACLU SPECIAL REPORT, *supra* note 154, at 15–16 (discussing *Chavez*). Results were less sanguine, however, for the plaintiffs on appeal. See *Chavez v. Ill. State Police*, 251 F. 3d 612, 636–33 (7th Cir. 2001) (holding that a plaintiff in a racial profiling case must show that similarly situated individuals in a non-protected class were not stopped or arrested under similar circumstances).

158. ACLU SPECIAL REPORT, *supra* note 154, at 17–18; ACLU, FOURTH MONITORING REPORT: PEDESTRIAN AND CAR REPORT AUDIT (1998) available at <http://www.aclu.org/community/pennsyl/dwbreport.html> (last visited Feb. 6, 2003) (reporting that data from police districts chosen for analysis revealed significantly disparate rates for stopping minority drivers).

159. See ACLU SPECIAL REPORT, *supra* note 154, at 10.

of the problem. The narratives were also designed to impress upon the reader the sense of humiliation and insult that DWB stops create.<sup>160</sup> That pain was portrayed as a central part of profiling's social cost, yet a part that could not be adequately conveyed by numbers alone.<sup>161</sup> One narrative, again from Maryland, illustrates the point:

Charles and Etta Carter, an elderly African American couple from Pennsylvania, were stopped by Maryland State Police on their 40th wedding anniversary. The troopers searched their car and brought in drug-sniffing dogs. During the course of the search, their daughter's wedding dress was tossed onto one of the police cars and, as trucks passed on I-95, it was blown to the ground. Mrs. Carter was not allowed to use the restroom during the search because police officers feared that she would flee. Their belongings were strewn along the highway,<sup>162</sup> trampled and urinated on by the dogs. No drugs were found and no ticket was issued.<sup>162</sup>

Other narratives included these: In Trumbull, Connecticut, police questioning why an African-American woman was even present in the largely white town; Portland, Oregon, police stopping an African-American woman for claimed seatbelt law violations when she and her passengers all had their seatbelts on; and Raleigh, North Carolina, police removing door panels, molding, and seats from, and deflating the tires of, a car driven by a stopped black driver.<sup>163</sup> The narratives covered a wide range of respondents, from advertising executives, to social workers, to athletes.<sup>164</sup> The breadth and depth of the narratives, and the corresponding statistical data, made it hard to dismiss these reports as "mere anecdote."<sup>165</sup> The Special Report emphasized, however, that litigation can be difficult, costly, and slow. Accordingly, the ACLU called for federal and state legislation and voluntary local actions as additional parts of the effort to end DWB stops.<sup>166</sup> The desired legislation and voluntary actions centered once again on data collection.<sup>167</sup>

Data collection helps to prove that the DWB problem is real and not simply a rare, if unpleasant, phenomenon; that disparate stops are not only due to racially differential rates of offending; and that the social costs of such stops is unduly high.<sup>168</sup> The narratives also help to capture the public imagination.<sup>169</sup> But

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160. *See id.* at 10–17.

161. *See id.*

162. *See id.* at 10.

163. *See id.* at 10–17.

164. *See id.*

165. *See* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 *GEO. J. LEGAL ETHICS* 781, 819 (1996) (discussing the high Court's willingness in constitutional analysis to rely on anecdote noteworthy for its "breadth and detail" when combined with other converging sorts of data, such as statistical information).

166. *See* ACLU SPECIAL REPORT, *supra* note 154, at 10–17.

167. *See id.*

168. *See* HARRIS, *supra* note 15, at 48–128.

169. *See infra* note 465 and accompanying text (explaining the power of empathy). Professor Harris notes that, where there is no supporting data collected, racial profiling has been accepted as involving "anomalies," its alleged victims "portrayed as crackpots, malcontents, criminals, or race baiters." HARRIS, *supra* note 15, at 175.

data is further necessary to aid the police in curing the problem, as law professor David Harris explains:

A police chief . . . who does not have data on the specifics of what officers under her command are doing and how they are doing it is at an extreme disadvantage. She will find it hard to know what decisions to make, what personnel she needs, or how to deploy existing assets without information that will tell her how effective her current efforts are. Accurate and timely information is a prerequisite for managing any organization, including law enforcement agencies.<sup>170</sup>

Data demonstrating the existence of the problem is, therefore, not enough. Police departments must track individual officers' activities, the location and reason for each stop, the financial and time costs of additional police record-keeping responsibilities, and the racial makeup of the community being patrolled.<sup>171</sup>

*How* the data is obtained and distributed also matters because the simple process of data-collection and recording, if done properly, can help to promote community trust in the police.<sup>172</sup> Thus, one of the ACLU's premiere consultants on the profiling issue recommends that law enforcement align their data-collection efforts with independent partners, including researchers in universities and think-tanks.<sup>173</sup> Involving independent consultants will improve the quality of data analysis, but, the consultant explains, will also foster public confidence in the results by avoiding the impression that reports are but an instance of "the fox guarding the henhouse."<sup>174</sup> Moreover, the consultant recommends, the police must convene a community task force including representatives of rank-and-file officers, the local community, and concerned organizations like the ACLU, NAACP, and National Urban League.<sup>175</sup> The task force should have input on all anti-profiling efforts, including data collection and dissemination, partly because "when all of these constituencies become a real part of the process from the beginning, the result is likely to be not only a better outcome but an outcome in which all of the participants have a stake."<sup>176</sup> ACLU participation in similar efforts in San Jose and San Diego, California, led to muted rather than angry reactions upon the release of damaging reports, and community groups and prominent citizens

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170. HARRIS, *supra* note 15, at 176.

171. *See id.* at 177–83.

172. *See id.* at 178 ("The smartest, most forward-thinking police departments will . . . collect data because it is in their interest to have accurate, comprehensive information to help them understand officer and departmental behavior and to address complaints before they undermine the effectiveness of efforts police make at reaching out to members of the community."); David Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, CRIM. JUST., Summer 2002 at 36, 38 ("Even if we ignore the high social costs—distrust of all government, including police and the legal system; exacerbation of existing problems such as residential segregation and employment discrimination; and destruction of valuable law enforcement initiatives such as community policing—racial profiling as a means to crime reduction simply does not deliver.").

173. *See* HARRIS, *supra* note 15, at 184–85.

174. *See id.* at 184.

175. *See id.*

176. *Id.* at 184–85.

enthusiastically stepped forward to support police reform efforts.<sup>177</sup> Professor Harris, in the context of discussing these reactions, describes the ACLU as “the organization that has clearly done the most to promote action against profiling across the country.”<sup>178</sup>

The importance of community involvement in data collection, analysis, and distribution, and in planning concrete responses to the lessons taught by the data, was underscored by recent ACLU efforts to address broader aspects of racial profiling. Those efforts took place in the specific context of violently explosive protests against racial profiling in Cincinnati, Ohio.

*b. Law on the streets of Cincinnati.* In early April, 2001, an unarmed teenager, Timothy Thomas, was shot to death by Cincinnati police officers.<sup>179</sup> The officers were pursuing Thomas on an outstanding arrest warrant for two alleged misdemeanors and numerous traffic offenses.<sup>180</sup> The shooting sparked protests in Cincinnati’s African-American community; protestors alleged that the officers used excessive force because of Thomas’s race.<sup>181</sup> Thomas was the fourth black male killed by the Cincinnati police since 1995; the police had not killed one white suspect during that time.<sup>182</sup> Feelings ran so high that the protests turned violent, with newspapers describing the reaction as a riot.<sup>183</sup>

But the protests and resulting violence were about far more than the excessive use of force. Protestors were also angered by what they viewed as years of degrading racial profiling by the local police.<sup>184</sup> A teenager interviewed by the *Washington Post* seemed to capture the sense of the community:

“The riots are not just a reaction to the killing of an African-American male, but to the injustice to our people for so long,” said Christopher Johnson, 16, as he stood on the church steps. “Just walking down the street I get asked [by police], ‘What are you doing?’ I pay taxes like they do. I should be able to walk down a public street.”<sup>185</sup>

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177. Mark Arner & Joe Hughes, *Police Stop Blacks, Latinos More Often; Data from Profiling Report Echo Fears of S.D. Minorities*, S.D. UNION TRIB., Sept. 29, 2000, at A1 (reporting that damning results of a study evoked praise rather than blame by leaders of the affected community, who had been involved in the study process); Tony Perry, *San Diego Promises More Study to See If Blacks and Latinos Are Being Singled Out by Officers Because of Skin Color*, L.A. TIMES, Sept. 29, 2000, at A1 (reporting that minority group members and the ACLU, having been included in the study process, supported the city’s police chief as he released a report which concluded that these same minorities had been subjected to racially disparate stops by the police); cf. Taslitz, *Stories*, *supra* note 26, at 2283 (explaining the importance to a sensible Fourth Amendment jurisprudence of giving minority communities voice).

178. HARRIS, *supra* note 15, at 185.

179. Amy DePaul & Peter Slevin, *Cincinnati Officials Impose Curfew; Mayor Acknowledges Race Woes as City Acts to Quell Violence*, WASH. POST, Apr. 13, 2001, at A1.

180. *See id.*

181. *See* Francis X. Clines, *In Aftershock of Unrest, Cincinnati Seeks Answers*, N.Y. TIMES, Apr. 23, 2001, at A11 (suggesting that the protests were sparked partly by concerns that the Thomas shooting was the latest in a long line of excessive force cases) [hereinafter Clines, *Aftershock*].

182. *See* Francis X. Clines, *Appeals for Peace in Ohio after Two Days of Protests*, N.Y. TIMES, Apr. 12, 2001, at A1 [hereinafter Clines, *Appeals for Peace*].

183. *See id.*

184. *See id.*; Clines, *Aftershock*, *supra* note 181; DePaul & Slevin, *supra* note 179.

185. DePaul & Slevin, *supra* note 179.

Indeed, shortly before the Thomas shooting, the Cincinnati Black United Front and the ACLU of Ohio had filed a lawsuit accusing the city's police force of a thirty-year pattern of racial profiling, including unduly frequent traffic and jaywalking stops, often involving unnecessary humiliation and use of force.<sup>186</sup> Cincinnati was, of course, an infamous site of riots in the violent summer of 1968, after African Americans charged that they were harassed by local police abusing the discretion granted them by loitering laws.<sup>187</sup> That allegation was supported the next year by the Kerner Commission's Report examining the causes of those riots and of similar violence in seven other cities.<sup>188</sup> The recent ACLU suit essentially alleges that little has changed since 1968.<sup>189</sup>

The 2001 Cincinnati violence and resulting bad press for the police force created an atmosphere conducive to the defendants settling quickly. Plaintiffs took advantage of this situation by offering to submit their complaint to a mediation.<sup>190</sup> Judge Susan J. Dlott accordingly appointed a special master, Dr. Jay Rothman, "a mediator experienced in two decades of conflict resolutions in the Middle East, Northern Ireland, and other global trouble spots."<sup>191</sup> Judge Dlott's charge to Dr. Rothman was to begin the settlement process "by studying the impassioned, informed views of Cincinnati residents."<sup>192</sup>

Dr. Rothman used a questionnaire addressed to 3,500 representatives of various segments of the community concerning their goals for future police-

186. See Clines, *Appeals for Peace*, *supra* note 182; see also Clines, *Aftershock*, *supra* note 181; DePaul & Slevin, *supra* note 179.

187. See DePaul & Slevin, *supra* note 179. See generally Andrew E. Taslitz, *Mob Violence and Vigilantism*, in *THE OXFORD COMPANION TO AMERICAN LAW* 564-65 (Kermit L. Hall et al. eds., 2002) (discussing social forces causing the 1968 urban riots in Cincinnati and other major cities).

188. See DePaul & Slevin, *supra* note 179; see also Taslitz, *Mob Violence and Vigilantism*, *supra* note 187, at 565.

189. See DePaul & Selvin, *supra* note 179 ("We have not a few isolated incidents . . . We have a pattern perceived by the Kerner Commission in 1968 and perceived continuously to this day. It's difficult for the city to credibly deny that this problem exists.") (quoting Raymond Vasvari, Legal Director of the American Civil Liberties Union of Ohio).

190. See *No Agreement Yet in Profiling Lawsuit*, CINCINNATI POST, Apr. 2, 2002, at 1A. Whether the plaintiffs or Judge Dlott started the mediation ball rolling is unclear. Compare *id.* (crediting the plaintiffs) with John Halpin, *A Model for Peace Service in Cincinnati*, GLOBAL PEACE SERVICES USA, Sept. 2002, at 1 (crediting Judge Dlott as the instigator). What all agree on, however, is that even if Judge Dlott made the suggestion, the plaintiffs ran with it, and the parties and their mediator played major roles in giving the process its final shape. As John Halpin, a Board member of Global Peace Services USA, put it:

Judge Dlott recognized that the courtroom wasn't always the best place to resolve such deep-rooted issues in which healing is necessary. She suggested to attorney Ken Lawson that he find another way to resolve the issue. Lawson's co-counsel Alphonse Gerhardtstein, in turn, contacted the Andrus Family Foundation, based in New York, and asked if they would help fund an alternative method of resolving the lawsuit. They eagerly agreed and suggested Jay Rothman as the man to do it.

*Id.* Whether the plaintiffs originated the idea or not, their successful efforts create a model for future such efforts by racial auditors.

191. Francis X. Clines, *A City Tries to Turn Candor Into Consensus*, N.Y. TIMES, Sept. 9, 2001, at A22 [hereinafter Clines, *Candor*].

192. *Id.* See Jay Rothman and Chris Soderquist, *From Riots to Resolution: Engaging Conflict for Reconciliation*, THE SYSTEMS THINKER 13, Oct. 2002, at 2 (detailing the workings of the Cincinnati collaborative process).

community relations in the city.<sup>193</sup> Dr. Rothman's mediation firm, the ARIA Group, divided respondents into eight stakeholding groups: African Americans, youths twenty-five and under, city officials and employees, religious/social service leadership, police and families, business/foundation leaders, whites, and other minority citizens.<sup>194</sup> The responses were converted into "platforms representing consensus goals agreed upon by self-selected representatives in 12 four hour feedback sessions."<sup>195</sup> The goals heavily emphasized the idea of "respect": respect for African-American community safety, for the citizens themselves, and for the police.<sup>196</sup> Additional themes included the importance of collaborative citizen-police law enforcement, monitoring of the police, and mutual accountability.<sup>197</sup> The information collected formed the basis for extensive negotiations among all stakeholder groups.<sup>198</sup> Those negotiations bore fruit when a settlement was reached creating a "collaborative" agreement among all stakeholders.<sup>199</sup> The settlement agreement was ratified by the ACLU's thirty-member state board, Cincinnati's police union, the City Council, and the Cincinnati Black United Front.<sup>200</sup> The deal committed the police to "bias-free policing,"<sup>201</sup> that is, providing "police services in a fair and impartial manner without any discrimination on the basis of race, color, or ethnicity."<sup>202</sup> To achieve that goal, the police committed themselves to "community problem-oriented policing" ("CPOP"), an "information intensive strategy that places a premium on data, intelligence, community input, and analysis."<sup>203</sup> CPOP relies on measuring outcomes, training officers as problem-solvers, "crime mapping" (constant data analysis of the frequency, location, and nature of crime), and police-community interaction.<sup>204</sup> The agreement also created a new citizen compliance board and committed the city, in consultation with the parties, to "take appropriate action to track compliance" with the police's promise to combat bias.<sup>205</sup>

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193. See ARIA GROUP, CINCINNATI POLICE-COMMUNITY RELATIONS COLLABORATIVE, *available at* [http://www.ariagroup.com/FINAL\\_document.html](http://www.ariagroup.com/FINAL_document.html) (last visited Mar. 18, 2003).

194. *See id.*

195. *Id.*

196. *See id.*; Taslitz, *Stories*, *supra* note 26 (on value of respect).

197. *See* ARIA GROUP, *supra* note 193.

198. *See* Clines, *Candor*, *supra* note 191.

199. *See* Francis X. Clines, *Deal Reached on Policing in Cincinnati*, N.Y. TIMES, Apr. 4, 2002, at A16. A collaborative agreement, unlike a consent decree or a typical mediation, involves participants well beyond the parties to the lawsuit, including a wide array of community representatives. *See* Aria Group *at* <http://www.ariagroup.com/FAQ> (last visited Nov. 22, 2002).

200. *See* Kevin Osborne, *Profiling Accord Ready for Signing*, CINCINNATI POST: ONLINE EDITION, *at* <http://www.cincypost.com/2002/apr/10/sbprofo41002.html> (last visited Sept. 26, 2002).

201. *Id.*

202. Collaborative Agreement at ¶ 50, *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002) (No. C-1-99-3170) [hereinafter Collaborative Agreement].

203. *Id.* ¶ 17, 21.

204. *Id.* ¶ 22-26. For an impassioned defense of data-driven policing, see JACK MAPLE, THE CRIME FIGHTER: PUTTING THE BAD GUYS OUT OF BUSINESS 92-119 (1999).

205. *See* Collaborative Agreement, *supra* note 202, at ¶ 50.

Data was at the heart of this compliance-monitoring strategy. The city agreed to develop a “system for consistently informing the public about police policies and procedures” and to conduct, again in consultation with the parties, a “communications audit” to improve community awareness of police policies.<sup>206</sup> Annual and quarterly reports detailing problem-solving activities were also required.<sup>207</sup> A Monitor was empowered to review all data relevant to implementation of the agreement and to report the results to a court-appointed “conciliator” who would evaluate the Monitor’s reports, instruct parties on how to improve compliance, and give the parties an opportunity to cure any flaw before the court becomes involved in the enforcement process.<sup>208</sup> Among the Monitor’s duties was supervision of the development and implementation of a “mutual accountability plan,” which required full documentation of all favorable and unfavorable police conduct, and regular meetings with the parties to study the results.<sup>209</sup> The parties were also mandated to create an “Evaluation Protocol” to assist monitoring.<sup>210</sup> That protocol must include periodic surveys of citizen satisfaction with the police, parsed by race, gender, age, and neighborhood, using probability samples that must include citizens who have had direct police encounters, periodic observations of a representative sample of police problem-solving projects, and annual statistical compilations of police-community interactions.<sup>211</sup> The Monitor was also granted full and unrestricted access to police and city staff and databases and must be involved in periodic compliance reports.<sup>212</sup>

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206. *Id.* ¶ 29(h).

207. *Id.* ¶ 29(i), (j).

208. *See id.* ¶¶ 30, 110–14.

209. *Id.* ¶ 30.

210. *Id.* ¶¶ 30–33.

211. *See Collaborative Agreement, supra* note 202, at ¶¶ 34–42.

212. *See id.* ¶¶ 100–13. Despite these fairly aggressive efforts to alter policing in Cincinnati, a few colleagues to whom I presented this paper—especially one who is a former Cincinnati resident—expressed pessimism about the likely long-term success of these efforts, and worried that weaker groups like the Black United Front (“BUF”) are inevitably co-opted, diverted, and weakened by participating in mediation with stronger parties. The BUF was keenly aware of the dangers of co-optation, insisting for that reason that any agreement be backed up by the force of a court order. Furthermore, the BUF has made clear its willingness to turn to direct citizen action should the Collaborative prove to be disappointing. Telephone Interview with Dr. Jay Rothman, Director of the Collaborative for Police Community Relations (Feb. 2, 2003). Thus, though not aimed at the Collaborative, as of this writing the BUF is still encouraging an economic boycott of the City until it makes greater efforts to include more African Americans in the City’s economic successes. *Id.* Long-term success partly turns on the continued flow of money to support the Collaborative’s activities. The initial effort combined the Andrus Foundation monies with hundreds of thousands of dollars raised by local religious organizations, law firms, and other contributors. *Id.* After that five-year period is up, the expectation is that the effort will continue under the auspices of a variety of then-existing institutions. An effort is being made to raise \$20,000,000 to create a problem-solving institute that will continue to pursue the Collaborative’s goals as one of its primary missions. *Id.*

Dr. Rothman believes that the Collaborative effort differs from earlier ones in several ways likely to promote long-term success. I paraphrase and elaborate on his analysis:

The Collaborative’s goal is not to regulate the police but to create a new set of relationships in which police and community work together toward shared aspirations.

Primacy is given to mutual respect. Respect, by definition, precludes co-optation. Although the BUF

In short, the agreement was reached via an inclusive data collection and dissemination process, and it created a more inclusive, data-intensive process as a way of deterring abusive police practices, fostering greater police–community respect and mutual trust, and improving the quality and fairness of police services and citizen safety.<sup>213</sup> However, if courts close the doors on racial profiling suits, as some are starting to do, lawsuits may become a less effective means of obtaining similar agreements.<sup>214</sup> Still, progress has been made on racial profiling in some cases without relying upon the courts. Indeed, a growing mass anti-profiling movement has done much to promote legislative and administrative solutions.<sup>215</sup> Whether sparked by lawsuits or grassroots political action, however, inclusive data-driven strategies like those followed in Cincinnati are instructive and promising.

