

LAW AND CONTEMPORARY PROBLEMS

Volume 66

Summer 2003

Number 3

FOREWORD: THE POLITICAL GEOGRAPHY OF RACE DATA IN THE CRIMINAL JUSTICE SYSTEM

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I

INTRODUCTION

Several months ago, there was a heated discussion on *CrimProf*, the listserv for criminal law professors, about the disproportionate representation of minorities in the criminal justice system.¹ Few participants in this online discussion contested the reality that racial and ethnic minorities, especially African Americans, make up a far larger percentage of those arrested and incarcerated than should be expected from their percentage of the country's total popula-

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This article is available at <http://www.law.duke.edu/journals/66LCPForewordTaslitz>.

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The author thanks his wife, Patricia V. Sun, Esq., and Professor Robert Mosteller for their comments on earlier drafts of this article, as well as his research assistants, Leander Altifofo, Monya Bunch, and Stephanie Stevens. A note on style—because the purpose of this essay is largely to summarize the articles in this Symposium and the common themes across the pieces, I have kept footnotes to a minimum. Those readers interested in more detailed support for the propositions discussed here are encouraged to consult the primary articles themselves.

1. Postings to CrimProf@chicagokent.kentlaw.edu. I am reporting the content of that discussion entirely from my memory. I am also summarizing comments made both by the discussants and by off-line colleagues with whom I debated many of the ideas exchanged online. For the sake of brevity and clarity, however, I make no effort to identify the precise persons or their manner of contribution (online or off-line), bundling all thinkers' comments into those of the "discussants" or "participants."

tion.² What made the discussion heated was the debate over the causes of this disparity. More African Americans, argued some discussants, commit crime than do their white counterparts. Therefore, said these discussants, the representation of blacks in the criminal justice system was not “disproportionate” to their representation among the population of *criminal wrongdoers*.³ Perhaps there are societal injustices that contribute to causing a relatively high percentage of racial minorities to commit crimes, but crimes they are, and the fair application of neutral legal principles requires punishing all who flout the law, regardless of their race.⁴ Indeed, argued these commentators, racial minorities are disproportionately *victimized* by crime, crime that is usually intra-racial.⁵ Accordingly, not punishing black criminals, for example, means leaving the law-

2. As Michael Tonry has said: “The prison populations nearly tripled during the 1980s, and by 1990 a quarter of young black males were in jail or prison, on probation or parole. The chance that a black male was in jail or prison was seven times that of a white male.” MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* vii (1995).

3. See generally HEATHER MAC DONALD, *ARE COPS RACIST? HOW THE WAR AGAINST THE POLICE HARMS BLACK AMERICANS* (2003) (arguing that racial profiling is simply a desirable effort by police to maximize search “hit rates” by “going where the crime is”). Analogously, Professor Randall Kennedy cautions:

People seeking solutions to American’s massive racial problems must resolutely eschew the temptation to prettify ugly realities. Crime and its demographics are part of those realities. It does no good to pretend that blacks and whites are similarly situated with respect to either rates of perpetration or rates of victimization. They are not. A dramatic crime gap separates them. In relation to their percentage of the population, blacks on average both commit more crimes and are more often victimized by criminality. The familiar dismal statistics and the countless tragedies behind them are not figments of some Negrophobe’s imagination. The country would be better off if that were so. Instead, the statistics confirm what most careful criminologists (regardless of ideological perspective) conclude: In fact (and not only in media portrayal or as a function of police bias) blacks, particularly young black men, commit a percentage of the nation’s street crime that is strikingly disproportionate to their percentage in the nation’s population.

RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 145 (1997). Unlike Heather MacDonald, however, Professor Kennedy would prohibit (absent the grossest of emergencies) the police from using race as but one factor among many others in making search and seizure decisions. See *id.* at 149–163. “Taking race into account in a small, marginal, even infinitesimal amount,” Professor Kennedy maintains, “still constitutes racial discrimination.” *Id.* at 149. Indeed, he argues:

Race-dependent policing erodes the difficult-to-maintain habit of individualizing persons and strengthens the reflex of lumping people together according to gross racial categories. This reflex had many disastrous consequences. One is the extra burden it puts upon blacks who want very much to assert responsibility for themselves but confront social impediments that mock their efforts.

Id. at 157.

4. Cf. Alfred Blumstein, *Racial Disproportionality of U.S. Prison Population Revisited*, 64 U. COLO. L. REV. 743, 759 (1993) (“[T]he U.S. displays distressingly high rates of [black incarceration] [T]his is not so much due to racial discrimination, but to other factors outside the criminal justice system.”).