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may not have put all its eggs in the collaborative basket, continued respectful treatment as an equal partner and positive results should promote greater trust. But that does not mean replacing good deeds with good words. Good words that accomplish nothing will undermine any willingness to accept the police as acting in good faith. Correspondingly, the police are wary of being blamed for all ills rather than being embraced as willing partners. If the police are not treated with respect by the community, they are likely to resist introspection and true teamwork with the citizens they police.

Implementation and institutional design are the results of a true bottom-up process. Neither the BUF nor the ACLU represents all community views. Neither the police union nor the City’s lawyers represent all police views. This process consults the community residents, beat officers, and other ordinary persons to identify and solve problems, promoting individual and group voice and maximum participation.

The Collaborative relies heavily on the creation, collection, distribution, and use of information by and to all stakeholder groups and to the broader public. Such continued transparency promotes a healthy tension to keep everyone on his or her toes. “Trust but verify” seem to be the watchwords.

The monitor for the Collaborative has just recently been appointed. Only time will tell whether the Collaborative will achieve its goals. But it is a novel and soundly designed project worthy of careful attention and continuing study.

213. The Collaborative Agreement’s approach seems consistent with most or all of what I have called the “Six Principles of Respect” for Fourth Amendment jurisprudence:

- 1) Balancing appropriately the needs for individualized and group justice;
- 2) Racial and ethnic Consciousness;
- 3) Giving minority communities voice;
- 4) Sharing institutional obligations among the three branches of government;
- 5) Promoting the citizenry’s monitorial role in regulating the police;
- 6) Ensuring a high quantity and quality of evidence to justify police action.

See Taslitz, *Stories*, *supra* note 26, at 2282–84. Professors Sandler and Schoenbrod have recently written a passionate condemnation of consent decrees in institutional reform litigation. See ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003). They raise numerous objections to the consent decree process: It is run by the lawyers in a narrow “controlling group;” it displaces democratic processes with secretive ones run by elites; it leaves the controlling group unconstrained by checks and balances; it mandates compliance with rigid minutiae over efforts most likely to achieve the goals set in changing circumstances; and it may involve the courts in enforcement for decades. *Id.* at 204–21.

I do not necessarily accept all these criticisms of consent decrees, but they do offer useful insights. What matters most for my purposes here is that the parties to the Cincinnati Collaborative carefully avoided what they saw as the inaccurate “consent decree” label. Telephone Interview with Dr. Rothman, *supra* note 213. The flexible, bottom-up, stakeholder-driven, transparent Collaborative process was designed precisely to retain the consent decree’s strengths while correcting for its weaknesses. *Id.*

214. See Taslitz, *Stories*, *supra* note 26, at 2321 n.413 (summarizing the reasons why “the burdens of proving civil [racial profiling] claims are substantial”).

215. See HARRIS, *supra* note 15, at 144–207.

## 2. *Amnesty International*

Amnesty International (“Amnesty” or “AI”) makes less use of the courts and is less advocacy-oriented than the ACLU. Nevertheless, Amnesty does advocate for change by making specific policy recommendations, lobbying legislators and executive branch officers, and engaging in letter-writing campaigns, among other activities.<sup>216</sup> Amnesty is “the world’s preeminent human rights advocacy organization,” called the “conscience of the world” for its efforts at documenting and publicizing human rights abuses.<sup>217</sup> Amnesty was founded over forty years ago with the idea of collecting information on political prisoners, then using volunteer activists to shower oppressive governments with letters calling for the prisoners’ immediate and unconditional release.<sup>218</sup> Since then, Amnesty was awarded the Nobel Peace Prize for documenting human rights abuses in Argentina, organized an international rock concert tour to encourage human rights awareness, played a major role in the 1993 Vienna World Conference on Human Rights, and generally “set the standard for other human rights organizations to follow.”<sup>219</sup> AI’s culture is one of international solidarity on human rights issues, democratic decision-making, and massive membership mobilization.<sup>220</sup> Its message is that “ordinary people, from every nation, and every walk of life, should and can do something to secure human rights for all.”<sup>221</sup> Its primary tools are data generation and collection, followed by publicity and “moral shaming” to change abusive governmental conduct.<sup>222</sup>

One of Amnesty’s strategies has been to provide a focus on the particular human rights abuses common in a particular country. In part, Amnesty does this by means of “country campaigns,” which bring the membership’s efforts and world attention to bear on a small number of countries for a specific, but extended, period of time.<sup>223</sup> At the end of 1998, Amnesty launched its “Rights for All” campaign, focusing on human rights abuses in the United States, including an analysis of police practices and of racial biases in the criminal justice system.<sup>224</sup> The campaign was considered by many to be especially important because of the United States’ self-portrayal as a human rights bastion; Amnesty thus spent over two years planning this ambitious campaign.<sup>225</sup>

That one-year campaign included efforts to mobilize other countries to diplomatically pressure the United States to reform its institutions.<sup>226</sup> In Belgium, Amnesty presented the U.S. embassy with a giant syringe filled with

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216. See generally Winston, *supra* note 77, at 25.

217. *Id.* at 25.

218. See POWER, *supra* note 112, at xi.

219. See Winston, *supra* note 77, at 25.

220. See *id.* at 30.

221. *Id.* at 30–31.

222. See *id.* at 50. See generally DRINAN, *supra* note 112 (evaluating the successes and weaknesses of a post-World War II international human rights strategy relying on the power of public shaming).

223. See POWER, *supra* note 112, at 253; Winston, *supra* note 77, at 39–40.

224. POWER, *supra* note 112, at 253–59.

225. See Winston, *supra* note 77, at 40.

226. POWER, *supra* note 112, at 277; Winston, *supra* note 77, at 40.

cards written by school children protesting U.S. juvenile justice and reliance on the death penalty.<sup>227</sup> In the Netherlands, Amnesty worked on protesting police brutality in Florida.<sup>228</sup> In Nepal, Amnesty presented the U.S. embassy in Katmandu with 40,000 signatures on a banner calling for American attention to human rights.<sup>229</sup> AI members throughout the world were asked to write to the U.S. state and federal governments asking for the creation of independent monitoring bodies to guard against police brutality, including stopping the use of hog-tying and stun guns.<sup>230</sup>

The centerpiece of the campaign was a country report, *Rights for All*, documenting U.S. human rights abuses, combined with follow-up or satellite reports on specific issues.<sup>231</sup> One important follow-up report was *Race, Rights and Police Brutality*.<sup>232</sup>

Both *Rights for All* and *Race, Rights and Police Brutality* made use of brief, but emotionally powerful, narratives, much like those used by the ACLU.<sup>233</sup> These narratives focused on unjustified police shootings, use of dangerous restraint procedures, misuse of police dogs, and use of stun belts throughout various cities and states in this country.<sup>234</sup> The reports also bemoaned the widespread nature of racial profiling, noted racial disparities and abuses in both inner cities and affluent suburbs, and documented significantly lower levels of confidence in the competency and fairness of the police among blacks than among whites.<sup>235</sup> Police department secrecy, police codes of silence, police failure to gather adequate data on abuses, and the underfunding of “independent” civilian review boards were among the factors that Amnesty identified as magnifying both the level of abuse and the racially tilted

227. POWER, *supra* note 112, at 277.

228. *Id.* at 278.

229. *Id.*

230. Winston, *supra* note 77, at 40.

231. AMNESTY INT’L, UNITED STATES OF AMERICA: RIGHTS FOR ALL (AMR 51/035/1998 1998), available at <http://www.amnesty.org/ailib/index.html> [hereinafter AMNESTY INT’L, RIGHTS FOR ALL].

232. AMNESTY INT’L, UNITED STATES OF AMERICA: RACE, RIGHTS AND POLICE BRUTALITY (AMR 51/147/1999 1999), available at <http://www.amnesty.org/ailib/index.html> [hereinafter AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY].

233. See AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY, *supra* note 232; AMNESTY INT’L, RIGHTS FOR ALL, *supra* note 231.

234. This was especially true of AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY, *supra* note 232.

235. See *id.*; AMNESTY INT’L, RIGHTS FOR ALL, *supra* note 231; see also YUEN J. HUO & TOM R. TYLER, HOW DIFFERENT ETHNIC GROUPS REACT TO LEGAL AUTHORITY (Public Policy Institute of California ed., 2000) (presenting a recent empirical study of minority group attitudes toward the police in California). Professors Huo and Tyler conclude that, compared to whites, African Americans and Latinos reported lower levels of satisfaction in their interactions with legal authorities—especially the police—and consequently less willingness to comply with the directives of legal authorities. See *id.* at viii. These same minority groups also experienced less procedural fairness in dealing with authorities than did whites, and these perceptions of fair treatment were more important than case outcomes in influencing the level of satisfaction with the police. See *id.* at viii–ix. Furthermore, different minority groups and whites shared relatively similar conceptions of what constitutes procedural fairness: unbiased, respectful, individualized assessments of each person by the authorities. See *id.* at ix–x. Procedural fairness mattered most to those minorities most strongly identifying with American Society, even where these same minorities shared a strong sense of ethnic identity. See *id.*

distribution of abuses.<sup>236</sup> Amnesty therefore counseled greater police department “transparency” and improved, regular data collection by police departments as two of its suggested solutions.<sup>237</sup>

Amnesty International USA’s Executive Director, William F. Schulz, thereafter detailed these and other reports’ results in a chapter of his recent book.<sup>238</sup> Schulz, too, focused on differences among the races, particularly between whites and blacks, both in victimization by the police and in the perceptions of such victimization.<sup>239</sup> He focused less on narrative and more on hard numbers. His general tack was to argue—apparently aiming toward middle-class white America—that *all* Americans’ self-interests are harmed by unduly aggressive policing generally and by racial profiling and its cognates specifically.<sup>240</sup> Lawsuits against abusive police and administrative investigations into their conduct are costly, he argued; the guilty defendant may be released along with the innocent when widespread frame-ups are occasionally revealed, as happened in the Los Angeles Ramparts investigation; and safety is diminished when distrustful minority communities cease to cooperate with the police in investigating and preventing crime.<sup>241</sup> Schulz expressly cautioned whites against the risks of racial unrest:

Nothing threatens to rip this society apart racially any faster than disparity in treatment at the hands of the police. It has happened over and over before. Have we forgotten that nearly every one of the incidents of urban unrest in 1968 was touched off by arrests of blacks by white officers for minor offenses? Have we forgotten the experience of Los Angeles in 1992 following the acquittal in the Rodney King case, a conflagration that did more than \$700 million worth of damage in this country? Are we aware that St. Petersburg, Florida was the scene of a similar, if less costly, riot as recently as 1996 following the killing of a black motorist by a white officer? Do we really want to gamble that the United States has “put all this behind us?”<sup>242</sup>

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236. See AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY, *supra* note 232; AMNESTY INT’L, RIGHTS FOR ALL, *supra* note 231.

237. See AMNESTY INT’L, RACE, RIGHTS AND POLICE BRUTALITY, *supra* note 232; AMNESTY INT’L, RIGHTS FOR ALL, *supra* note 231.

238. WILLIAM F. SCHULZ, IN OUR OWN BEST INTEREST: HOW DEFENDING HUMAN RIGHTS BENEFITS US ALL (2001).

239. See *id.* at 154–56.

240. See *id.* at 156–62.

241. See *id.* Concerning minority community distrust of the police, Schulz had this to say:

A good percentage of successful police work depends on cooperation from the law-abiding elements in any community. If huge segments of the community are alienated from law enforcement authorities, mistrustful of them or frightened, that bodes ill for the willingness of those community members to extend a helping hand. Social commentator Dinesh D’Souza could never be accused of being a “bleeding heart liberal.” His reason for opposing racial profiling is quite pragmatic: “Government-sponsored . . . discrimination has the cataclysmic social effect of polarizing African-Americans who play by the rules and still cannot avoid being discriminated against. Even law-abiding blacks become enemies of the system because they find themselves treated that way.”

*Id.* at 159.

242. *Id.* at 158. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (offering an extended analysis to explain why procedural justice, a belief that police and courts are acting in good faith, and a stronger sense of connection to the broader American community without sacrificing racial identity, are likely to promote safer streets, police legitimacy, and community cooperation with law enforcement).

Perhaps playing on precisely the sort of white fears that have contributed to oppressive criminal justice system policies, Schulz suggested that the best way to assuage those fears is more racial fairness, not less; he argued that fairness is cheaper than its opposite, and that whites' reaction to their fears has been counterproductive in the past.<sup>243</sup> Schulz thus urged the same sort of reforms as Amnesty did in the centerpiece reports of its U.S. campaign.

Two of the "satellite" reports leading up to, accompanying, or following the 1998 U.S. country campaign are worth addressing because each illustrates specific additional important points about Amnesty's tactics, aims, and social role.<sup>244</sup>

First, in its report on police abuse in Chicago,<sup>245</sup> Amnesty demonstrated its ability to aid in uncovering patterns and institutional problems where others see only a few "bad apples."<sup>246</sup> In Chicago, the Office of Professional Standards ("OPS"), a civilian-staffed office of the police department, processes complaints. But the OPS is limited to looking at individual cases and lacks a computer system capable of tracking the race of complainants, the types of complaints, the districts where they occur or "other factors which may enable it to discern patterns of concern."<sup>247</sup>

Additionally, a police union contract prohibited the Chicago Police Department, including OPS, from considering an officer's prior complaint history in determining the officer's responsibility for a specific allegation of misconduct.<sup>248</sup> Furthermore, in all but the most serious cases, no information is made public concerning the outcome of a complaint or the reasons for a decision. This combination of forces made it hard to spot patterns of abuse or department-wide institutional failures in Chicago.<sup>249</sup> The Amnesty report on the Chicago Police drew on multiple sources of data to discern various patterns of abuse, including excessive use of force and the sharp racial disparities among those victimized by the police.<sup>250</sup> The report also criticized the Department's procedural rules that atomized complaints into a series of discrete, individual cases. For Amnesty, police misconduct is a systemic problem requiring systemic solutions.<sup>251</sup>

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243. *See id.* (Schulz's views); *infra* text accompanying notes 344–62 (white fears of black dangerousness).

244. *See infra* text accompanying notes 245–267.

245. *See* AMNESTY INT'L, USA, SUMMARY OF AMNESTY INTERNATIONAL'S CONCERNS ON POLICE ABUSE IN CHICAGO (51/168/1999 1999), *available at* <http://www.amnesty.org/ailib/index.html> (last visited Feb. 6, 2003) [hereinafter AMNESTY INT'L, CHICAGO].

246. On the flawed "few bad apples" theory of police misconduct, see BOUZA, *supra* note 128, at 23–28, which reveals that institutional practices and police culture can lead even the most honest officers to behave in ways inconsistent with the broader community's values.

247. *See* AMNESTY INT'L, CHICAGO, *supra* note 245, at 14.

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

Second, though many of Amnesty's reports are brief and synthesize data collected elsewhere, Amnesty also engages in in-depth original investigation that can be of tremendous significance. Most notably, Amnesty authored a major report on police brutality in the New York City Police Department ("NYPD").<sup>252</sup> That report arose from an eighteen-month investigation, including two research visits to New York City by Amnesty delegates from the United Kingdom. These delegates met with lawyers for alleged brutality victims, members of civil rights groups, local officials from the NYPD's Internal Affairs Bureau and from the Civilian Compliance Review Board ("CCRB"), and representatives of the office of the United States Attorney for the Southern District of New York and from the Bronx District Attorneys' Office.<sup>253</sup> Amnesty obtained documentary and other information from the City Comptroller's Office, the Office of the City Council, court records, newspaper articles, and police reports and guidelines on the use of force.<sup>254</sup> Moreover, Amnesty reviewed over ninety individual cases of alleged ill-treatment and excessive force from the late 1980s through early 1996. The report contained detailed narratives summarizing each of these ninety cases.<sup>255</sup> The report's central conclusion was this:

The alleged brutality occurred across a wide area of New York City and involved victims from a variety of social, racial and ethnic backgrounds. However, the most serious complaints tended to be concentrated in high crime precincts and in precincts with large minority populations. More than two-thirds of the victims in the cases examined were African-American or Latino and most, though not all, of the officers involved were white. Nearly all of the victims in the cases of deaths in custody (including shootings) reviewed by Amnesty International were members of racial minorities.

Statistics published by the Civilian Complaint Review Board in its bi-annual reports also indicate that minorities are disproportionately the victims of police abuse compared to the overall racial composition of New York City.

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... [W]hile it appears that much of the abuse is directed toward racial minorities, the problem of excessive force within the PD is not confined exclusively to white officers, but may reflect a wider police culture.<sup>256</sup>

The report further concluded that minority victims (unlike white victims) were nevertheless unlikely to bring civil lawsuits.<sup>257</sup> The report found internal

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252. See AMNESTY INT'L, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT (51/36/96 1996), available at <http://www.amnesty.org/ailib/index.html> [hereinafter AMNESTY INT'L, NYPD BRUTALITY].

253. *Id.* at § 2.1.

254. *Id.* For a detailed and fascinating history of the NYPD's ups and downs, see JAMES LARDNER & THOMAS REPPETTO, NYPD: A CITY AND ITS POLICE (2000).

255. AMNESTY INT'L, NYPD BRUTALITY, *supra* note 252, at § 2.7.

256. *Id.*

257. *Id.*

discipline of offending officers to be lax.<sup>258</sup> As many as forty percent of abuse victims were never even suspected of crime by the police.<sup>259</sup>

Even though Amnesty's Los Angeles and Chicago reports were "well received and contributed to changes in those departments," the NYPD repeatedly refused Amnesty's requests for statistical data, and then condemned the report as flawed for lacking such data.<sup>260</sup> Even if the NYPD had been forthcoming, it maintained weak records of abuse incidents, making them hard to track.<sup>261</sup> Earlier investigations, such as the Mollen Commission report, had caused little change.<sup>262</sup>

Amnesty's report recommended improved recordkeeping, greater departmental transparency to the public, increased resources to the CCRB, meatier disciplinary proceedings open to the public, appointment of an independent inquiry into police brutality and excessive use of force in the NYPD, implementation of a standing independent monitor or auditor, and greater minority recruitment.<sup>263</sup>

Amnesty's U.S. country campaign did not radically alter institutional and systemic problems with policing practice in the United States.<sup>264</sup> Nevertheless, the campaign did achieve some discrete changes. For example, the Los Angeles District Attorney's Office re-opened a police program to investigate police shootings. The report also got the ball rolling on international attention to human rights violations in the United States, led to an unprecedented debate among policymaking elites in this country about police brutality, energized other U.S.-focused NGOs working on police reform by adding credibility to their efforts, led to sustained media coverage of these problems,<sup>265</sup> and promoted modestly more aggressive local reform in several places where city reports had been issued.<sup>266</sup>

Yet, for all the success, Amnesty concluded its campaign more aware than ever how incremental and arduous change is, even in an open society where criticism is allowed and the media are prepared to magnify it. Institutional inertia and a large measure of public indifference at best, at worst hostility, are obstacles that in their own way are as difficult to surmount as the walls of a repressive dictatorship.<sup>267</sup>

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258. *Id.*

259. See SCHULZ, *supra* note 238, at 157 ("[T]he [racial] differential in treatment also holds when comparing encounters with police that do *not* result in arrests."); AMNESTY INT'L, NYPD BRUTALITY, *supra* note 252.

260. See SCHULZ, *supra* note 238, at 153.

261. *Id.* at 153–54.

262. See AMNESTY INT'L, NYPD BRUTALITY, *supra* note 252, at § 2.9.

263. See *id.* at § 6.

264. See POWER, *supra* note 112, at 274.

265. *Id.* at 274–76.

266. See SCHULZ, *supra* note 112, at 155–62.

267. POWER, *supra* note 218, at 279.

### 3. *The United States Commission on Civil Rights*

I have the least to say about the efforts of the United States Commission on Civil Rights (“the Commission”) because its primary tool is the same as Amnesty’s: the issuing of reports condemning certain practices. Indeed, the Commission is limited by its authorizing legislation to collecting and disseminating information.<sup>268</sup> Nevertheless, the Commission merits separate consideration both because of the depth and breadth of some of its reports and because it is an “independent” organization whose members are appointed partly by the President of the United States and partly by Congress,<sup>269</sup> and whose funding is largely from the United States Treasury. This appointment process has been rightly criticized for so politicizing the Commission recently as to affect its vigilance as a protector of civil rights, the power of its reputation of non-partisanship, and the quality of its scholarship.<sup>270</sup> Indeed, recent battles between conservatives and liberals on the Commission now commonly make their way into the mass media.<sup>271</sup> Nonetheless, when the political forces have been properly aligned, the Commission has played a useful role as a racial auditor.<sup>272</sup> Furthermore, the Commission’s status as a governmental entity gives it certain advantages over the NGO auditors that may help to compensate for the disadvantages caused by Commission members’ partisan in-fighting.<sup>273</sup>

I want to focus on two important reports prepared by the Commission. The first is a report published in August, 2000, concerning police practices in New York City, one of several recent reports by the Commission on policing in major American cities.<sup>274</sup> As a quasi-governmental entity, the Commission often proceeds by hearing, as it did with its New York Report.<sup>275</sup> At that hearing, the Commission received “hundreds of pages of sworn testimony from the mayor, the police commissioner, the chair of the Civilian Complaint Review Board (“CCRB”), other state and city officials, religious leaders, [and] representatives of civic and civil rights advocacy groups,” and also heard from numerous persons victimized by police misconduct.<sup>276</sup> Commission staff received 32,000

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268. See 42 U.S.C. § 1975c(a) (Supp. 2002). Foster Rhea Dulles identified the Commission’s three goals in its early years: “to gather facts which would lay the foundation for civil rights legislation, to stimulate action by Congress and the Executive, and to serve as the conscience of the nation by exposing failures to secure and protect civil rights.” Frye, *supra* note 68, at 454–55 (1987) (summarizing FOSTER RHEA DULLES, *THE CIVIL RIGHTS COMMISSION: 1957–1965*, at x (1968)).

269. Since 1983, four members of the Commission have been appointed by the President, two members by the president pro tempore of the Senate upon recommendation of the majority and minority leaders (not more than one coming from the same party), and two members appointed by the Speaker of the House of Representatives upon the recommendation of the majority and minority leaders (not more than one from the same party). See 42 U.S.C. § 1975(b)(i)(A–C) (Supp. 2002).

270. See generally Frye et al., *supra* note 68.

271. See, e.g., Neil A. Lewis, *No Room for Bush’s Civil Rights Appointee*, N.Y. TIMES, Feb. 5, 2002, at A21.

272. See *infra* text accompanying notes 282–308.

273. *Id.*

274. See UNITED STATES COMM’N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY (2000) [hereinafter COMM’N, POLICE IN NYC].

275. See *id.* at xi; Frye et al., *supra* note 68.

276. COMM’N, POLICE IN NYC, *supra* note 274, at 95–96.

pages of documents subpoenaed by the Commission from agencies testifying at the hearing.<sup>277</sup>

The most important set of documents reviewed by the Commission were “UF-250s,” the first report that NYPD policy requires each officer to complete after stopping, frisking, or arresting a person.<sup>278</sup> Those reports record a wide variety of information, including the race of the person stopped and frisked and the reasons for the stop.<sup>279</sup> Although the Commission found reason to believe that UF-250s under-reported stops and frisks and relied solely on the individual officer’s description of events, no better data was available.<sup>280</sup> Furthermore, the NYPD gave the Commission access only to the Department’s computerized UF-250 data summaries, omitting helpful details.<sup>281</sup> Nevertheless, the data was sufficiently detailed for the Commission to conclude:

An examination of the UF-250 data indicates that NYPD officers routinely stop blacks and Hispanics out of proportion to their presence in the general population. In many precincts . . . significant disparities exist between the actual population of Hispanics and primarily African-Americans within New York’s communities, and the racial distribution of UF-250 subjects reported by the NYPD. In addition, a number of minority New York City residents also contend that they are more likely to be stopped and frisked, as well as detained by the police.<sup>282</sup>

The NYPD prepared a lengthy response to the Commission’s earlier draft report. That response argued that police merely stopped suspects fitting the description given by crime victims of the offenders.<sup>283</sup> But the Commission, relying on expert testimony, concluded instead that a “significant proportion of the UF-250s that were filed by NYPD officers in 1998 did not originate from victim identifications.”<sup>284</sup> The Commission focused, as to this point, on the City’s Street Crimes Unit (“SCU”). For example, Sergeant Noel Leader testified that “Street Crime rides around the city. And they stop individuals with no complainant, with no victim. They arbitrarily of their own initiation stop individuals . . . . Street Crime . . . stops male black and Latinos randomly in the street without any victims.”<sup>285</sup> Similarly, New York Attorney General Eliot Spitzer explained that “it is the officer’s own observation that initiates the stop and frisk.”<sup>286</sup> Members of the SCU itself admitted, according to the

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277. *Id.* at xi.

278. *Id.* at 95–96.

279. *See id.*

280. *See id.*

281. *See id.* A collection of other interesting critiques of recent NYPD practices can be found in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY (Andrea McArdle & Tanya Erzen eds., 2001). The NYPD’s stop-and-frisk policy is situated within a brilliant broader theoretical and empirical critique in BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 173–75 (2001). For a discussion of some of the positives of the modern NYPD’s strategies, see ELI B. SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING (1999).

282. COMM’N, POLICE IN NYC, *supra* note 274, at 103.

283. *See id.* at 106 (discussing NYPD response).

284. *See id.*

285. *Id.* at 105 (quoting testimony of Sergeant Noel Leader).

286. *Id.* (quoting testimony of Attorney General Elliot Spitzer).

Commission, to calling in phony complaints matching a suspect's description if the suspect indicated a willingness to complain about the stop's legality.<sup>287</sup>

A second report worth mentioning briefly is a November 2000 document concerning police practices nationwide.<sup>288</sup> That report largely synthesized other city reports done by the Commission and investigatory work done by other organizations.<sup>289</sup> The Commission also engaged in a "briefing," inviting five especially prominent criminal justice experts to make presentations to the Commission.<sup>290</sup> The Commission found evidence of racial profiling throughout much of the country, inadequate cultural sensitivity training, slow and toothless internal regulatory controls, and modestly helpful, but ultimately inadequate, external controls on police misconduct.<sup>291</sup>

Two of the report's recommendations merit special attention. First, the Commission found that there were too few civilian review boards and that "most . . . that do exist are severely underfunded, understaffed, and lack any enforcement power."<sup>292</sup> Accordingly, the Commission recommended enhancing funding and granting review boards subpoena power and disciplinary authority over police misconduct investigations.<sup>293</sup> Second, the Commission agreed with sentiment repeatedly stressed in this article, that policing must be viewed holistically to identify practices and patterns.<sup>294</sup> Since 1994, when Congress passed the Violent Crime Control and Law Enforcement Act ("Violent Crime Act"), it has been unlawful for state and local police to engage in a pattern or practice of conduct depriving persons of rights protected by the Constitution or the laws of the United States.<sup>295</sup> However, the Violent Crime Act authorized only the Attorney General to bring civil actions under the legislation, seeking equitable and declaratory relief.<sup>296</sup> The Justice Department has, through the Special Litigation Section of its Civil Rights Division, brought at least four major suits under the Act.<sup>297</sup> But the process of litigating these cases is lengthy and costly, and individuals have no standing to sue for monetary damages or any other relief.<sup>298</sup> Accordingly, the Commission called on Congress to increase funding for Attorney General suits under the Act and for legislation permitting private parties to bring actions.<sup>299</sup>

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287. *Id.* at 107.

288. UNITED STATES COMM'N ON CIVIL RIGHTS, REVISITING WHO IS GUARDING THE GUARDIANS?: A REPORT ON POLICE PRACTICES AND CIVIL RIGHTS IN AMERICA (2000) [hereinafter COMM'N, REVISITING THE GUARDIANS].

289. *See id.*

290. *Id.* at 5.

291. *Id.* at ix–xi.

292. *Id.* at 63.

293. *Id.*

294. *See id.* at 67–69.

295. *See* 42 U.S.C. § 14141 (2000).

296. *See* COMM'N, REVISITING THE GUARDIANS, *supra* note 288, at 68.

297. *See id.* at 68–69.

298. *See id.* at 72.

299. *See id.*

These two short examples reveal a number of advantages that the Commission has over the ACLU and Amnesty as racial auditors. The Commission's subpoena power makes it easier for it to obtain certain sorts of information, and concentrated public hearings provide a dramatic avenue for citizen voice and a vivid focal point for the public's attention. Furthermore, the Commission's bipartisan composition but quasi-governmental status sometimes gives it an air of neutrality and expertise meriting public respect. On the other hand, efforts are periodically made to "pack" the Commission with those of a particular ideology, as is currently happening.<sup>300</sup> If current efforts succeed, the Commission may lose its will to proceed so vigorously in rooting out wrongful police behavior. Yet it has been an effective tool in uncovering patterns of abuse, and its prestige is sufficiently great that the NYPD, for example, thought it worthwhile to prepare a point-by-point response to the Commission's allegations.<sup>301</sup>

#### B. Racial Auditors' Symbiosis with the Media

There are other outlets, most particularly the mass media, for disseminating information about the police, race, and crime.<sup>302</sup> Certainly the mass media directly reach many more recipients than do racial auditors.<sup>303</sup> Nevertheless, racial auditors fill important gaps in public information left by other media sources while bearing a symbiotic connection to the mass media.

The major news wire services, such as Reuters, UPI, and API, and major news organizations like the *New York Post* and CNN, have information-gathering resources far more expansive than anything that can be marshaled by racial auditors.<sup>304</sup> However, these vast resources must be spread across many subjects, and these entities face tremendous pressure for timely, even near instantaneous, "on the spot," reporting.<sup>305</sup> Racial auditors, by contrast, have a "constant focus on just one kind of news—human rights news."<sup>306</sup> They are also more interested in the thorough checking and verification that gains them a reputation for accuracy, reliability, and balance than in being the first on the scene.<sup>307</sup>

Moreover, powerful market and other institutional forces skew the content and hamper the quantity and quality of political information disseminated by the mass media. Information is a "public good," which ordinary markets tend

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300. See Lewis, *supra* note 271 (recounting political maneuvering between Democrats and Republicans to shift the balance of power on the current Commission from liberals to conservatives by altering the Commission's membership).

301. See COMM'N, POLICE IN NYC, *supra* note 274, at 106 (discussing NYPD response).

302. See generally RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE (2d ed. 1998).

303. See Winston, *supra* note 77, at 36.

304. See *id.* at 36–37.

305. See *id.*

306. *Id.* (describing Amnesty International).

307. *Id.* at 36–37.

to underproduce.<sup>308</sup> Information is intangible, which makes it difficult to adequately establish and maintain property rights in much of what an individual entity gathers.<sup>309</sup> Property rights are especially unlikely to vest in *political* information; its gatherers must face the probability that any “investment they make in producing information will benefit others as well as themselves.”<sup>310</sup> This inability to exclude nonpayers arguably results, as with all public goods, in the underproduction of political information.<sup>311</sup>

Because information about who bears the benefits and burdens of government action is widely diffused, individual citizens also have little incentive to produce it.<sup>312</sup> The costs in time and coordination make collective citizen action unlikely.<sup>313</sup> Smaller, more motivated special interest groups, who manage to overcome these costs, worsen the problem because they focus only on one side of a narrow set of issues whose resolution benefits them disproportionately.<sup>314</sup> Accordingly, they produce information emphasizing a decision’s benefits rather than its costs, yet the costs may be so widely distributed that the harm to each individual is too small to motivate him to organize with other victims.<sup>315</sup> Similarly, the demand for political information falls below its full social value.<sup>316</sup> Good government is also often a public good, benefiting the ignorant and the well-informed alike.<sup>317</sup> “Many citizens seem likely therefore to free ride on the information-acquiring efforts of their fellows rather than to incur the costs of becoming informed themselves.”<sup>318</sup>

There are counter-forces at work to increase the quantity of political information, but these forces may be weak and work to distort *quality*. Notably, advertising enables information collectors to realize more of the profit from their efforts, thereby converting information from a public to a private good.<sup>319</sup> But advertising revenue depends upon expected audience size, and large

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308. See Lillian R. Bevier, *The Invisible Hand of the Marketplace of Ideas*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 233, 242 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

309. *Id.*

310. Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *SUFFOLK U. L. REV.* 1, 20 (1986).

311. Bevier, *supra* note 308, at 242.

312. *See id.*

313. *See id.* at 242–43.

314. *See id.* at 243.

315. *Id.*

316. *Id.*

317. ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 207–37 (1957) (on the “rational ignorance” phenomenon); Bevier, *supra* note 308, at 243.

318. *Id.* Solutions to this problem vary, from increased government regulation to prod more information availability, to subsidies to achieve that goal. Compare CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 220 (1993) (“[T]he market will produce too little information . . . . For this reason, a regulatory solution, solving the public good problem, is justified.”) with Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 *HARV. L. REV.* 554, 559 (1991) (“[I]f the government intervenes in the market at all, it should subsidize speech rather than limit it. Legal restrictions on information only further reduce a naturally inadequate supply of information.”).

319. Bevier, *supra* note 308, at 244.

audiences often do not want the kind and quantity of political information needed for optimal citizen deliberation.<sup>320</sup> Consequently, many information providers have turned to “infotainment,” the packaging of political information in entertaining formats that maximize audience appeal.<sup>321</sup> Infotainment has the virtue of bringing more political information to more people, but it has the vices of “catering to the lowest common denominator of public taste,”<sup>322</sup> the taste of wealthier, bigger-spending slices of the audience,<sup>323</sup> and the dictates of wealthy corporate advertisers.<sup>324</sup> Some commentators have therefore described this process as “market censorship.”<sup>325</sup> Such censorship can mean that network executives even refuse to broadcast certain stories.<sup>326</sup> More often, “[o]rganizational culture normally steers reporters away from sensitive topics before a confrontation point by defining response to certain public information needs as beyond the resources the firm is willing to commit to news, or outside the proper purview of news.”<sup>327</sup> Market forces may also mean that, even when stories are covered, certain perspectives simply never get aired—a result that can also be the inevitable outcome of a producer’s need to pick and choose what will be covered.<sup>328</sup> Institutional factors other than profitability also hamper mass media news quality. Rigid (usually daily) deadlines have led to a “beat system” in which reporters are assigned to cover specific governmental operations each day.<sup>329</sup> This creates a risk that reporters, eager not to jeopardize relationships with their primary sources, become “insiders” more receptive to a particular viewpoint.<sup>330</sup> Reporters also rely heavily on government press offices, which creates similar problems.<sup>331</sup>

All these forces are especially powerful in crime coverage, particularly coverage involving issues of race. Seriousness of harm to individuals, rather than to society overall, is most vivid and sells best.<sup>332</sup> Crime beat reporters facing deadlines and needing routinized, steady information sources rely on

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320. *See id.*

321. *See* CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 5–6 (1993) (coining “infotainment” term); Bevier, *supra* note 308, at 245 n.35 (explaining the infotainment-generation process).

322. Bevier, *supra* note 308, at 245 & n.34 (citing Rodney A. Smolla, *Report of the Coalition for a New America: Platform Section on Communications Policy*, 1993 U. CHI. LEGAL F. 149 (1993)).

323. *See* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101 (1993).

324. *See* SUE CURRY JANSEN, *CENSORSHIP: THE KNOT THAT BINDS POWER AND KNOWLEDGE* 153–78 (1991).

325. *Id.* at 167.

326. PATRICK COLM HOGAN, *THE CULTURE OF CONFORMISM: UNDERSTANDING SOCIAL CONSENT* 68 (2001).

327. JOHN H. MCMANUS, *MARKET-DRIVEN JOURNALISM: LET THE CITIZEN BEWARE?* 26 (1994).

328. *See* HOGAN, *supra* note 326, at 71 (on silencing views); Bevier, *supra* note 308, at 247 (discretion).

329. Bevier, *supra* note 308, at 246.

330. *Id.*

331. *Id.* at 247; *see also* MARTIN A. LEE & NORMAN SOLOMON, *UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA* 45 (1990).

332. *See* SURETTE, *supra* note 302, at 61.

police sources, whose access and trust they must gain.<sup>333</sup> The police and other criminal law enforcement agencies also now use public information officers (“PIOs”) to coordinate the flow of information to the news media. Reporters accordingly drift toward sympathy with the police perspective and dependence on information already pre-filtered by state agencies.<sup>334</sup> The exception is the rare instance in which police crime or corruption has broken into the public eye.<sup>335</sup> Furthermore, entertainment value means that juicy, atypical crime stories that either meet audiences’ pre-existing expectations or are novel only in their severity crowd out coverage of more typical crimes.<sup>336</sup>

Several structural factors skew the media’s presentation of the role of race in the criminal justice system. Television coverage, for example, reflects an inadvertent class bias: Middle-and-upper-income persons, a group that is disproportionately white, have the skills and resources to afford bail, get good legal representation, and get advice on handling the press.<sup>337</sup> In short, they look good on television. Police are also more likely to protect their privacy.<sup>338</sup> But poor, low-status offenders, a group that is disproportionately comprised of racial or ethnic minorities, often do not make bail, and are more likely to appear disheveled, poorly dressed, and threatening on the news, when reporters cover their “perp-walks” to the station, frequently having been alerted by the police.<sup>339</sup> Similarly, blacks accused of crimes are often shown in the custody of white or both white and black officers, while white suspects are shown accompanied only by white officers, perhaps sending the message that blacks are not trusted to exert police authority over whites.<sup>340</sup> Yet these observations likely result from residential segregation and the practice of police forces of “assigning police of different races to specific neighborhoods.”<sup>341</sup> Moreover, “market censorship” forces and “confirmatory bias”—misperceiving or misremembering facts inconsistent with strongly held expectations—can lead to unintended racial bias in crime coverage.<sup>342</sup> For similar reasons, African-American explanations for crime, views on criminal responsibility, and analyses of police behavior are rarely offered.<sup>343</sup>

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333. *Id.* at 63.

334. *Id.* at 63–64.

335. *See id.* at 64.

336. *Id.* at 64–66.

337. ROBERT M. ENTMAN & ANDREW ROJECKI, *THE BLACK IMAGE IN THE WHITE MIND* 46–59 (2000).

338. *Id.* at 85.

339. *Id.* (stating that informants have found the police to be more protective of the privacy of white defendants).

340. *Id.*

341. *Id.*

342. *See* HOGAN, *supra* note 326, at 74–75 (confirmatory bias); JANSEN, *supra* note 324, at 153 (market censorship); *cf.* ENTMAN & ROJECKI, *supra* note 337, at 84–85 (acknowledging that at least some, though by no means all, racial bias in crime coverage stems from subconscious forces).

343. ENTMAN & ROJECKI, *supra* note 337, at 87.

One recent study of local television news coverage—the primary source of news for most Americans<sup>344</sup>—illustrates the result of these forces. News coverage in Chicago significantly over-represented the percentage of black offenders relative to white offenders as the perpetrators of crime, while under-representing the proportion of black victims, “even though Blacks in Chicago and most core cities are more likely to be victimized.”<sup>345</sup> Nor were contextual explanations offered to explain the disparity in coverage, feeding prior conceptions of black criminality.<sup>346</sup> Furthermore, blacks were four times more likely than whites to be shown in mug shots, “which make their subjects look guilty,” and far more likely than whites to be shown without their names.<sup>347</sup> Namelessness may suggest that “individual identity does not matter, that the accused is part of a single undifferentiated group of violent offenders: just another Black criminal.”<sup>348</sup> Blacks were also represented twice as often as being under physical control, “handcuffed, grasped, or restrained by an officer,” and much more likely to be shown in street or jail clothing than whites.<sup>349</sup>

Political elites also have an incentive to stoke white fears of crime generally and black criminality specifically.<sup>350</sup> Raising the crime issue gets votes, and, for whites, automatically stimulates “an image of dangerous Blacks.”<sup>351</sup> Politicians of both major parties further have an incentive to portray crime as largely random violence, as “ever-increasing, patternless, pointless.”<sup>352</sup> Random imagery frees liberals from confronting the reality that violent crime is disproportionately committed by the poor and racial minorities, though not nearly as disproportionate as the media suggest.<sup>353</sup> Thus, liberals can avoid openly scheming to undercut minority interests while simultaneously diverting attention from the hot-button social problems that may explain the disparate crime rates.<sup>354</sup> Conservatives simultaneously can avoid the inference that

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344. *Id.* at 79.

345. *Id.* at 81.

346. *Id.* See generally KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT AND OTHER MACROAGGRESSIONS* (1998).

347. ENTMAN & ROJECKI, *supra* note 337, at 82.

348. *Id.*

349. *Id.* at 83. Entman and Rojecki found, however, that Chicago newspapers revealed the race of the offender via text or photograph significantly less often than Chicago television. See *id.* at 88–90. Ray Surette suggests, however, that there is evidence that consumers picture violent offenders as black even where the offender’s race is unidentified:

[M]any crime reports give no description of the perpetrator, leaving the public to fill in the image. It follows that since most crime news is about violent interpersonal crime, the image that is constructed is that of a faceless predator. Thus it was found that the public’s image of criminals reflected the typical street criminal—a young, unemployed black male.

SURETTE, *supra* note 302, at 68–69 (emphasis added).

350. ENTMAN & ROJECKI, *supra* note 337, at 92.

351. *Id.* For a history of politicians’ manipulation of crime as an issue, see TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001).

352. JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 25 (1999).

353. *Id.* at 23.