5. See KENNEDY, *supra* note 3, at 145; JOHNETTA BETSCH COLE & BEVERLY GUY-SHEFTALL, *GENDER TALK: THE STRUGGLE FOR WOMEN’S EQUALITY IN AFRICAN AMERICAN COMMUNITIES* 140–41 (2003) (“Homicide is the leading cause of death among Black males between the ages of fifteen and twenty-four Most of them will be killed by other Black males”).

abiding vast majority of African Americans inadequately protected from being preyed upon by criminal predators.⁶

To the contrary, argued others on the listserv, much of the disparity is due to racial bias in law enforcement.⁷ Some of that bias may stem from race hatred, but more stems from subconscious racial stereotyping or systemic forces, such as its being easier for the police to catch poor black kids smoking crack on a street corner than to grab rich white kids snorting powder cocaine in the bedroom of a large suburban home.⁸ Still others argued that crime itself is “socially constructed.”⁹ Thus the War on Drugs condemned many small-time drug abusers to long-term prison sentences. That mass imprisonment in turn decimated certain neighborhoods, denuding them of so many young black men as to leave these localities partly abandoned, contributing further to a cycle of crime.¹⁰ All this, these thinkers argued, foreseeably had a disparate impact on minority communities. Therefore, much of the decimation of those communities could have been avoided by a careful, consciously chosen alternative social policy.¹¹ Drug possession should have been defined as an illness to be treated rather than a crime to be punished.¹² Because ill-devised social policies and biased law enforcement account for at least part of the high percentage of minorities ensnared in the justice system, that percentage is indeed “disproportionate” to what should obtain in a just world.

Listsर्व debates often tend to be more off-the-cuff and sometimes more extreme than more considered arguments in scholarly publications, and some of the participants in this particular discussion arguably may have used the word “disproportionately” imprecisely. Nevertheless, the *CrimProf* discussion still captured the contours of a lively and important dispute about the criminal justice system. It is not a dispute, however, that this Symposium seeks to resolve.

6. Cf. Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: The Paradox of Unwanted Rights*, in URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 3 (Joshua Cohen & Joel Rogers eds., 1999) (arguing that rampant crime in some minority communities requires a new conception of constitutional criminal procedural rights that permits some more aggressive forms of policing in inner-city neighborhoods).

7. See generally KATHERYN K. RUSSELL, THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS 26–46, 110–29 (1998) (making the case that biased antiblack law enforcement combines with the under-recognition of white criminality to both cause and exaggerate much of the racial disparity in apparent criminality rates).

8. See TONRY, *supra* note 2, at 105–07.

9. See generally RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES (1998) (presenting a comprehensive survey of the role of the media in the social construction of crime).

10. See generally RICHARD LAWRENCE MILLER, DRUG WARRIORS AND THEIR PREY: FROM POLICE POWER TO POLICE STATE (1996) (presenting an overview of the principles, history, and consequences of the War on Drugs).

11. See TONRY, *supra* note 2, at 81–124, 201–07.

12. The most persuasive brief that the author has read for de-criminalizing illicit drug use is Douglas Husak’s careful melding of empirical data with political philosophy on the subject. See DOUGLAS HUSAK, LEGALIZE THIS!: THE CASE FOR DECRIMINALIZING DRUGS (2002).

Instead of grappling with the big question of causes, the authors in this Symposium see more to be gained in smaller questions. The perspective is local rather than global. All the authors share a belief that, whatever the causes of high minority representation in the justice system, we should not knowingly adopt new policies that worsen the problem. Like doctors taking the Hippocratic Oath, we should, at least, do no harm.¹³ Of course, we should make the patient better if we can. Harm is conceived of as raising the representation of racial minorities in the criminal justice system when alternative policies could equally well serve public safety without adding to racial disparities.¹⁴ The authors' analyses, therefore, are local partly in the sense that they analyze particular social policies to gauge their costs and benefits rather than assuming a single overall cause or narrow set of causes for the current state of the system. But some authors' analyses are local in another way: exploring circumstances in a single city, state, or region and comparing them to circumstance in other cities, states, and regions. What works and what does not, what is needed and what is not might, at least in theory, not be the same in Provo, Utah as in Washington, DC.¹⁵

Determining the scope of disparities and what might worsen or lessen them, of course, requires examining and analyzing data. There is a growing body of empirical research on the local and global causes of racial disparities in the criminal justice system.¹⁶ Much of this research is in its early stages, but enough of it has been done to suggest potential solutions, as well as the appropriate directions for further investigation. These data are statistical, historical, and anecdotal, both quantitative and qualitative, and their implications are only now starting to be clear.

Many of the authors in this Symposium, however, are not so much interested in what lessons can be drawn from particular data as in what can be learned about the politics of data collection, dissemination, and ensuing action. How data are collected, for whom, and how they are used have political consequences.¹⁷ Some mechanisms can mobilize enthusiastic change agents; others

13. The approach is thus in part reminiscent of Cass Sunstein's praise of the current United States Supreme Court's "minimalism," its gradual, case-by-case evolution of the law, an effort to solve little problems cumulatively rather than grasping for the grand solutions that may be forever beyond our reach. See generally CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

14. See generally TONRY, *supra* note 2 (making this case concerning the War on Drugs). See also HUSAK, *supra* note 12 (drawing a similar conclusion but from the political philosopher's rather than the social scientist's perspective).

15. Cf. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 33-62 (1998) (opining that local knowledge is often superior to other kinds of knowledge).

16. See Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 *LAW & CONTEMP. PROBS.* 17 (Summer 2003) (summarizing much of the leading research).

17. See, e.g., Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 *LAW & CONTEMP. PROBS.* 221 (Summer 2003) [hereinafter Taslitz, *Racial Auditors*].

can breed resignation and despair. Some data procedures can build cross-racial coalitions, creativity, and unity, while other procedures incite racial divisions, fossilized thinking, and social fragmentation. A data-gathering procedure that involves the affected communities as well as the police, that is transparent to all concerned, and that is as attentive to the need to efficiently prosecute crime as it is to the need to reduce racial disparities is