354. *Id.*

poverty and social inequality cause crime; random pathology or dysfunctional sub-cultures are claimed to be the real culprits.<sup>355</sup>

Racial auditors can, at least in theory, help to serve as a corrective for mass media bias. Citizens differ in their level of interest in political information and in their willingness to invest resources in absorbing it, the intensity of interest likely varying with the importance of the particular policy question at issue to those citizens.<sup>356</sup> Racial auditors who respond to the needs of these specialized information markets can and do bring more diverse and higher quality information to these citizen subgroups.<sup>357</sup> In doing so, they create competitive forces that can pressure mass media outlets into greater accuracy and completeness in their own reporting because a reputation for inaccuracy can harm market share.<sup>358</sup> Lillian Bevier explains:

Prodded by their various audiences, and reflecting their constituents' particular concerns, these alternative information suppliers will often delve more deeply into apparent realities, interpret events with greater sophistication, and analyze data more thoroughly than the mainstream media is inclined to do. In doing so, of course, their principal motivation is to satisfy their own customers. While pursuing this goal, they serendipitously constrain, even if they do not completely eliminate, the mainstream media's ability to portray falsehood as truth or to omit key facts from otherwise apparently complete accounts.<sup>359</sup>

This constraining role on the mass media is, however, likely a modest one unless racial auditors can themselves reach something approaching a mass audience, even if only at the level of local media markets.<sup>360</sup> Yet their heavy reliance on careful, extensively documented reports ensures a small readership.<sup>361</sup> Moreover, the same market forces undermine the mass media's extensive coverage of racial auditors' efforts: "[T]he profusion of so many images, the blurring of the lines between fiction and fact (reconstructions, factoids, and documentary dramas), and the relativist excesses of postmodernism and multiculturalism make the representation of old-fashioned human rights news more difficult than ever."<sup>362</sup>

Racial auditors, recognizing this "CNN effect,"<sup>363</sup> are starting to take video cameras on search missions and to launch media-attracting training activities as ways to get the mass media's attention.<sup>364</sup> Auditors are also trying to circumvent the mass media by making more extensive use of the Internet and experimenting with ways to use the public's anxieties about race and class as the

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355. *Id.* at 24.

356. *See* Bevier, *supra* note 308, at 253–54.

357. *Id.* at 254.

358. *Id.* at 252, 254.

359. *Id.* at 254.

360. *Cf.* Winston, *supra* note 77, at 38.

361. *See id.* (making a similar comment concerning Amnesty).

362. Stanley Cohen, *Government Responses to Human Rights Report: Claims, Denials, and Counter-claims*, 18 HUMAN RIGHTS REPORTS 517, 542 (1996). *See generally* STANLEY COHEN, DENIAL AND ACKNOWLEDGEMENT: THE IMPACT OF INFORMATION ABOUT HUMAN RIGHTS VIOLATIONS (1995).

363. Winston, *supra* note 77, at 38.

364. *Id.*

very means for gaining the public's attention.<sup>365</sup> Auditors also historically have done better in reaching elite media, and often focus their information campaigns on both elite citizens and elite policymakers.<sup>366</sup> This combination of efforts aimed at elites and popular masses—sometimes combined with corporate support—has led to important successes in the area of criminal justice.<sup>367</sup> Perhaps more importantly, geographically localized, intensive information campaigns—like that in New York City—and local combinations of creative advocacy with coalition-building and media drama—like the ACLU's efforts in Cincinnati—may be promising models for effecting broader and more extensive contributions to social change.<sup>368</sup> Finally, “success” can be defined more broadly than by the size of the auditors' audience, as the following examination of the political emotions reveals.

#### IV

##### THE POLITICAL EMOTIONS

To feel as much as to think is central to being human.<sup>369</sup> Emotions motivate human action, centrally constitute human relationships, and are an inseparable part of human reasoning.<sup>370</sup> Certain social science models, such as those based on conceptions of “rational choice,” often disparage emotion as the antithesis of reason.<sup>371</sup> The notion of reason as a matter of cold, careful, and informed calculation reflects our culture's broader history of dichotomizing our mental world into thinking versus feeling.<sup>372</sup> The law, too, has often praised dispassionate reason as the essence of justice.<sup>373</sup>

365. *See id.* at 26, 44 (discussing the Internet); *infra* Part IV.B (discussing racial anxiety and the public's attention).

366. Bevier, *supra* note 308, at 37, 39–40.

367. *See id.* at 53 n.28.

368. *See supra* Part III.B–C.

369. Research in cognitive psychology demonstrates

that the reason/emotion dichotomy is false. Emotion often plays some role in our reasoning. Emotions identify what matters to us and permits us to assign values to what we perceive and do. The emotionless person is an irrational person. Furthermore, emotions are a central part of our moral and social judgments.

Andrew E. Taslitz, *Abuse Excuses and the Logic and Politics of Expert Relevance*, 49 HASTINGS L.J. 1039, 1054 (1998) (citing supporting philosophical theory and empirical data) [hereinafter Taslitz, *Abuse Excuses*].

370. *See id.*; Taslitz, *Twenty-First Century*, *supra* note 26 (human relationships); *infra* text accompanying notes 389–408 (human motivation).

371. *See* GEORGE E. MARCUS ET AL., AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT 5 (2000) (“[T]he rational choice school has been subject to criticism by outsiders who are uncomfortable with its disciplined and narrow focus on human behavior as interest-calculation. . . . [T]he rational choice perspective [is] so self-disciplined in consistently excluding affect-related variables from its models.”) (citation omitted).

372. *See* sources cited *supra* notes 370–71.

373. As Susan Bandes has said:

In the conventional story, emotion has a certain, narrowly defined place in law. It is assigned to the criminal courts. It is confined to those—like witnesses, the accused, the public—without legal training. In this story, there is a finite list of law-related emotions—anger, compassion, mercy, vengeance, hatred—and each emotion has a proper role and a

But a growing trend in the social sciences and in law recognizes that the emotion—reasoning dichotomy oversimplifies reality.<sup>374</sup> In this part, I join that trend, making no pretense of fully defending its wisdom here.<sup>375</sup> I do hope, however, to illustrate the usefulness of an emotion-laden jurisprudence in understanding some of the fundamentally political aspects of the Fourth Amendment.<sup>376</sup>

The Fourth Amendment permits the state, under certain circumstances, to use force to interfere with our privacy, property, and locomotion rights—rights that are critical to a meaningful life and the proper exercise of citizenship. The ease with which the Amendment permits such interferences, therefore, necessarily has political consequences and fosters political reactions. Such reactions can help to prevent state excesses, restore Fourth Amendment equilibrium, and promote the people’s sense of the state’s legitimacy. Understanding these benefits, and the potential costs, requires an understanding of the role of emotions in political judgment. I have already touched very briefly on the emotions of “empathy,” “sympathy,” and “compassion,” though space constraints require me to leave a more detailed discussion of their meaning and political significance for another day.<sup>377</sup> This Part will focus on three sets of political emotions to illustrate the point: (1) enthusiasm, (2) anxiety, and (3) political honor. Strictly speaking, the last of these three, “political honor,” involves certain aspects of a trait of character.<sup>378</sup> However, “character” is defined as a disposition to act, think, or *feel* certain ways in certain sets of circumstances,<sup>379</sup> and it is the feeling-related aspects of political honor in which I am most interested.

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fixed definition. And it is portrayed as crucially important to narrowly delineate that finite list and those proper roles, so that emotion doesn’t encroach on the true preserve of law: which is reason.

Susan Bandes, *Introduction*, in *THE PASSIONS OF LAW 2* (Susan Bandes ed. 1999).

374. For a quick summary of the recent literature, see Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 *WIS. WOMEN’S L.J.* 3, 9–12 (2000) [hereinafter Taslitz, *Two Concepts*]. See also Taslitz, *Abuse Excuses*, *supra* note 369, at 1054 (“A justice system devoid of emotion is soon one devoid of the common man’s respect.”).

375. For such a fuller defense, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *COLUM. L. REV.* 269 (1996), and the magisterial *MARTHA NUSSBAUM, UPHEAVALS OF THOUGHT* (2001).

376. I have written elsewhere about other aspects of the emotions relevant to Fourth Amendment reasoning. See, e.g., Taslitz, *Stories*, *supra* note 26 (respect); Taslitz, *Twenty-First Century*, *supra* note 26 (privacy).

377. See *supra* notes 104–09; *infra* note 465 and accompanying text (briefly defining the emotions of empathy, sympathy, and compassion).

378. See *infra* Part IV.C (defining “political honor”).

379. Taslitz, *Two Concepts*, *supra* note 374, at 48, 52 (“Our emotions [and thoughts] are important aspects of our character. Our disposition to feel and act on emotions reflects our disposition to do good and evil, our character.”).

## A. Enthusiasm

### 1. *Overcoming Political Habits*

Recent empirical social science suggests that most political decision-making is a matter of habit.<sup>380</sup> Democrats usually vote Democratic, and Republicans vote Republican. Liberals vote for initiatives to raise taxes; conservatives oppose them. Ideology, partisanship, and interest group identity rule the day, *not* informed, open-minded issue examination.<sup>381</sup>

Even habitual behavior, however, is costly.<sup>382</sup> Voting when we are sleep-deprived or must drop the kids off at day care, donating to a political campaign when we are strapped for cash, or protesting when we already work sixty hours per week to make ends meet are not easy. These activities require sacrifices of time, money, and energy, albeit sometimes of small amounts. Our willingness to act habitually, therefore, turns on the degree of enthusiasm that we feel for a particular issue or candidate—a sense that “this guy can really win and make a difference,” for example, so that campaigning seems worth the effort.<sup>383</sup> Repeated failure to act habitually, perhaps because of feelings of frustration or despair, can weaken the force of a political habit over time, just as its enthusiastic repetition can strengthen it.<sup>384</sup>

Appeals to a group’s racial identity can be one powerful way to amplify its enthusiasm. Class-consciousness has rarely had widespread appeal to Americans.<sup>385</sup> We do not strongly identify with the “working class” or the “upper class,” and the appeal of class-based calls to action has been consistently declining.<sup>386</sup> In multicultural modern America, race offers a stronger sense of solidarity.<sup>387</sup> Because persons classified as members of certain racial groups are stigmatized, organizing them in same-race groups around issues of racial

380. MARCUS ET AL., *supra* note 371, at 1–11, 52–53.

381. *See id.* at 51–52. For a discussion of the role of cognitive habits in human reasoning more generally, see Mihnea Moldoveanu & Ellen Langer, *When “Stupid” Is Smarter than We Are: Mindlessness and the Attribution of Stupidity*, in *WHY SMART PEOPLE CAN BE SO STUPID* 212–31 (Robert J. Sternberg ed. 2002).

382. *See* MARCUS ET AL., *supra* note 371, at 51–52; Moldoveanu & Langer, *supra* note 381, at 222–28.

383. MARCUS ET AL., *supra* note 371, at 51–52.

384. *See id.*

385. *See* BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* vii (2000) (“Many citizens of this nation, myself included, have been and are afraid to think about class . . . . Our nation is fast becoming a class-segregated society where the plight of the poor is forgotten and the greed of the rich is morally tolerated and condoned.”).

386. *See id.* at 5 (“We live in a society where the poor have no public voice.”); *id.* at 70 (“[W]e all know that the rich live apart from the rest of us and that they live differently.”).

387. Too often, however, race has “been used to obscure class, to make the white poor see their interests as one with the world of white privilege.” *Id.* at 5. Without minimizing the grave dangers revealed in our history of white racial consciousness, I argue here that minority racial consciousness has been, and can be, a powerful and progressive political organizing force for racial minorities.

oppression can build individual and group self-esteem.<sup>388</sup> Sharing common experiences can reveal patterns of oppression, foster community, and generate righteous indignation.<sup>389</sup> African Americans in particular, several studies suggest, often have an usually strong sense of group loyalty and solidarity.<sup>390</sup> They frequently have what sociologist Charles Lemert has called a “weak-we” identity.<sup>391</sup>

“Weak-we” individuals construct their self-conception from their local experiences—from the reality of their material world and the social practices that tangibly and intangibly affect their daily lives. “Strong-we” individuals instead have a more autonomous, isolated sense of themselves rooted in abstract notions of justice projected onto all humanity.<sup>392</sup> The more local weak-we sense of self as tied to a particular group draws its greatest psychological strength from that group and is most likely to develop group-consciousness.<sup>393</sup> Because blacks are so much more often weak-we selves than are whites, blacks are likely to respond well to race-based appeals.<sup>394</sup> Race becomes a source of strength and pride, not merely a marker of social stigma.<sup>395</sup>

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388. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 78–84 (2002). Professor Lani Guinier explains further:

What was missing from my conversation with my son [about why race matters] was recognition that being forced to identify with a group of people can be an unexpected blessing. Those who are racialized by society may miss out on a specific kind of individual liberty, but they gain a different perspective on wholeness and its relationship to freedom. They learn to appreciate the importance of friendship, of solidarity, of connection. They also may learn from a place at the bottom or on the margin to be skeptical of authority, to distrust hierarchy, to find comfort in community.

*Id.* at 4. On the negative role of race in stigmatizing entire groups, often at the subconscious level, see GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* (2002).

389. See GUINIER & TORRES, *supra* note 388, at 88–89.

390. See *id.* at 85–91.

391. See CHARLES LEMERT, *FRENCH SOCIOLOGY: RUPTURE AND RENEWAL SINCE 1968*, 104 (1981); GUINIER & TORRES, *supra* note 388, at 88–89 (discussing Lemert’s work).

392. See LEMERT, *supra* note 391, at 104. (defining these terms). In Lemert’s words, for a weak-we person, the “we” “refers to occasional, but deeply understood, groupings of individuals sharing similar or same historical experiences, usually below, or marginally outside, the world to which the first group’s [strong] ‘we’ refers.” *Id.*

393. See GUINIER & TORRES, *supra* note 388, at 88–89.

394. See *id.*

395. Guinier and Torres amplify this point further:

Race-consciousness can affirm the individual’s ability to cope with the challenges of discrimination. It can offer solace to people who might otherwise individuate the stigma of being positioned at the bottom of a racial hierarchy, by granting access to a sense of community and not just critique.

*Id.* at 82. Political scientists have long recognized the value of such “relational goods” in promoting political activity. See Carole J. Uhlaner, “Relational Goods” and Participation: Incorporating Sociability into a Theory of Rational Action, 62 *PUB. CHOICE* 253–85 (1989). “Relational goods” include group identity, social interaction, and recruitment, each of which are incentives to political action that are available only to individuals in their roles as group members. See JAN E. LEIGHLEY, *STRENGTH IN NUMBERS?: THE POLITICAL MOBILIZATION OF RACIAL AND ETHNIC MINORITIES* 7 (2001). These rational benefits result in information exchange, thus reducing the costs of political participation to individuals. See *id.* at 7. Interestingly, there is significant evidence that reducing the costs of participation has a greater effect on raising minority political involvement than it does Anglo political involve-

But naked appeals to race alone are insufficient. Those appeals must take place in institutions that promote group interchange and discussion. The effect, in the words of Lani Guinier and Gerald Torres, is that:

Racial solidarity gives those who may feel racially marginalized the political confidence to organize and take risks. The bonds of trust that form around common cultural rituals and practices also help them transcend class differences and gain confidence. A collective awareness of systemic racial injustice can move those who have been marginalized to participate in public life rather than withdraw from it. The process of participation itself becomes an act of discovery, offering the rewards of fellowship and community awareness that come from being part of joint decision-making.<sup>396</sup>

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ment, although raising the perceived benefits has the opposite effect, elevating Anglo involvement more than it does minority involvement, though the size of the differences may vary depending on the racial or ethnic minority group in question. *See id.* at 8. Tactically, this observation means that relational and other information-disseminating efforts may be especially important in motivating minority group political action, again suggesting the importance of properly crafted data dissemination and exchange efforts by racial auditors.

396. GUINER & TORRES, *supra* note 388, at 81. Some researchers have concluded that black political participation has fallen since the 1970s because “the decline of the civil rights movement resulted in fewer opportunities for Blacks to participate.” LEIGHLEY, *supra* note 395, at 25. The expansion of the number of, and energy devoted to, race conscious *political* organizations and activities recommended by Guinier and Torres may help to close this opportunity gap. Small successes by such groups can have powerful cumulative effects. This increased perceived political empowerment by blacks—such as a rise in the number of elected black officials in a particular locality—raises black mobilization to, and engagement in, political activity. *See id.* at 26–27, 49. Group size—an increase in the percentage of blacks in a broader community—also increases black participation in local elections, though group size has little effect on black involvement in other sorts of political activity. *See id.* at 144. These observations may vary for other minority groups because of a complex set of contextual reasons. *See id.* at 171 (noting, for example, that greater population size encourages Latino participation in a wider range of political activities than is true for blacks). What can seem to be fairly said for many minority groups is that relational strategies will be particularly effective for at least some such groups, and reduction in the costs of political participation—partly via enhanced information dissemination—is likely to aid all minority groups. *See id.* at 171, 173. Similarly, enhancing group members’ sense that their action can make a difference in outcomes also helps. *See id.* at 9–10.

Finally, all group members can be mobilized *if asked*, though who does the asking matters. *See* LEIGHLEY, *supra* note 395, at 165, 173. Individuals are most likely to join a political effort if asked by *those they know*, whatever their race, though this effect is enhanced for African Americans when asked by those of the same race. *See id.* at 142–44. But knowing who does the asking has powerful significance even apart from the race of the asker. *See id.* This last observation suggests that the sort of cross-racial coalitions proposed by Guinier and Torres can be self-perpetuating: The more opportunities there are for interracial “asking,” the more likely are the participants to join in a common cause. In political scientist Jan Leighley’s words, “the similarities regarding why individuals participate may be as great as the differences. And those ‘relational goods’ might well be the incentives that build stronger communities in a more *diverse* democratic society.” *Id.* at 165.

This optimism must be tempered, however, by another observation: The more racially and ethnically diverse any community is, the *less likely* that *anyone of any race* will participate in political action, or so Leighley believes the data shows. *See id.* at 171. If Leighley is right, then Guinier and Torres may also be right, first, in arguing for spaces in which relatively homogenous groups can be themselves, and, second, in insisting on cross-racial efforts that are still largely initially led by racial minorities in the hope that high political energy may thereby be retained. *See* GUINER & TORRES, *supra* note 388, at 12–22. Leighley herself surmises that the willingness of political elites skillfully to avoid racially polarizing efforts at mobilization and to embrace cross-racial coalitions matters greatly. *See* LEIGHLEY, *supra* note 395, at 173. She further suggests that this requires appeals to substantive issues that matter equally to individuals of many races. *See id.* at 74.

In my later discussion of political honor, I address the power of ideas to supplement perceived group self-interest as a way to mobilize political resources. But there are no easy solutions, for racial homogeneity risks Balkanization, while cross-racial organizing offers the promise of unity but at the

This process of race-based exchange and calls for response to racial injustice generates the enthusiasm that leads people to act consistently with their political habits and dispositions. Habitual political behavior, though involving subconscious processes, is not an entirely subconscious affair.<sup>397</sup> To the contrary, many enthusiastic individuals will learn more about a campaign or debate by wider reading and conversation, investigations necessary for affective judgment about how enthusiastic to be.<sup>398</sup> But absent the special circumstance of “political anxiety” (discussed shortly), learning is done primarily to reinforce habits and energize actions. Viewpoints may be refined, justifications improved, but the bottom line remains unaltered: The “joint decision-making” becomes more about *when* and *how* (that is, about tactics) but not *what* to do.<sup>399</sup>

## 2. Promoting Counterpublics

Guinier and Torres seem to suggest that racial group-based participatory processes can lead not merely to heightened enthusiasm about pre-existing views, but also to novel positions.<sup>400</sup> Professor Kendall Thomas indeed argues for the importance of race-based group decision-making precisely because it will develop “oppositional counterpublics.”<sup>401</sup> The value of such counterpublics is partly that they quell group anger by helping to create a real prospect for political victories on some issues, but also that society as a whole benefits from having those who always stand ready “to ask awkward questions, to shine light

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potential cost of growing indifference. Critical, nonetheless, is a bold attitude of willing experimentation and optimistic action, building on the resources and strengths of the past as modified by the adventurousness of the future—the attitude expressed by Guinier and Torres and that I hope I bring to the project of racial auditing. See generally PAUL M. SNIDERMAN & THOMAS PIAZZA, *BLACK PRIDE AND BLACK PREJUDICE* (2002) (demonstrating that increased black pride and solidarity generally does not translate into black antipathy toward other minorities or toward whites; most blacks are willing to work on political projects with whites and ethnic minorities; blacks and whites share many—though not all—of the same principles and values; and blacks frequently demonstrate a willingness to make decisions based upon principle, even when it is arguably contrary to raw or narrow black self-interest). Sniderman and Piazza’s work thus buttresses the argument that appeals to black identity and solidarity to build black political enthusiasm can be fully consistent with broad, principled, cross-racial coalitions much like those envisioned by Guinier and Torres.

397. “Habit,” as used by political scientists, does not, therefore, have precisely the same meaning as when the term is used in evidence law. In evidence law, there are two views: *either* an oft-repeated (albeit conscious) response to a very situationally specific stimulus (for example, brushing your teeth every night before you go to bed) or acting in semi-conscious fashion, not completely within our control (for example, arriving at a destination without conscious awareness of how you drove there). See STEVEN FRIEDLAND ET AL., *EVIDENCE LAW AND PRACTICE* 140–44 (2002). Political habits are often conscious and do not automatically ensure a response to a specific stimulus. See MARCUS ET AL., *supra* note 371, at 802. Instead, they require environmental factors to generate enthusiasm for political action, the resulting action being “habitual” only in the sense that it requires almost no thought concerning what action to take. The individual’s choice is simply between no action or the usual one. See *id.* at 63–64.

398. See MARCUS ET AL., *supra* note 371, at 48–53.

399. See *id.* at 93–94.

400. See GUINIER & TORRES, *supra* note 388, at 95–96, 147–53 (“in-between spaces” as “laboratories of Democracy”).

401. Kendall Thomas, *Racial Justice: Moral or Political?*, in *LOOKING BACK AT LAW’S CENTURY* 78, 86–87 (Austin Sarat et al. eds. 2002).

in dark corners, and expose abuses of power.”<sup>402</sup> Political scientist Jane Mansbridge’s view concerning the oppositional nature of these counterpublics resonates with Thomas’:

The goals of these counterpublics . . . [include] working out alternative conceptions of self, of community, of justice, and of universality, trying to make sense of both the privileges they wield and the oppressions they face, understanding the strategic configurations for and against their desired ends, deciding what alliances to make both emotionally and strategically, deliberating on ends and means, and deciding how to act, individually and collectively.<sup>403</sup>

### 3. *Novelty and “Good” Group Polarization*

Mansbridge, Thomas, Guinier, and Torres all claim to reject any “essentialist” view of a uniform black perspective on any issue.<sup>404</sup> Thomas expressly urges the value of intra-group dissent to sound deliberation, and the importance of a low-cost exit for members who can no longer abide by the group’s decisions.<sup>405</sup> But there is a danger that the sort of deliberation Thomas describes becomes but an instance of the phenomenon of “group polarization.”<sup>406</sup> Group members who talk primarily to like-minded thinkers are often observed over time to become more extreme—more polarized—in their views.<sup>407</sup> Rephrased, political habits are strengthened and refined but not fundamentally changed or replaced by truly alternative perspectives. Group

402. *See id.* at 88 (quoting IAN SHAPIRO, *DEMOCRACY’S PLACE* 234–35 (1996)). *See also* NANCY FRASER, *JUSTUS INTERRUPTUS: CRITICAL REFLECTIONS ON THE “POSTSOCIALIST” CONDITION* 81 (1997) (using the phrase “subaltern counterpublics”); LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* 55–69, 97–102 (2001) (arguing that no political victories are final, and everyone believes that he or she has a real chance to prevail on some issues some of the time, including reversing current dominant positions at a future time). On the value of dissenters in challenging the accepted wisdom and monitoring abuses of power, see STEVEN H. SCHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

403. Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 46, 58 (S. Benhabib ed. 1996).

404. *See, e.g.*, GUINIER & TORRES, *supra* note 388, at 15–16 (explaining that political race is not about being, but doing; it is an action, not a thing); Thomas, *supra* note 401, at 101 n.28.

405. *See id.* (emphasizing pluralism inherent in the phrase “black civic publics,” denoting more than one such public, thus affirming disagreement and dissent as constructive forces in black political life and recognizing dissenters’ power by giving them the credible threat of exit from the group if the dissenters’ views are not fully and fairly heard). Thomas further notes that his terminology embraces a common “political culture” rather than a common “racial culture,” for example, joining black-skinned persons from the United States, the South Caribbean, Europe, Central America, and Africa to mobilize against police brutality or for environmental justice in New York City. *See id.*

406. *See* CASS SUNSTEIN, *REPUBLIC.COM* 65 (2001) (“The term *group polarization* refers to something very simple: *After deliberation, people are likely to move toward a more extreme point in the direction to which the group’s members were originally inclined.*”)(emphasis in original)[hereinafter SUNSTEIN, *REPUBLIC.COM*]; *see also* PATRICIA WALLACE, *THE PSYCHOLOGY OF THE INTERNET* 73–76 (1999) (defining group polarization, reviewing empirical data supporting it, and analyzing its effects).

407. The posited reasons for the group-polarization effect are first, that members of a group of like-minded persons thereby hear a limited argument pool, thus entrenching their positions; and, second, in an effort to be perceived favorably by themselves and by other group members, they adjust their positions toward the group-dominant one, prodding a “spiral of silence” in which people with minority positions silence themselves, potentially excising those positions from society over time.” SUNSTEIN, *REPUBLIC.COM*, *supra* note 406, at 67–68; *see also* WALLACE, *supra* note 406, at 73–80 (offering a similar, more detailed, explanation).

polarization can sometimes be dangerous, particularly when it involves the actions of violent hate groups.<sup>408</sup> But in the case of racial counterpublics, and within limits, such polarization may be desirable because it heightens the enthusiasm of often silenced groups to make their voices heard in public fora. Cass Sunstein has made an analogous point:

Of course we cannot say, from the mere fact of group polarization, that there has been a movement in the wrong direction. Notwithstanding some of the grotesque examples . . . [of ill social effects], the more extreme tendency might be better rather than worse. Indeed, group polarization helped fuel many involvements of great value—including, for example, the civil rights movement, the antislavery movement, and the movement for sex equality. Each of these movements was extreme in its time, and within-group discussion certainly bred greater extremism; but extremism should not be a word of opprobrium. If greater communications choices produce greater extremism, society may, in many cases, be better off as a result. One reason is that when many different groups are deliberating with one another, society will hear a far wider range of views as a result.<sup>409</sup>

Sunstein's observation—that group polarization from within-group homogeneity might paradoxically produce more heterogeneous public deliberation and therefore better-informed public policy choices—stems from the reality that high-status members in deliberating bodies tend to speak more and to be more influential than lower status members.<sup>410</sup> Lower-status members often lack confidence in their abilities or fear retribution.<sup>411</sup> Marginalized groups may therefore self-silence or be discouraged when they do speak because, even if politely heard, they may be ignored.<sup>412</sup> In this light, “a special advantage of enclave deliberation is that it promotes the development of positions that would otherwise be invisible, silenced, or squelched in public debate.”<sup>413</sup> The confidence, enthusiasm, and energetic conversation of within-group extremism *might* mean that more, not fewer, voices are heard in the halls of power.

Yet views that are too extreme may lead to ignoring counter-evidence that there is a better way and may foster the sort of intolerance that undermines coalition building, serving only the interests of the status quo.<sup>414</sup> To avoid that

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408. See SUNSTEIN, REPUBLIC.COM, *supra* note 406, at 62–65.

409. *Id.* at 75.

410. See *id.* at 76; cf. TASLITZ, RAPE AND CULTURE, *supra* note 27, at 69–73 (summarizing empirical data on this phenomenon's impact in rape trials).

411. See SUNSTEIN, REPUBLIC.COM, *supra* note 406, at 76; TASLITZ, RAPE AND CULTURE, *supra* note 27, at 73–75.

412. See SUNSTEIN, REPUBLIC.COM, *supra* note 406, at 67–68, DELGADO & STEFANCIC, *supra* note 142, at 24–25, 64, 103–04 (on minority silencing).

413. SUNSTEIN, REPUBLIC.COM, *supra* note 406, at 76.

414. As Sunstein says:

Group polarization is a common phenomenon . . . . Recall that no shift should be expected from people who are confident that they know what they think, and who are simply not going to be moved by what they hear from other people. If, for example, you are entirely sure of your position with respect to nuclear power—if you are confident not only of your precise view, but of the certainty with which you ought to hold it—the positions of other people will not affect you.

See *id.* at 79.

result, specific efforts must be made to ensure the presence and airing of diverse views within a same-race institution and to reach out, *during the process of view-articulation*, to supportive members of other groups who may have a different perspective.<sup>415</sup> Importantly, there is a *necessary* tension between building group enthusiasm for habitual political action and simultaneously seeking to encourage more novel, in-depth political thinking. Human motivation is complex; individuals and groups can be prompted to follow habit while debating that habit's wisdom. Such debate among racial counterpublics in the United States can genuinely contribute over the long run to changes in political habits without detracting from their ability to build enthusiastic action among those still engaged in habitual thinking.<sup>416</sup> Therefore, when new ways of thinking do occur, they are but a bonus for the quality of public debate.

This brief discussion of enthusiasm suggests important lessons for racial auditors. First, an express focus on conscious or subconscious racial discrimination in policing is a powerful way to motivate racial minorities as troops in the battle for reforming police search and seizure and excessive force practices. Second, those troops are likely to fight their best when they are creatively and widely involved in decision-making concerning reform, as was

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415. Sunstein explains, for example, that a group of twelve people deliberating about global warming in which half the group starts favoring one view of whether the problem is serious and half favoring the other will often ultimately move individual members toward more moderate positions. *See id.* at 79–80. He also describes experiments with the “deliberative opinion poll,” in which people’s views are polled only after diverse citizens with varied perspectives have first been brought together to exchange views. *See id.* at 84–85. Although group polarization sometimes resulted, often participants proved willing to move away from (rather than more vehemently embracing) their original positions. *See id.* at 84–85.

Again, racial activists must walk a fine line. As noted above, group polarization can sometimes be a good thing for public deliberation. But if the goal of political activism is in part to build coalitions more likely to bring about concrete short-term gains and alter wider public attitudes to aid longer-term gains, then polarization that is too extreme may undermine the basis for sincere, respectful partnership and exchange. Inter-group personal interactions create shared experiences, which “help to promote and to ease social interactions, permitting people to speak with one another, and to congregate around a common issue, task, or concern, whether or not they have much in common.” *Id.* at 95. Furthermore, shared experiences between “people who would otherwise see one another as quite unfamiliar, in extreme cases as nearly belonging to a different species, can come instead to regard one another as fellow citizens with shared hopes, goals, and concerns.” *Id.* at 96. Such fellow-feeling can itself be a benefit, but it may also, more concretely, lead to cooperative political projects. *See id.* at 96. *Personal* contact is critical. *Cf.* WALLACE, *supra* note 406, at 82–83 (dissenters are more willing to speak on-line than off-line, but their views are also more likely to be ignored by the broader group than when they are expressed face-to-face).

Racial auditors provide opportunities for multi-racial deliberation and action in the process of collecting, disseminating, and advocating based upon information. Because the auditors focus on an issue of primary concern to the weakest parties in the nascent coalition (the racial minorities), that party’s distrust of other groups’ members may decline, setting the stage for further inter-group action. Yet there is always the danger of depriving racial minority groups of the private spaces they need or of too diluting their views in a broader coalition. The Cincinnati experiment might suggest a helpful middle-ground: A local auditors’ group, largely composed of racial minorities, made common cause with a national, more experienced, and better-funded multi-racial auditor, the ACLU. *See supra* Part III.A.2; *cf.* GUINIER & TORRES, *supra* note 388, at 102 (describing a successful effort at coalition-building between black and white workers while acknowledging existing racial divisions).

416. *See supra* note 415 (illustrating this possibility).

apparently true of the ACLU mediation efforts in Cincinnati.<sup>417</sup> Shying away from race, or relegating it to but one matter of minor relevance to police performance, may cause auditors to lose the fully energetic assistance of the very persons most harmed by police conduct.

But these lessons are only tentative ones because too exclusive a focus on race has a potentially undesirable political effect: raising white anxieties about “dangerous” minority groups.<sup>418</sup> Raising such anxieties too much can undermine cross-racial coalitions and even lead to open racial conflict.<sup>419</sup> Anxiety can serve positive functions too, but it does so only under a special set of circumstances that require reformers to move deftly in their affective dance with their hoped-for future partners in social change.

## B. Political Anxiety

### 1. *Anxiety’s Fearful Advantage*

Politically salient information that is novel or threatening creates anxiety in the recipient.<sup>420</sup> Anxiety jolts actors out of their political habits, goading them to gather information (including information that contradicts their expectations) and to deliberate carefully about their choices, much in the manner suggested by traditional rational choice theory.<sup>421</sup> That deliberation may lead to the same outcome as habitual action, but it also may lead to complete changes in opinion. A Democrat may defy his habit, voting for a Republican candidate in this one instance, or a conservative might support this one particular tax hike that he deems wise.<sup>422</sup> Moderate doses of anxiety can thus disengage actors’ political habits while activating serious political judgment.<sup>423</sup>

Understanding when and why this is so may profitably start with a comparison to anxiety’s close cousin—fear. Fear is not an ordinary emotion, but rather one of the “vehement passions.”<sup>424</sup> Such passions “drive out every other form of attention or state of being.”<sup>425</sup> There is nothing else in the world to the fearful person but himself and the source of his fear.<sup>426</sup> Moreover, fear’s time horizon is short; we fear grave (usually physical) harm about to befall us in the future.<sup>427</sup> Fear’s great power is that it focuses our attention on a single thing—the danger.<sup>428</sup> But that focus cuts the frightened person off from the

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417. *See supra* Part III.C.

418. *See infra* text accompanying notes 455–79.

419. *See id.*

420. *See* MARCUS ET AL., *supra* note 371, at 57–58.

421. *See id.* at 48–53, 80–82.

422. *See id.* at 95–125.

423. *See id.*

424. PHILIP FISHER, *THE VEHEMENT PASSIONS* 43 (2002).

425. *Id.*

426. *Id.* at 72; *see also* FEIGENSON, *supra* note 95, at 83–84 (citing others and offering definitions of the cognate terms of “dread” and “terror”).

427. FEIGENSON, *supra* note 95, at 84; FISHER, *supra* note 424, at 72.

428. Professor Fisher explains:

social world and from his sense of mutual obligations to others.<sup>429</sup> Fear is therefore radically inconsistent with political activity and individual contribution to fulfilling the social contract.<sup>430</sup> Indeed, when we are overcome with fear, we often later apologize to those we have ignored while we were obsessed with our own safety. We apologize because we understand that we have insulted those around us, treating them, however temporarily, as unworthy of our notice, care, and concern.<sup>431</sup> Fear—or at least fear that does not immobilize the individual—grants him intense powers of concentration, but at the cost of political and social interaction with others.

Anxiety is fear's relatively gentler relative. An anxious person "perceives an uncertain, existential threat to his or her well-being."<sup>432</sup> Anxiety is not so time-limited as fear, for the threat that induces anxiety may be in the distant future, or at an uncertain future time and place.<sup>433</sup> Indeed, though anxiety may arise from a specific threatening person or condition, anxiety may also stem from the sense that a vague, non-specific, ill-defined threat may come from persons unknown.<sup>434</sup> Robert Nozick called this last sort of anxiety "general anticipatory fear,"<sup>435</sup> a "fear of everyone, at every minute, and across the full range of imaginable damaging acts."<sup>436</sup> It is akin to the ever-present concern of urban-dwellers with random street violence or of women with a rapist leaping from the bushes.<sup>437</sup> Anxiety, like true fear, focuses our attention on a perceived threat, pressing us to craft ways to reduce or eliminate the danger.<sup>438</sup> But unlike true fear, anxiety does not cut us off from the social and political worlds in which we live. Indeed, it is in those worlds that we may find our salvation.<sup>439</sup>

Professor Phillip Fisher offers a vivid example, drawn from Shakespeare's *Merchant of Venice*. The play opens with a melancholy Venetian merchant,

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What fear or grief, falling in love, anger, jealousy, shame, and the vehement passions in general make clear is that, by means of the passions, an absorbing concentration on one present-time object in the outer world exists at the expense of any and all other possible attention. Instead of a diversified investment in persons and objects, in events just past or in the near or slightly more remote future, the impassioned state solidifies attention in the direction of one monopolizing fact: the recent death of a parent, the snarling dog on the path in front of me, the contemptuous insult that I have just noticed . . .

FISHER, *supra* note 424, at 62.

429. *See id.* at 63–66.

430. *Id.* at 63–65.

431. *Id.* at 66.

432. FEIGENSON, *supra* note 95, at 84.

433. *Id.* at 109–10.

434. *Id.*

435. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 65 (1974).

436. FISHER, *supra* note 424, at 110.

437. *See id.* at 19. Although Fisher sometimes loosely uses the word "fear," he makes clear later that in this portion of his book, he is speaking about what is commonly called anxiety.

438. *See id.* at 109–56.

439. *See id.*

Antonio, having financed a lengthy and expensive sea voyage.<sup>440</sup> His friends speculate about the cause of his mood, proposing that:

[O]nce he has sunk his wealth into the voyage and the ship disappears from sight, the wind cooling his soup makes his mind picture what harm a wind might do at sea. When he looks at the sands running through his hourglass, he is forcibly reminded of sandbars, shallows, and flats and imagines his ship wrecked and sunk in sand. Even if, in desperation or anxiety, he goes to church to pray for the ship, the stone walls of the church make him think of rocks onto which his ship might be driven by a storm and sunk to “scatter all her spices on the stream, /Enrobe the roaring waters with my silks.”<sup>441</sup>

Antonio responds that he has no such worries because he has, in modern terms, “diversified his risks,”<sup>442</sup> by investing his wealth in several ships, many bound for different destinations, and not investing all his assets during any one year.<sup>443</sup> Antonio’s claim to be free from anxiety is unconvincing. His response, more fairly read, is that his anxiety over his investment prompted him to gather information, ponder his commercial options, and act to reduce his risk. Explains Fisher, “Ships, destinations, and time are all diversified to reduce merchant anxiety or, as Nozick calls it, general anticipatory fear.”<sup>444</sup> A social venture—commercial exchange, hiring sailors, and buying goods—had a social solution: seeking variety in the exchanges, hirings, and purchases that bring profit. Just as anxiety spurred Antonio’s commercial judgment, so can it spur a citizen’s political judgment.

## 2. *The Dangers and Blessings of Radical Anxiety*

Where race and criminal justice are involved, however, appeals to citizen anxiety can be a double-edged sword. Amnesty International USA Executive Director William Schulz’s argument that white self-interest requires an end to police brutality (if it does not end, blacks will riot) is an excellent illustration of how inducing anxiety can ultimately reinforce, rather than replace, political habits—at least those habits of the white majority.<sup>445</sup>

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440. See *id.* at 112; see also WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 1, sc. 1. For a general and persuasive discussion of the value of Shakespeare’s work in understanding legal concepts, see generally DANIEL KORNSTEIN, *KILL ALL THE LAWYERS?: SHAKESPEARE’S LEGAL APPEAL* (1994).

441. FISHER, *supra* note 424, at 112–13 (quoting Shakespeare, *supra* note 440, at act 1, sc. 1.).

442. *Id.* at 113.

443. *Id.*

444. *Id.*

445. See *supra* text accompanying notes 245–50. Anthony Bouza has sought to offer a similar reminder to forgetful whites of the physical dangers of their own indifference to black suffering: “The overclass will not admit that its practices of privilege and exclusion create pressures for the underclass that drive it to revolt. This takes the form of street crime and, occasionally dotted over our history, riots.” BOUZA, *supra* note 128, at 28. I do not take issue with the reality that a group of people who perceive the legal-political system as ineffective, indifferent, or corrupt may react with violence as a (sometimes subconscious) form of protest. See Andrew E. Taslitz, *Mobs and Vigilantism*, in *THE OXFORD COMPANION TO AMERICAN LAW* 564–66 (2002). I simply worry that pointing out this reality in the case of African-American oppression carries a risk of being counterproductive.

Whites already associate blacks with violent criminality.<sup>446</sup> The media repeatedly emphasize the disproportionate number of African-American males in our country's prisons and jails.<sup>447</sup> "Reality" police television programs "showcase Black criminals front and center," including videotapes of angry black males cursing law enforcement.<sup>448</sup> Mainstream conservative commentators, like Abigail and Stephen Thernstrom, join the chorus, declaring, "If the African-American crime rate suddenly dropped to the current level of the white crime rate, we would eliminate a major force that is driving blacks and whites apart and is destroying the fabric of black urban life."<sup>449</sup> Even Harvard's well-known African-American law professor, Randall Kennedy, writes, "Just as race can signal heightened risk that a black person will die younger . . . [and] experience more unpleasant encounters with the police . . . than a white person, so, too, can race signal a heightened risk that a black person will commit or has committed certain criminal offenses."<sup>450</sup>

To be sure, counter-images of black success increasingly fill the airwaves and the movie theaters.<sup>451</sup> But such images have the unfortunate effect of raising white ire at "undeserving" blacks stealing "white jobs" via affirmative action.<sup>452</sup> The violent, negative images continue to have a greater effect than the positive ones, reducing white empathy and heightening white animosity.<sup>453</sup>

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446. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 113 (2000). Professor Feagin explains:

Another common white stereotype is that of the dangerous black man. This seems to be a staple of white thinking, including the thinking of white leaders and intellectuals speaking or writing about the black "underclass." A majority of whites seem to view the generic street criminal as a black man . . . .

As a result of these common stereotyped images, many whites have fearful reactions to a black man encountered in public settings such as on streets, in public transport and in elevators. In my interview studies, numerous black men have reported aversive reactions taken by white women and men when they are walking the streets of U.S. towns and cities. Many whites lock their car doors, cross streets, or take other defensive precautions when a black man is near.

*Id.* at 113–14.

447. See, e.g., ENTMAN & ROJECKI, *supra* note 337, at 78–93 (recounting images of black violence and criminality in television news and daily newspapers).

448. See RUSSELL, *supra* note 346, at 2.

449. STEPHEN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 285 (1997).

450. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 145 (1997).

451. See RUSSELL, *supra* note 346, at 1–4.

452. Compare *id.* at 4 ("The contradictory media representations of Blacks reflects a double-edged resentment: the threat of both Black crime and Black success . . . . While the media portrays neutral and in some cases positive, images of Blacks, these images cannot compete with the overwhelmingly negative characterizations."), with CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* 109–29, 184–220 (2002) (noting simultaneous white fear of black criminality and white anger over black advancement via affirmative action). But see LEON E. WYNTER, *AMERICAN SKIN: POP CULTURE, BIG BUSINESS, AND THE END OF WHITE AMERICA* (2002) (arguing that media marketing to multi-racial audiences is leading to the concept of all skin colors as "American skin," though not specifically addressing the impact of media on race's role in criminal justice policy).

453. See ENTMAN & ROJECKI, *supra* note 337, at 91 (noting empirical support for this proposition); RUSSELL, *supra* note 346, at 2–4 (similar analysis).

Whites, feeling their lives and property threatened, “seek to eliminate that threat as expeditiously as possible,”<sup>454</sup> thus favoring harsher criminal sentences and scapegoating black criminality as emblematic of the breakdown in social order.<sup>455</sup> That combination is not a recipe for breeding white concern over warrantless, suspicionless searches of blacks or over their victimization through police brutality. Amnesty’s flirtation with a focus on the dangers of increased black criminality is thus a risky one. Similarly, the success of the ACLU’s effort to present racial profiling as an ineffective strategy for reducing crime, and one that unduly impinges on “innocent” blacks’ freedom of movement, is uncertain.<sup>456</sup> Demonstrated ineffectiveness of current profiling practices would seem to appeal to white self-interest: A different tactic will better lessen violence and more readily protect white families.<sup>457</sup> On the other hand, the strategy unintentionally reminds whites that there is a “black threat” to be addressed. Furthermore, the white assumption of black criminality may spur indifference to the plight of blacks who are wrongly stopped and frisked; they become seen as an acceptable cost in the war on crime.<sup>458</sup> The strategy must be executed delicately to succeed.

Moreover, the phenomenon of “defensive attribution” may also hamper white concern for police abuse of blacks. “Defensive attribution” describes the jury response observed in studies of blame-assessment in tort trials.<sup>459</sup> Although jurors are not themselves facing a threat to their personal safety, they may “imaginatively project” themselves into the accident victim’s situation, leading the jurors to become “anxious or afraid at the prospect of suffering such an accident themselves.”<sup>460</sup> Yet, rather than jurors’ embracing the plaintiff’s perspective, researchers discovered, the opposite sometimes happened. Where there was evidence of comparative negligence (contributory wrongdoing by both plaintiff and defendant), the more severe the injury, the more the jurors *blamed the plaintiff* for the accident.<sup>461</sup> The jurors arguably did so because of their belief in a “just world” in which only the deserving suffer.<sup>462</sup> By blaming the victim, jurors believe that they, being blameless, can avoid similar misfortune.<sup>463</sup> Analogous results have been found in criminal cases as well.<sup>464</sup> If

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454. See SWAIN, *supra* note 452, at 129.

455. See Kennedy, *supra* note 21, at 855–68 for a discussion of scapegoating and black criminality.

456. See *infra* Part V.A–B (recounting Amnesty’s and ACLU’s efforts in this area).

457. See HARRIS, *supra* note 15, at 13 (arguing that racial profiling is less effective than its alternative).

458. COLE, *supra* note 14, at 16–55 (arguing that current Fourth Amendment doctrine is politically viable because it protects the white majority, which remains largely indifferent to the reality that aggressive search and seizure practices disproportionately impose costs on the poor among racial minorities).

459. See FEIGENSON, *supra* note 95, at 84–85.

460. *Id.* at 84.

461. See *id.* at 85 and sources cited therein.

462. See *id.* But see COLLEEN A. WARD, ATTITUDES TOWARD RAPE: FEMINIST AND SOCIAL PSYCHOLOGICAL PERSPECTIVES 84–85 (1995) (explaining that evidence on the existence of a “just world” explanation for the attribution of responsibility in rape cases is mixed).

463. See FEIGENSON, *supra* note 95, at 85.

many whites view blacks' being illegally stopped as blacks' fault because of their own criminality, then defensive racial anxiety rather than empathy might result.<sup>465</sup> Indeed, where the "victim" is considered blameworthy, jurors may react toward the victim with anger, further blocking empathy.<sup>466</sup> Some psychologists dispute whether defensive attribution is adequately empirically supported; even the concept's many continuing proponents concede that the same stimuli may evoke empathy in some observers, anxiety or anger in others, with no clear explanation of the disparity.<sup>467</sup> Nevertheless, the research highlights the real risk of a white backlash to strategies aimed at racial empathy.<sup>468</sup>

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464. *See id.*

465. More precisely, "empathy" is the ability to stand in another person's shoes, to feel, as much as possible, what they feel, to see the world from their perspective. NUSSBAUM, *supra* note 375, at 301–02, 327–28. One can empathize and still be horrified by the other person's thoughts and feelings, or indifferent to them, or moved only to condescending pity. *See id.* at 328–29. Empathy is therefore often a prerequisite for sympathy—the kind of concern that moves us to action on another's behalf. *See id.* at 330–35. But empathy alone does not guarantee sympathy; more is required. Thus, Professor Martha Nussbaum explains, "compassion" involves painful awareness of another person's serious, *undeserved* misfortune. *See id.* at 302. "Sympathy" and "compassion" refer to similar concepts, except that "compassion" creates images of more intense suffering by either the victim or the observer. *See id.* Once empathy has enabled an observer to see the world through the sufferer's eyes, the observer must then make three judgements before concluding that such suffering merits compassion: first, the belief that the suffering is serious, not trivial; second, the belief that the person does not deserve the suffering; and third, the belief that the suffering of another is a significant part of the observer's own goals and projects. This last belief is easier to hold when the observer imagines similar possibilities between his situation and the sufferer's. *See id.* at 315–21. Differing life experiences and preconceptions may make empathy hard to achieve; even once achieved, an observer may feel no sympathy for the sufferer. Without sympathy, the observer will not act to alleviate another's suffering. But, as just noted, achieving sympathy requires the observer to see the sufferer's situation as serious, fault-free, and similar to the observer's vulnerabilities. Yet these three assessments turn on moral judgements and accurate information. *See id.* at 316–17 (explaining the importance of social and familial teachings and similar class and racial backgrounds); *id.* at 414 (asserting that in a just society, the assessments necessary to compassion must be allied to a reasonable ethical theory). Moreover, Nussbaum argues, a just society should design its institutions to promote compassion that is rooted in sound ethical theory. *See id.* at 401–15. Such a society can still be a pluralistic liberal society when the guiding theory is one that seeks to advance certain central human capabilities consistent with diverse views of what constitutes the good life. *See id.* at 416–18. Those capabilities include physical safety, mobility, and treatment of each person as of equal worth with others. *See id.* These are among the capabilities protected by the Fourth Amendment's prohibition against unreasonable searches and seizures.

For my purposes, the bottom line suggested by Nussbaum's reasoning is this: Absent aggressive societal action in the form of careful institutional design guided by a "respect-full" political morality, perceived social differences among groups will make it hard for the more powerful among us to feel either empathy or sympathy for the less powerful. *See generally*, Taslitz, *Stories*, *supra* note 26, at 2266–67 & n.60 (defining a "respect-full" political morality and jurisprudence in the Fourth Amendment context). That absence of feeling will choke off motivation to improve the plight of minorities victimized by unwise political conduct, and indeed, might instead encourage a view of police as ill-treated by the presumptively criminal classes.

466. FEIGENSON, *supra* note 95, at 85. Rephrased, my suggestion is that many whites will presumptively hold all blacks responsible for the perceived criminality of blacks as a group. Correspondingly, if an individual African American is wrongly stopped, he is seen as partly responsible for not correcting the perceived wrongs of his group. The costs of improper searches and seizures of innocent blacks are thus seen as, at best, regrettable but acceptable in the war on crime.

467. *See id.* at 84–85.

468. *Cf.* RICHARD DELGADO, *THE RADRIGO CHRONICLES* (1997) (exploring racial empathy).

Additionally, humans have a strong tendency to resist giving up their preconceptions. They will filter out information that counters their assumptions while absorbing information that supports them.<sup>469</sup> Therefore, anxiety must be quite high before minds will open to new ideas. But the higher anxiety is, the closer it comes to fear.<sup>470</sup> Remember, however, that a fearful person is an asocial, self-involved person, one unlikely to look beyond *immediate* dangers to his well-being or to care for others' fate.<sup>471</sup> Fearful whites are therefore unlikely to voice concern for state injustice visited upon blacks.

A focus on black concerns can also be perceived by whites as selfish identity politics. If blacks are seen as serving their own narrow ends rather than the goal of universal justice for all, that, too, may anger whites as well as members of non-black racial or ethnic minorities.<sup>472</sup>

### 3. *Anxiety and the Collective*

Despite these risks, there are countervailing reasons to be hopeful that an anxiety-producing political strategy centered on race (but not exclusively so) can succeed if carefully crafted.

First, empirical research demonstrates that political anxiety can be sparked by perceived threats to the collective good as well as to individual welfare.<sup>473</sup> Which pull is stronger—the individual or the collective—depends on individual circumstances and values.<sup>474</sup> For many people, especially those with a strong sense of group identity (whether to a political party, particular political cause, or a racial, ethnic, or religious group), a sense of the collective good is a central part of their individual identity.<sup>475</sup> The state's explicit or implicit approval or rejection of a group's values is perceived, respectively, as honoring or insulting the group itself and each of its individual members.<sup>476</sup> State action honoring a group's status is likewise viewed as preserving the group members' particular way of life, indeed as preserving fundamental political morality.<sup>477</sup> To a conservative Christian fundamentalist, legalized abortion is an assault on his individual beliefs, his religious group's core values, and the sanctity of the nation's political soul.<sup>478</sup> To a gay activist, criminalized sodomy is the essence of

469. See MARCUS ET AL., *supra* note 371, at 61; Andrew E. Taslitz, *Patriarchal Stories I*, *supra* note 76, at 410–19 (describing “epistemological filters”). See generally PIATELLI-PALMARENI, *INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS* (1994) (on cognitive errors that filter information or alter its weight).

470. MARCUS ET AL., *supra* note 371, at 61.

471. See *supra* text accompanying notes 433–54.

472. See TODD GITLIN: *THE TWILIGHT OF COMMON DREAMS* (1996) (addressing the alleged failures of identity politics).

473. See MARCUS ET AL., *supra* note 371, at 134–35.

474. See *id.*

475. See Richard Abel, *Fighting Words*, 1 MARGINS 199 (2001).

476. See RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* 72 (1998) (recounting reactions to the Smithsonian's *Enola Gay* exhibit).

477. See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313–31 (1997).

478. See DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 606 (1998) (quoting *Christianity Today* as reacting to the Supreme Court's affirming

a regime repressive of diversity in sexual orientation.<sup>479</sup> And to a white liberal Democrat, assaults on race-based affirmative action, on strong protections for the disabled, and on the right to counsel are painful assaults on his vision of our nation's commitment to equality under law.<sup>480</sup>

This last example is particularly important because it illustrates that people can experience anxiety from assaults on their most dearly held principles even when their material or psychic self-interest, narrowly defined, is not involved. But the harder question is whether anxiety can be instilled in people based on a threat to the collective, but not to the individual, *contrary to that individual's political habits and principles*. The Enron collapse discussed in this article's introduction may form the basis for a useful example.

In the wake of Enron, several additional scandals involving deception in the securities market and in accounting practices by other major corporations and their auditors hit the press.<sup>481</sup> Some commentators feared a general loss of trust by the public in the securities market, while others worried that confidence in the capitalist system itself was at stake.<sup>482</sup> The most stalwart conservative Republican legislators—ideologically opposed to increased government regulation of any sort—demanded energetic enforcement of existing securities laws, more expenditures on criminal prosecution, and new regulations governing securities marketing and accounting practices.<sup>483</sup> To some extent, this was a matter of self-interest: fear that the scandals would chase buyers and sellers from the market, harming the economy and prompting voters to seek

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a woman's right to choose an abortion by condemning the Court because it had "explicitly rejected Christian moral teaching" and "clearly decided for paganism and against Christianity").

479. See generally WILLIAM ESKRIDGE, JR., *GAYLAW* 149–73 (1999).

480. See, e.g., THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 61, 79 (2002) (recounting that although civil rights groups and the Republican Party eventually found common ground on the Americans with Disabilities Act ("ADA"), liberal Democrats were the prime movers for the ADA in the Senate, while conservatives criticized the act as a "lawyer's employment act" that would result in extended and expensive litigation); COLE, *supra* note 14, at 63–95 (passionately defending a robust right to counsel); CHARLES LAWRENCE & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1999) (offering a progressive view on affirmative action).

481. See ELLIOT & SCHROTH, *supra* note 8, at 178–79.

482. Lanny Davis, former Special Counsel to President Clinton, explained:

[T]he underlying cause of Enron's fall—a corporate culture of secrecy and obfuscation—is not unique to that company.

....

If that culture isn't replaced by more transparency and accountability, regulated and enforced by the Securities and Exchange Commission (SEC) and U.S. prosecutors, the credibility and integrity of the various stock markets in which millions of Americans are now invested could be seriously undermined.

Davis, *supra* note 1; see also ELLIOT & SCHROTH, *supra* note 8, at 9 ("[T]he damage and upheaval caused by trading manipulations and accounting fraud, monitored by politicized enforcement, could be the seeds of serious calamity in the future.").

483. See Paul Merrion, *Hastert, GOP Scramble to Lead the Corporate Reform Parade*, *CRAIN'S CHI. BUS.*, July 15, 2002; Susan Milligan, *House Approves Tough Action Against Corporate Fraud*, *BOSTON GLOBE*, July 17, 2002, at A1.

retribution against the party in power.<sup>484</sup> At least anecdotally (and based upon an admittedly small sample), I have Republican acquaintances who doubt they will personally suffer any long-term financial loss but worry that, without more regulation, respect for a minimally active state and the capitalist system that they so admire will wither, to the great detriment of this country. Furthermore, self and collective interest merge to the extent that they worry that such reduced respect for big business will work to their party's disadvantage and foster the political ill-health of America.<sup>485</sup> Similarly, whites initially unreceptive to recognizing black oppression by the police, perhaps because they believe in police as guardians of safety and in black criminality,<sup>486</sup> might find their beliefs contradicted by vivid depictions of innocent blacks harassed by the police. If significant evidence is offered that such abuses are widespread, this novel information might encourage these whites to read more in magazines outside their usual view, and to converse more with those having contrary perspectives.<sup>487</sup> That may result in the sort of anxiety about their principles that can change at least some minds, much in the way that leading conservative commentators like William F. Buckley have come around to supporting the legalization of using certain illicit drugs.<sup>488</sup>

Lani Guinier and Gerald Torres have made a related but slightly different point. They argue for a conception of political rather than biological race. "Political race" starts by using race as a way to organize people of color, as they are defined by the broader society, but does not end there.<sup>489</sup> The experiences of people of color, argue Guinier and Torres, are like the "canary in the coal mine": Their pain and illness warn of a threat to the health, even the life, of the principles that define the American polity.<sup>490</sup>

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484. See James Kuhnhehn, *Congress Agrees On Business Reform Bill*, SAN JOSE MERCURY NEWS, July 25, 2002, at 1A ("Negotiators from the Senate and House reached a deal Wednesday on legislation to curb the corporate abuse that has driven stock prices into a deep rut, agreeing to impose stiff regulation on accountants and harsher criminal penalties on executives who defraud investors."); Milligan, *supra* note 483 ("[T]he House's rush to outdo the Senate displays the political sensitivity on Capitol Hill to the issue of corporate irresponsibility and the worry, some analysts and lawmakers say, that Democrats will try to use the issue against Republicans in the fall elections.").

485. See ELLIOT & SCHROTH, *supra* note 8, at 12–64 (cataloguing the various corporate scandals that led to public concern with corporate reform); Merrion, *supra* note 483 (describing Republican Party activists' anxiety over Enron, Worldcom, Adelphia, and the general decline in trust in big business).

486. See *supra* text accompanying notes 455–79.

487. See *supra* text accompanying notes 429–53 (explaining how political anxiety can open previously closed minds).

488. See WILLIAM F. BUCKLEY, JR., *ON THE FIRING LINE* 230 (1989) ("The largest single cause of crime in the eighties is the high price of illegal drugs. To legalize drugs would eliminate this crime, but would leave society with the social consequences of coping with its drug addicts, presumably in greater number . . . . [S]ociety isn't prepared to make the exchange of free drugs for less crime. The reasons are cultural, philosophical, and other . . . ."); see also JAMES L. NOLAN JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 52 (2001) ("Even conservative pundit William F. Buckley, though not easily classified as a libertarian, joins ranks with those supporting the legalization of drugs.").

489. See GUINIER & TORRES, *supra* note 388, at 78–80.

490. See *id.* at 11 ("Those who are racially marginalized are like the miner's canary: their distress is the first sign of a danger that threatens us all.").

Learning from the experiences, thoughts, and needs of people of color thus helps to diagnose America's political illnesses—the individual, group, and institutional power imbalances in the American soul.<sup>491</sup> The plight of racial minorities is appealed to because of the danger it reveals to us all; political race therefore has a more inclusive goal than does traditional identity politics.<sup>492</sup> Those “politically raced” black can include Latinos, Asian Americans, and whites, whether working class or privileged.<sup>493</sup> Political race encourages people of color to lead the movement because of their unique perspectives and experiences but seeks coalition-building with those of all races based upon shared principles.<sup>494</sup> The key point is that the political race idea, if correct, optimistically asserts that the circle of the sympathetic can be widened based on a strategy of portraying a threat to the common good. The anxiety raised by novel information given to otherwise uninformed whites may therefore help to foster white willingness to embrace a new view of America as, in part, a racial polity.<sup>495</sup>

More selfish, less principled appeals to white material needs can also help, of course, by convincing whites to define those needs broadly. Analogously, the “more jurors dread a risk,” empirical research reveals, “the greater the ‘stain’ they may place on the person who created the risk, and hence, the greater the causal and legal responsibility they will attribute to that person in order to justify the stain.”<sup>496</sup> Rephrased, risks of things jurors particularly fear will be perceived as greater than they are, and the source of the risk as more culpable. Thus, Amnesty's recent arguments that human rights violations cost Americans money, jobs, and safety might have psychological power because those violations pose a risk to whites where it hurts: their persons and their pocketbooks. They may prime whites to be more receptive to the idea that the creators of the risk—here, the police—are culpable.<sup>497</sup> Similarly, in the case of racial profiling, the argument might be that its absence will mean cheaper, more effective law enforcement, fewer lawsuits, and thus lower taxes and more bang

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491. *See id.* at 14–15.

492. *See id.* at 16–17.

493. *See id.* at 19–22. Guinier and Torres argue that whites might join a political race movement because of four characteristics of these movements: (1) race today is less rigidly constructed by pseudo-scientific certainty; (2) no individual alone speaks for the group so that conscious association, participation, and identification with the group is easier; (3) members are given “not only choice, but also voice,” the opportunity to change the way in which the group responds to perceived injustice; and (4) the political race concept evolved as part of a project organized around *both* race *and* democratic politics. *Id.* at 21–22.

494. *See id.* at 19–20. Guinier and Torres also believe that people of color must lead the movement because the greatest “impetus for seeing patterns of injustice usually comes from the group that has the greatest connection” to the experience. *Id.* at 19.

495. On the idea of a “racial polity,” America's social contract partly being *defined* by clauses concerning the rules of racial engagement, see CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997). Although Mills uses this idea as a means of political critique, Guinier and Torres view this sort of racial realism as simply making race-based appeals necessary and as suggesting that race can simultaneously serve to liberate and promote solidarity as well as to oppress.

496. FEIGENSON, *supra* note 95, at 86.

497. *See supra* text accompanying notes 240–47

for the buck.<sup>498</sup> An even more emotionally powerful approach would advertise police abuses as extending as well to white, middle-class suspects. As noted above, however, any appeals that acknowledge black violence may unleash undesirable emotive counter-forces.

#### 4. *Mutual, Shared, and Reciprocal Fear*

Finally, the ideas of mutual and shared anxiety add to optimism. “Mutual anxiety” occurs when each of us fears the other.<sup>499</sup> If five people are stranded on a lifeboat for weeks, each might worry that, to survive, his fellows passengers might assault, then eat him—a hypothetical variation of a well-known case.<sup>500</sup> To assuage that fear, each passenger might forswear such action and work with the others as a team to row to safety quickly, before hunger becomes so great that all bets are off. Selfish individualism is therefore replaced by collective action in the interest of group survival.<sup>501</sup> “Shared anxiety” occurs when several people face similar dangers at once.<sup>502</sup> Each member of a platoon of soldiers traversing a minefield fears death or disfigurement. If one steps on a mine, the others may feel relieved that they did not, but each of them can better imagine the wounded man’s pain and better understand one another’s fear.<sup>503</sup> The opening of this “path to the imagination of the situation of others” reveals to each of us our interdependence.<sup>504</sup> Though this example involves true fear of imminent physical harm, the same principle applies to the more existential, temporally uncertain, continuing threats that characterize anxiety.<sup>505</sup> Mutual fear and shared anxiety thus lead to what Phillip Fisher calls a positive “aesthetics of fear,” that is, the paradoxical notion that the ugliness of fear breeds the beauty of interdependence, sharing, collective action, and understanding:

Once the aesthetics of fear tries to model mutual, reciprocal, or general fear, or any condition involving more than one person’s state, and once it is uncertainty and a long, open future rather than a one-time episode that we are interested in, and, finally, once conditions rather than events become our concern, then it is the [forward-looking] economic model [of future benefits] rather than the [backward-looking] legal-ethical model [of judging past blame] that proves rich, suggestive, and, in the end, necessary to aesthetics.<sup>506</sup>

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498. *See supra* note 172 and accompanying text.

499. *See* FISHER, *supra* note 424, 113–14.

500. *See* PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 14–18 (2d ed. 2002) (summarizing the facts of the infamous case of Thomas Dudley); *cf.* LEO KATZ, BAD ACTS AND GUILTY MINDS 8–11 (1988) (discussing the real-world circumstances: five spelunkers who were trapped by a landslide ate a companion to survive).

501. *Cf.* DAVID SLOAN WILSON, DARWIN’S CATHEDRAL (2002) (arguing that morality and religion are the result of evolutionary forces aiding group survival).

502. *See* FISHER, *supra* note 424, at 140–41.

503. *See id.*

504. *See id.* at 156.

505. *See id.* at 131.

506. *Id.*

The bottom line, therefore, is complex. Racial auditors should disseminate novel and even threatening information to build black enthusiasm and white anxiety. That information should be presented in a fashion that defines white self-interest broadly and appeals to widely-shared social values. The information should focus on police racial discrimination, but it should demonstrate both how that discrimination in itself harms minorities *and* why it should be viewed as part of a broader, principled problem affecting all races. The information must be vivid and powerful enough to create white anxiety but not so vivid as to push whites over into abject fear. Moreover, black criminality and violence must be minimized. This is a hard task to achieve, but it is essential to building a multi-racial coalition for police reform. Amnesty International and the United States Civil Rights Commission can be criticized for undue reliance on sometimes dry, technical reports aimed only at elites.<sup>507</sup> On the other hand, they both have generally sought to foster a sense of principled anxiety, of danger to individuals as endangering the common good. Amnesty's hint at a strategy of appealing to white fear of black criminality is unwise. But its efforts to define white self-interest broadly, though offensive to some of its members because it smacks more of self-interest than principle, may be a good start to a more effective new strategy.<sup>508</sup> That new strategy should supplement, but not replace, the appeal to principled anxiety.

Coalition building and white support can be less important where problems are treated as more localized and where elites are the primary immediate audience. Thus in Cincinnati, the organization of African-American community groups in the wake of racial violence, combined with the principled support of the already sympathetic ACLU, was sufficient to promote a promising experiment in social change. The implicit threat of future black violence may have given these groups their trump card with worried elites, but this threat may have been less of an advantage had broader coalitions been forged with the white grassroots.<sup>509</sup>

Apart from appealing to racial minorities' enthusiasm and the white majority's anxiety, racial auditors may also succeed by appealing to an old-fashioned notion still important to all Americans: honor.

## C. Political Honor

### 1. *American Political Honor Defined*

"Honor" is a trait of character: the principled ambition to live up to one's code of honor.<sup>510</sup> A "code of honor" is a set of widely agreed-upon principles, a collection of social rules of conduct governing all members of a community,

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507. See Winston, *supra* note 77, at 38.

508. See *supra* text accompanying notes 245–48.

509. See *supra* Part III.A.2 (summarizing the events in Cincinnati).

510. SHARON KRAUSE, LIBERALISM WITH HONOR 1–3 (2002).

though individuals' interpretations of the *meaning* of some rules may vary.<sup>511</sup> An honorable person will do what the code demands, even if he thereby gains neither recognition nor material aid.<sup>512</sup> Indeed, doing what one understands to be dictated by a code of honor may be wildly unpopular at the time that the action is taken.<sup>513</sup> Honor's exercise therefore requires courage in the face of giant odds, making honor a "powerful source of individual agency, especially for the members of the marginalized and minority groups . . . who are least likely to be on the winning end of public opinion and the political authorities that distribute recognition."<sup>514</sup> Nevertheless, the honorable person also fervently hopes one day to receive recognition for his reverence for, and principled loyalty to, the sacred social code to which he adheres.<sup>515</sup>

Honor is ultimately a form of principled self-interest, for one who embraces it cannot live with himself if he violates the code. He thus acts to preserve his self-respect, first and foremost, but also to gain the respect of others within his community.<sup>516</sup> Former President of the United States, John Fitzgerald Kennedy, in his book, *Profiles in Courage*, recounted the stories of a number of brave leaders. He explained that *why* these leaders acted had little to do with an unselfish love of others in political life:

If this be true [that they were courageous men], what then caused the statesmen mentioned in the preceding pages to act as they did? It was not because they "loved the public better than themselves." On the contrary, it was precisely because they did *love themselves*—because each one's need to maintain his own respect for himself was more important to him than his popularity with others—because his desire to win or maintain a reputation for integrity and courage was stronger than his desire to maintain his office.<sup>517</sup>

Honor is thus an obligation to oneself rather than to others.<sup>518</sup> An individual's willingness to meet that obligation when his code is challenged is measured not by his or intentions but by his deeds.<sup>519</sup> Honor may therefore "animate risky and unusually ambitious forms of action."<sup>520</sup> Only a relatively small percentage of the populace will display such principled courage, but honor is often shown by

511. *See id.* at 28–29.

512. *See id.* at 19–20.

513. *See id.* at 20.

514. *Id.*

515. I am adopting for my current purposes the idea of the "secular social sacred" developed by Joseph Kennedy in a different context. *See* Kennedy, *supra* note 21, at 845–48. I use the term to convey the idea that certain codes of social behavior play essential roles in promoting societal cohesiveness such that members of a society accord those codes an attitude akin to that of the sacred. *Cf.* WILSON, *supra* note 501, at 5–85 (summarizing natural and social science evidence on the "secular utility" of religion in promoting group cohesiveness).

516. *See* KRAUSE, *supra* note 510, at 135–44.

517. JOHN F. KENNEDY, *PROFILES IN COURAGE* 250–51 (Harper & Row 1964) (1957); *see also* KRAUSE, *supra* note 510, at 135 (quoting and reflecting on Kennedy's views).

518. KRAUSE, *supra* note 510, at 5.

519. *See id.* at xi–xii.

520. *Id.* at 10. *See generally* JOANNE B. FREEMAN, *AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC* (2001) (explaining the role of honor in the early political life of the nation and the risky actions, including life-threatening ones, that it inspired).

the soldiers as much as the officers, the members of the everyday masses as much as the glorified heroes.<sup>521</sup> Because honor inspires principled action in the face of steadfast opposition, even danger, men and women of honor are necessary to defend against tyranny.<sup>522</sup>

Yet honor can also encourage tyranny. Whether honor serves liberal or illiberal ends depends upon the substantive content of the governing social code of honor.<sup>523</sup> Antebellum Southern honor, for example, embraced not only what was brave but what was right.<sup>524</sup> Yet what was “right” included the violent debasement of an entire class of persons based upon their race because of a code embracing the idea of property rights in human beings as the basis for a moral, just society.<sup>525</sup>

There have been conflicting codes of honor revered by different groups in U.S. society.<sup>526</sup> But in post-Civil War America, and especially in America after the Civil Rights movement, the “principles of liberty and equality articulated by the Declaration have formed the core of one common code of honor in the United States . . . based on universal principles of abstract right . . . attached to a shared national political identity rather than sited in the extrapolitical intermediary associations of honor.”<sup>527</sup> Whatever the drafters of the original Declaration may have meant its words to mean, the American people have made of it a code of political honor rooted in principles of equal respect for all.<sup>528</sup> Abraham Lincoln perhaps first gave voice to a view then held by many,

521. See KRAUSE, *supra* note 510, at 16–17.

522. See *id.* at xi (stating that honor is at its best when “one rises to defend individual liberties against encroaching political power or the threat of majority tyranny”).

523. See *id.* at 7–8.

524. See *id.* at 6 (“The student who lives up to the honor code prefers her principles to her interests . . . She acts, rather than simply reacting to the pressure of her circumstances.”); BERTRAM WYATT-BROWN, *THE SHAPING OF SOUTHERN CULTURE: HONOR, GRACE, AND WAR, 1760S–1880S* (2001) (reviewing the spiritual and political roots, and required bravery, of the Revolutionary and antebellum Southern codes of honor).

525. See Taslitz, *Mutual Indifference*, *supra* note 18, at 1316–22 (summarizing the antebellum South’s code of honor and its connection to slavery and racial violence). See generally KENNETH S. GREENBERG, *HONOR & SLAVERY* xiii (1996) (“[A]ll issues of [Southern] honor relate to slavery.”); WYATT-BROWN, *supra* note 524 (offering a more detailed treatment).

526. See KRAUSE, *supra* note 510, at 26–27.

527. *Id.* at 27.

528. As Pauline Maier said:

Abraham Lincoln gave expression to a powerful strain in the American mind, not what all Americans thought, but what many did. The values he emphasized—equality, human rights, government by consent—had in fact been part and parcel of the Revolution, and as much the subject of controversy then as later. Lincoln and those who shared his convictions did not therefore give the nation a new past or revolutionize the Revolution. But as descendants of the revolutionaries and of their English ancestors, they felt the need for a document that stated those values in a way that could guide the nation, a document that the founding fathers had failed to supply. And so they made one, pouring new wine into an old vessel manufactured for another purpose, creating a testament whose continuing usefulness depended not on the faithfulness with which it described the intentions of the signers but on its capacity to convince and inspire living Americans.

PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 208 (1997).

albeit not most, Americans,<sup>529</sup> that war cannot inspire sacrifice “without the promise of something better, than a mere change of masters.”<sup>530</sup> As early as 1861, he described the Northern cause in the Civil War as saving a form of government “whose leading object is to elevate the condition of men—to lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance in the race of life.”<sup>531</sup> The rebellion was, said Lincoln, an effort “to overthrow the principle that all men are created equal.”<sup>532</sup> Though Lincoln and the United States overall have often failed to live up to these words, it has been the struggle of American men and women of honor to bring deed in line with creed ever since.<sup>533</sup>

Indeed, as long ago as the 1830s, Alexis de Tocqueville recognized the strong need for honor to overcome majority tyranny and mild despotism in a democracy, especially in the American form of democracy.<sup>534</sup> According to Tocqueville, honor easily weakens in a democracy because rapid change and diversity make codes of honor less clear.<sup>535</sup> Equality also makes people more similar, recognition more equal, and thus obscurity easier.<sup>536</sup> Individualist Americans amplify the problem, for they focus on themselves and those nearest to them, frequently “abandoning ‘the greater society.’”<sup>537</sup> Individualism erodes social attachments, especially to intermediary bodies between the household and the state. Yet, complained Tocqueville, individuals standing alone are weaker than when acting collectively, leading growing government power to fill the void.<sup>538</sup> Moreover, public opinion in all modern democracies comes to have unprecedented power.<sup>539</sup> That power can silence the vigorous dissent that promotes the critical reflection necessary for an effective democracy.<sup>540</sup> Furthermore, democratic citizens lack the security provided by lineage, title, and hereditary fiefs. Accordingly, materialism and love of money, especially in

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529. *See id.* at 207–08.

530. Abraham Lincoln, *Fragment on the Constitution*, in IV COLLECTED WORKS OF LINCOLN 169 (Roy Basler ed. 1953); *see also* MAIER, *supra* note 528, at 207 (discussing Lincoln’s *Fragment*).

531. Abraham Lincoln, *Message to Congress*, in IV COLLECTED WORKS, *supra* note 530, at 438; *see also* MAIER, *supra* note 528, at 207 (discussing this quote).

532. Abraham Lincoln, *Response to a Serenade*, in VI COLLECTED WORKS, *supra* note 530, at 320.

533. *See generally* GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* (2001) (arguing that the American nation must now embrace the “secret constitution” of equal respect articulated by Lincoln and implicit in our later constitutional struggles).

534. *See generally* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed. 1972).

535. *See* KRAUSE, *supra* note 510, at 73.

536. *See id.* at 74–75.

537. *Id.* (quoting from Tocqueville).

538. *See id.* at 76. For a magisterial analysis of Tocqueville’s views on the strengths and dangers of public opinion in a democracy and on his political theory of America more generally, *see* SHELDON S. WOLIN, *TOCQUEVILLE BETWEEN TWO WORLDS: THE MAKING OF A POLITICAL AND THEORETICAL LIFE* (2001).

539. *See* KRAUSE, *supra* note 510, at 76.

540. *See id.* at 77.

America, bring the lure of security to the point of obsession.<sup>541</sup> Materialism, too, weakens social conscience and makes it easy for a government that offers its citizens material comfort to buy the populace's complacency.<sup>542</sup> Even enlightened self-interest will be an insufficient counterweight to majority tyranny, said Tocqueville, given the citizenry's weakness caused by individualism and materialism.<sup>543</sup> Liberty can therefore be maintained, he argued, only if it is fervently valued as an end in itself by those with the courage to defy encroaching public authority.<sup>544</sup>

In America's "legalistic spirit," however, Tocqueville saw hope.<sup>545</sup> The independence of the judiciary, he believed, made it more attached than common folk to the defining principles of the republic.<sup>546</sup> Furthermore, lawyers were a "quasi-aristocracy" because of their "respect [for] the law and old things."<sup>547</sup> The jury system, too, taught citizens to revere the law and think in principled rather than solely instrumental terms.<sup>548</sup> The commitment to individual rights, in Tocqueville's view, had aristocratic roots: "[R]ights resemble fiefs, territory within which an individual is entitled to exercise command."<sup>549</sup> Rights enable self-mastery, freeing individuals from servility to others and expressing the love of liberty.<sup>550</sup> The law has become America's common code of honor.

## 2. *Social T-Cells and Citizen Character*

Some free speech theorists have long spoken in analogous terms about the close ties between character and free speech.<sup>551</sup> They argue that a culture that prizes expressive liberty must nurture citizen character traits that include an inquiring spirit, distrust of authority, and the willingness to confront evil.<sup>552</sup> These traits are valued "not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political."<sup>553</sup> These traits

541. *See id.* at 78–79.

542. *See id.*

543. *See id.* at 80. One author has argued that modern social science teaches a similar lesson: that the submission of the people even to oppressive rulers can often be bought or subtly coerced via economic and social pressures and subtle emotional appeals. *See HOGAN, supra* note 326.

544. *See KRAUSE, supra* note 510, at 83. For a review of those aspects of the American character about which Tocqueville was most sanguine, see MICHAEL A. LEDEEN, *TOCQUEVILLE ON AMERICAN CHARACTER* (2000).

545. *See KRAUSE, supra* note 510, at 88–90.

546. *Id.*

547. *See LARRY SIEDENTOP, TOCQUEVILLE* 62 (1994) (describing the "quasi-aristocracy"); James Ceaser, *Alexis de Tocqueville on Political Science, Political Culture, and the Role of the Intellectual*, 79 *AM. POL. SCI. REV.* 656, 665 (1985) (quoting Tocqueville on "law and old things").

548. *See KRAUSE, supra* note 510, at 88–90.

549. *Id.* at 92.

550. *Id.* at 93.

551. *See Vincent Blasi, Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 61, 61–63 (Lee C. Bollinger & Geoffrey C. Stone eds. 2002).

552. *See id.*

553. *Id.* at 62.

are realized in action, not in words alone.<sup>554</sup> John Milton, an early proponent of this view, wrote in *Areopagitica*, his 1644 protest against licensing systems for books and pamphlets, “I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary.”<sup>555</sup> For Milton, political evil could be “contained and repaired” only by a “citizenry that is energized in a countervailing way: intellectually independent, morally engaged, politically resilient, not afraid to speak out or to stand up.”<sup>556</sup> Additionally, dissenters must voice their protest because they can thereby shape, and be vindicated by, the future, and because only people open to novel ideas can remain vibrant, understanding their history in liberating ways.<sup>557</sup> More modernly, Louis Brandeis has similarly praised the love of novelty and the courage to speak as central to freedom.<sup>558</sup> Only a nation of “courageous, self-reliant men,” argued Brandeis, combined with an inventive spirit, make for a vital, well-governed democratic society.<sup>559</sup> “[T]he greatest menace to freedom is an inert people,” he famously declared, and the “path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”<sup>560</sup>

Vincent Blasi, the leading advocate of free-speech character theory today, argues that “rallies, meetings, and publications can inform dissenters that they are not so isolated, not so far on the margin, as they might have assumed.”<sup>561</sup> Facilitating and energizing solidarity is a central function of free speech regimes.<sup>562</sup> Moreover, “the spectacle of some persons standing up to authority or convention or corruption or evil or mediocrity can enhance in others the sense of duty to take enough responsibility for their convictions *to act on them*.”<sup>563</sup> For Blasi, free speech reminds us that private citizens are an important part of our system of checks and balances.<sup>564</sup> But the citizenry’s checking function turns on its having information about abuses of authority *and* a populace with an independent, skeptical, persevering, deliberative nature ready to heed and act on the whistleblower’s warning.<sup>565</sup>

Information is thus needed to activate what David Brin has called our “social T-cells.”<sup>566</sup> The body’s T-cells offer early warnings of danger, calling the rest of the bodies’ defense mechanisms to arms. Similarly, social T-cells—

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554. *See id.* at 63–64.

555. John Milton, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE 716, 728 (Merritt Hughes ed. 1957).

556. *See* Blasi, *supra* note 551, at 65.

557. *See id.* at 71.

558. *See id.* at 73–78, 80, 83.

559. *See id.* at 78.

560. *Whitney v. California*, 274 U.S. 357, 375 (1927), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

561. *See* Blasi, *supra* note 551, at 86.

562. *See id.*

563. *Id.* (emphasis added).

564. *See id.* at 87.

565. *See id.* at 87–88.

566. *See* DAVID BRIN, THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM? 133–36 (1998).

educated, skeptical, high ego citizens, who see hidden patterns, distrust authority, and act on strongly held beliefs—alert the rest of the polity to danger to our liberties, calling all men and women to defend freedom.<sup>567</sup> Information activates a few social T-cells, who, in turn, search to find “some terrible mistake or nefarious scheme,” motivating other T-cells and their sympathizers into action.<sup>568</sup>

Martin Luther King, Jr. certainly acted as an early social T-cell in the battle against racial segregation.<sup>569</sup> But King’s heroism and creativity would have meant little had other social T-cells, the many faceless civil rights advocates whose names grace no history book, not joined the fight.<sup>570</sup> Indeed, the civil rights activists of the early movement in the 1950s and 1960s embraced some very ancient notions of honor.<sup>571</sup> Critically, many shared the willingness to risk their lives and health in defense of liberty.<sup>572</sup> The songs, sermons, freedom schools, and church committees rekindled African Americans’ sense of self as political beings, triumphing over fear and asserting self-mastery.<sup>573</sup> Going to jail became a badge of honor.<sup>574</sup> Before the movement, many blacks lived under a fear that they would randomly suffer physical harm at the whim of an arbitrary, entrenched power.<sup>575</sup> But,

“to participate publicly in civil rights demonstrations, even in larger cities, made participants feel distinctly vulnerable to verbal, not to mention physical, abuse from angry whites. But what was different about risking such vulnerability was that it was chosen rather than experienced as fate.” . . . [N]onviolent demonstrations served a function similar to that of the duel in so far as it provided an arena in which one could prove to oneself and to others that one had conquered the fear of death and therefore become one’s own master.<sup>576</sup>

Resistance brought self-respect and did so by reminding whites of the American code of honor’s commitment to equality.<sup>577</sup> The willingness of movement members to suffer for those beliefs struck a chord in many whites’ vision of American honor, swelled the movement’s ranks, and made white Americans take notice.<sup>578</sup>

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567. *See id.*

568. *See id.* at 135.

569. *See* KRAUSE, *supra* note 510, at 168–80.

570. *See id.*

571. *See id.* at 175.

572. *See id.*

573. *See id.* at 176.

574. *See id.* at 185–86. That sense of honor in struggle and imprisonment is palpable in reading S. JONATHAN BASS, *BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING, JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE “LETTER FROM BIRMINGHAM JAIL”* (2001).

575. *See* KRAUSE, *supra* note 510, at 175–76.

576. *Id.* at 176 (quoting STEPHEN OATES, *LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING, JR.* (1994)).

577. For a thoughtful analysis of the connection between concepts of self-respect and the Civil Rights Movement, see generally RICHARD H. KING, *CIVIL RIGHTS AND THE IDEA OF FREEDOM* (1996).

578. *See, e.g.*, EDWARD P. MORGAN, *THE 60’S EXPERIENCE: HARD LESSONS ABOUT MODERN AMERICA* 84–85 (1991) (concluding that the Civil Rights Movement of the ‘50s and ‘60s “had a profound effect on white consciousness”); JERROLD M. PACKARD, *AMERICAN NIGHTMARE: THE*

### 3. *The Organization Man and the Police*

Honor faces a special challenge in fighting more local battles against faceless public and private organizations. Organizations define their own expectations, and require that their members comply with instrumental (goal-oriented) criteria for evaluating their employees' performance.<sup>579</sup> Rephrased, organizations create their own codes of behavior, ignoring, as much as possible—indeed “delegalizing”—all other criteria for proper conduct.<sup>580</sup> Workers who bring other, outside criteria to bear on their decision-making and actions, for example, relying on broader social values, are viewed as “unpredictable and potentially destabilizing.”<sup>581</sup> The apparent obsession of some major corporations such as Enron with the instrumental goal of maximizing stock value as more important than honesty and clarity in financial

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HISTORY OF JIM CROW 232–73 (offering an excellent summary of the latter part of the Civil Rights Movement). Recently a growing number of scholars have argued that whites embrace racial justice primarily when they believe it will serve white self-interest. See MARY DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000) (arguing that the success of the Civil Rights Movement can be significantly attributed to white elites' fear that continuing Jim Crow would push the world's people of color into the arms of the Soviet Union during the Cold War); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.–C.L. L. REV. 369 (2002) (defending this “interest convergence” thesis). There is much truth in this thesis, but its advocates often define “self-interest” too narrowly. I would add to raw, narrow self-concern the existence among certain whites of the principled self-interest embraced by the idea of honor. Agitation from below and leadership from above can sometimes lead elites to work to alter social meanings, appealing to both raw and principled self-interest as a way to lessen the oppression of racial and other minorities. Cf. JOHN D. SKRETNY, *THE MINORITY RIGHTS REVOLUTION* (2002) (using an analogous approach to explain why some minorities succeeded and some failed in the mid-to-late-twentieth-century Civil Rights Movement, and why even the successes were sometimes limited). The terms of engagement of the Cold War were set by a post-World War II consensus on the importance of human rights that made it important for the United States to be seen as embracing such rights to succeed in its competition with the Soviet Union. See *id.* at 7–9. So conceived, white concessions to black demands for equality can partly be explained by a combination of whites' raw self-interest and *principled* self-interest, that is, interest guided by a commitment to human rights. Moreover, the history of the movement reveals that at least some whites acted from an enthusiastic embrace of the principle of equality. See MORGAN, *supra*, at 84–85; RABBI MARC SCHNEIER, *SHARED DREAMS: MARTIN LUTHER KING, JR. AND THE JEWISH COMMUNITY* xiii (1999) (“Though blacks were the prime architects of [the Civil Rights Movement] . . . the battle for freedom would have taken longer—and been even more torturous—if not for the participation of the people who were not blacks and who put their own lives on the line to help African Americans.”)

None of these comments are meant to excuse the missteps or insensitivities of even progressive whites nor to excuse white backlash. See FEAGIN, *supra* note 446, at 121–23, 127, 248, 251 (discussing white backlash and the limitations of many white liberals). See generally DEBORAH MATHIS, *YET A STRANGER: WHY BLACK AMERICANS STILL DON'T FEEL AT HOME* (2002) (describing white insensitivity). Nor do I mean to detract attention from the African-American leaders, philosophers, and front-line troops who made the movement happen. Rather I mean only to make the points that human motivation is varied and complex and that “self-interest,” rightly understood and when not crowding out gentler motivations, is not always a bad thing. See JAMES R. OTTESON, *ADAM SMITH'S MARKETPLACE OF LIFE* 141–43 (2002) (defending Adam Smith's view that self-interest, properly understood, is one of the motivations for virtuous conduct); *supra* text accompanying notes 510–22 (defining and defending honor as principled self-interest).

579. See C. FRED ALFORD, *WHISTLEBLOWER: BROKEN LIVES AND ORGANIZATIONAL POWER* 21 (2001).

580. See *id.*

581. See *id.* (quoting in part ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* (1989)).

reporting is a powerful illustration of this principle.<sup>582</sup> Indeed, studies of whistleblowers—those who face retaliation for speaking out in the name of the public good—reveal that colleagues and superiors even try not to hear or read what the whistleblower says because mere exposure to his words taints organizational members and smacks of disloyalty.<sup>583</sup> Colleagues often regard a whistleblower “as though he were a space-walking astronaut who had cut his lifeline to the mother ship.”<sup>584</sup> The organization man is skilled at “doubling,” treating the organizational part of his self as if it were his whole self while on the job.<sup>585</sup> Whistleblowers lack this skill and by their mere words remind the organization men of their everyday selves and of the social world beyond the organization.<sup>586</sup> But this reminder is perceived as an “insidious disease, a boundary violator.”<sup>587</sup> That sense of infection explains why even purely “internal” whistleblowers—those complaining entirely within the organization but going over their superiors’ heads—still face equally severe retaliation to that visited upon “external” whistleblowers.<sup>588</sup> The sin of the purely internal whistleblower is that he represents “the presence of the outside on the inside: not just the unassimilated individual but the unassimilated citizen.”<sup>589</sup> Whistleblowers show honor-loving natures when they bring the collective social conscience of the community to bear on an organization despite the risk of severe retribution.

Police forces face the same whistleblower dynamics, and police culture may create even more extreme pressures to conform to organizational dictates.<sup>590</sup> “Such a thing as ‘the police character’ exists uniquely because of the power of the institution to shape and condition its members,” writes Anthony Bouza, former Chief of Police in Minneapolis, Minnesota, and a former commander of the Bronx, New York, police force.<sup>591</sup> Bouza continues:

The moral courage to stand up and disagree or to point out wrongdoing or to remonstrate when someone is committing a brutal or corrupt act has been systematically exorcised from the body. Nothing is rarer than dissidents publicly disagreeing with their colleagues about the codes of conduct, as is clearly evident from the cover-ups and studied silences accompanying serious acts of wrongdoing. Whistleblowers, reformers, and other troublemakers are “snitches and rat finks” and all ranks are to close against these menaces.<sup>592</sup>

To Bouza, much crime and corruption is a result of an underclass revolt, in the form of street crime, against the privilege, exclusion, and indifference

582. *See supra* Part I.

583. *See* ALFORD, *supra* note 579, at 5, 20–22, 32.

584. *Id.* at 5.

585. *See id.* at 72–73, 115–17.

586. *See id.* at 12, 21–22.

587. *Id.* at 99.

588. *See id.* at 20.

589. *Id.* at 23–24.

590. *See* BOUZA, *supra* note 128, at 21.

591. *Id.* at 21.

592. *Id.* at 22.

practiced by the overclass.<sup>593</sup> That does not excuse criminality, argues Bouza, but it does explain the sometimes not-so-subtle message sent to the police by the mostly white, well-off, educated, and voting overclass that the police are to keep the poor, jobless, uneducated, frequently minority underclass contained and controlled in a tidy fashion that does not confront the overclass with its own conscience or force it to “encounter unappetizing or threatening visions.”<sup>594</sup> The police get the message: work to stop, contain, and punish underclass crime in darkness and obscurity. That work becomes the organization’s primary instrumental goal.<sup>595</sup> Although most police likely embrace the vision “to protect and serve,” they too often do so with the clouded vision and “doubled” moral self so characteristic of organizational life.<sup>596</sup> They come to see themselves as “under siege” from the neighborhood communities whom they are sworn to protect, the political establishment, and their own internal affairs bureaus.<sup>597</sup> “Outsiders” are the enemy; insiders are “brothers on the force.”<sup>598</sup>

Criminal justice theorist Samuel Walker thus sees the function of a generous, persistent individual rights-based criminal procedure culture as communicating to the police that they must make the broadly defined political community’s official values their own.<sup>599</sup> Walker continues:

The values embedded in the principle of accountability have a broad community orientation. They include respect for all citizens and equality. Even the vilest criminal is due a minimum level of respect, and there can be no systematic mistreatment of groups, whether they be racial minorities, the homeless, homosexuals, or any others. The very idea of accountability itself embodies the notion that others, and the community as a whole, have a claim on you, and can properly ask you (the police officer in this instance) to explain your behavior.<sup>600</sup>

Police department internalization of community norms does not arise from mere paper rights. They arise from muscular rights-in-action, defined and enforced by public protest, community struggle, practical experimentation, and community condemnation of individual and group suffering, all of which is sparked by sunshine being spread into the dimmest corners of police operations.<sup>601</sup> Community vigilance and the impact of revelation over time are required. Yet whistleblowers alone cannot be counted on to provide enough of the principled courage, the honor, needed to reintegrate police departments into broader communities of political morality. Whistleblowers are few; most

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593. *See id.* at 28.

594. *See id.*

595. *See id.* at 13–14, 25–28.

596. *Compare id.* at 13, 21–22, 28 (discussing police psychology), with ALFORD, *supra* note 579, at 72–73, 115–17 (discussing “doubling”).

597. *See generally* MICHAEL L. MIDDLETON, *COP: A TRUE STORY* 67–105 (rev. ed. 2000) (exploring officers’ “siege mentality”).

598. *See id.* at 85 (“It was ‘us against them’ . . . *Them* not only encompassed the criminal element, but also included law-abiding citizens who wanted equality and justice.”).

599. *See* SAMUEL WALKER, *THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA* 138–45 (1998).

600. *Id.* at 139–40.

601. *See id.* at 139–41.

face such brutal retaliation that they foreswear ever speaking out again, and the laws protecting them, as other writers have thoroughly surveyed, are generally weak and easy to circumvent.<sup>602</sup> Moreover, they usually act alone, with few resources at their disposal.<sup>603</sup> Racial auditors, on the other hand, can provide the cover of anonymity and the collective resources to break down police organizational moral boundaries. Racial auditors' important, though not exclusive, emphasis on race uses equality as the battering ram. Racial auditors represent a kind of group honor where they assert the "conscience [of the] collective in the midst of the organization."<sup>604</sup>

## V

### CONCLUSION

Several commentators, myself included, have recently written about the value of transparency in exposing and deterring police violations of Fourth Amendment search and seizure protections.<sup>605</sup> I have made the modest claim here, mostly by way of illustration, that racial auditors can be important contributors to that process. I do not claim that they alone are "the solution," nor even that they are the most critical part of a solution, for I have not had the space here to do a thorough comparison to the many existing and proposed institutional alternatives. Nevertheless, racial auditors have contributed to improving the quality of policing in Cincinnati, Los Angeles, Chicago, New York, and other major American cities.<sup>606</sup>

What other work on transparency has ignored, however, is the role of political emotions in any reform strategy.<sup>607</sup> Here, I have sought to illustrate

602. See, e.g., ALFORD, *supra* note 579, at 18–19, 103–07, 113.

603. See *id.* at 138.

604. *Id.*

605. See, e.g., Luna, *supra* note 9; Taslitz, *Slaves No More!*, *supra* note 9 (arguing that expanded discovery in criminal cases can promote better citizen oversight of the police). A greater judicial willingness to look at evidence of patterns of police conduct, as has been proposed by Professor Susan Bandes, see *supra* text accompanying notes 89–108, would create additional incentives for, and broaden the scope of, defense efforts to obtain discovery from the prosecution. The public availability of such information would further ease the task of racial auditors.

606. See *supra* Part III.

607. See, e.g., Luna, *supra* note 9. When I presented this paper to the faculty of the Washington and Lee University School of Law, Professor Colleen P. Murphy pointed out that the political-emotions-based strategy that I argue for has applicability in a wide range of other settings that clarify the concept. She illustrated the point with her observation of a public service television announcement ("PSA") showing people of varied backgrounds expressing unity with another in the wake of the September 11, 2001, attack on the World Trade Center. In a subsequent email, Ms. Murphy explained her point this way:

I wanted to amplify my comments on the PSA shortly after 9/11 with the individuals of all colors and cultures stating one by one "I am an American." I thought the clear message was—don't look at the person next to you as a terrorist or terrorist sympathizer just because he or she "looks like one." I didn't view it so much as a "let's all feel good because we're melting-pot Americans. . . ." Anyway, I do think that the commercial serves the three emotions that you discuss (the anxiety of Americans about whether there are more terrorists in our midst; the honor code of equality as Americans; and the enthusiasm of those who feared racial profiling and retaliation).

that role by focusing on how three sets of such emotions—enthusiasm, anxiety, and feelings associated with political honor—matter to the work of racial auditors. The examination of those emotions teaches several lessons, each of which can be the basis for further research and reform.

First, these emotions provide incentives for both elites and ordinary citizens to expose police abuses. Given the blue wall of silence, political pressure for results in stopping crime, and a siege mentality, both elites and ordinary citizens must be highly motivated and relentlessly aggressive to achieve long-term improvements in police culture. Auditors must refine their strategies to augment the citizenry's enthusiasm, anxiety, and sense of honor about reform. An intense, but not a sole, focus on racial disparities in policing can be an effective spur to mobilize minority community enthusiasm in challenging the police establishment. If racial discrimination is portrayed as a warning bell in the night against the advancing forces of tyranny coming to oppress all citizens, then a race-conscious politics of policing can be unifying, rather than divisive. Race becomes a springboard for the principled defense of respect for all persons rather than for identity politics.

If that springboard is to work for other minority groups and for whites, however, auditors must likely instill anxiety in whites about the current state of affairs. That requires an appeal to white self-interest narrowly-defined, such as the high cost of certain police practices or their ineffectiveness as crime control measures. But appeals to broader notions of self-interest must be made as well, confronting whites with their own occasional hypocrisy and making them vividly aware of practices at odds with the principles at the core of their sense of self. The goal is not to appeal to white pity or shame, which can be counterproductive.<sup>608</sup> It is to assault whites' comfort that they can continue in their indifference without sacrificing their very souls.<sup>609</sup> Auditors must thus make more effective, vivid popular appeals, using the Internet, storytelling, and other media to reach a wider audience more effectively.

Second, the independence of most auditors from the police specifically, and from the government more generally, is essential to their credibility, power, and freedom of action. Independence prevents their being co-opted. Nor can they be starved for resources by the government because the auditors' own fundraising efforts determine the level of their resources.<sup>610</sup> On the other hand, auditors rely at least in part on obtaining information from frequently recalcitrant police departments. Some governmental supplements to, and links to, independent auditors may help to address this problem. The United States Commission on Civil Rights, for example, has the subpoena power that

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E-mail from Colleen P. Murphy, Professor, Washington and Lee University School of Law (Feb. 14, 2003) (on file with the author).

608. See Taslitz, *Mutual Indifference*, *supra* note 18, at 1300–03 (explaining why pity can forestall change).

609. This was part of the same ultimately successful strategy of the abolitionists combating antebellum slavery. See *id.* at 1362–68.

610. See *supra* Part III.

independent auditors like the ACLU and Amnesty International lack.<sup>611</sup> A suggestion by Professor Christopher Edley, a member of the Commission, concerning minimizing the encroachment of anti-terrorism efforts onto civil liberties offers analogous help.<sup>612</sup> Edley argues that the courts have historically done little to protect the narrowing of individual rights during war time. Moreover, the sheer volume of concerns and bipartisan war fever render congressional oversight unlikely and unduly deferential. Furthermore, a “watchful public will not protest, because the war will be mostly secret, mostly for good reason. Without transparency, public debate will be ill-informed or nonexistent.”<sup>613</sup> Edley’s solution: Congress should create in the new Department of Homeland Security an independent Office of Rights and Liberties. That office would not decide what the rules should be, but would seek to enforce the rules set down by other authorities and to collect the information necessary for other authorities’ rule-creation.<sup>614</sup> The Office would be headed by a Senate-confirmed Director, who would act like a “super-inspector general, but focused solely on monitoring compliance with civil liberties and civil rights norms in the government-wide war.”<sup>615</sup> Career professionals would staff the Office, and the Office would have the powers to “subpoena documents, interview witnesses under penalty of perjury and aggressively audit both policymakers and foot soldiers.”<sup>616</sup> The Office would also receive complaints and issue quarterly reports, one unclassified for the public and one classified for Congress. Additionally, it would have the power to seek judicial enforcement of subpoenas without first turning to the Justice Department and to impose administrative fines on individuals violating statutes or regulations meant to protect civil liberties. Finally, the Office would have a “part-time, bipartisan advisory board designed to build public confidence in its operations and in the general conduct of the war.”<sup>617</sup>

Edley’s proposal could be a model for further research exploring the creation of a similar independent Office of Rights and Liberties in municipal police departments. Such an office would be no substitute for independent auditors. Any government entity faces dangers of fund-starvation and capture by those they regulate. Moreover, governmental entities cannot by definition constitute the engaged action of an independent citizenry that the best

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611. *See supra* Part III.C.

612. *See* Christopher Edley, Jr., *A U.S. Watchdog for Civil Liberties*, WASH. POST, July 14, 2002, at B7. The political auditing function discussed in this article also provides further support for my argument elsewhere that citizen oversight panels are needed to monitor the expanded public use of video surveillance cameras in the wake of the War on Terrorism. *See* Taslitz, *Twenty-First Century*, *supra* note 26, at 164–74, 182–87.

613. *Id.*

614. Edley’s suggestion has borne some legislative fruit. *See* Homeland Security Act, H.R. 5005, 107th Cong. (2002) (establishing office for civil rights and civil liberties in the new Department of Homeland Security.)

615. Edley, *supra* note 612.

616. *Id.*

617. *Id.*

democracies require. Nevertheless, such an Office would make it easier for independent racial auditors and the public to obtain information that might otherwise be too long withheld within fortress police departments. If the Office Advisory Board were mandated to include a certain number of seats to be held by independent racial auditors, that would also be an important bridge between the auditors and the police, a bridge that would inform auditors without compromising their independence. Furthermore, having an Office whose primary goal is to monitor department-wide police compliance with civil liberties norms and to shed light on norm violations may serve an important symbolic function in reminding police that they are bound by the broader society's standards of political morality and not only by the local standards of police morality.

Third, racial auditors play an important function in unifying “the People” in whom the Fourth Amendment vests protection.<sup>618</sup> A democracy must serve all the people, not merely a subset thereof.<sup>619</sup> Racial auditors involve many otherwise marginalized people in the process of governance, replacing silence with voice, complacency with passion, quiescence with indignation. Racial auditors appeal to basic principles of equality and respect for all, serving both as “T-cells” of honor to attack assaults on the heart of the body politic and as goads to others to join the fight. In the process of coalition-building, racial auditors encourage cross-community understanding and solidarity.<sup>620</sup>

Fourth, *how* information is gathered and *from whom* matters. Activities such as the ACLU's efforts at mediation in Cincinnati or Amnesty's interviews of police victims in New York in furtherance of data collection and dissemination help to build solidarity, promote community enthusiasm, and foster creative dialogue likely to promote more informed, productive decision-making and experimentation.<sup>621</sup>

Finally, racial auditors are at their best when they mix data collection and dissemination strategies with straightforward advocacy. The ACLU used litigation in Cincinnati both as a means for gathering more information about the police and as an incentive for crafting more novel, promising solutions. Amnesty combined its report-writing strategy with letter-writing campaigns and legislative and executive lobbying in its efforts to root out abusive police conduct in the United States.<sup>622</sup> All these efforts seem to be bearing significant fruit. Thomas Jefferson once said that the tree of liberty must be refreshed

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618. See U.S. CONST. amend. IV.

619. See Taslitz, *Twenty-First Century*, *supra* note 26, at 158–69 (illustrating this point by considering how an alternative conception of Fourth Amendment privacy to that currently embraced by the Court can enhance the political power of gays and the poor).

620. See *supra* Part IV.

621. See *supra* Part III.A.2.

622. See *supra* Part III.A.2.

from time to time with the blood of patriots.<sup>623</sup> I prefer to think that today, liberty's life depends on an engaged, activist citizenry goading America to live up to the best of its principles and dreams.

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623. See JEAN M. YARBROUGH, *AMERICAN VIRTUES: THOMAS JEFFERSON ON THE CHARACTER OF A FREE PEOPLE* 114 (1998) (quoting Jefferson: "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants").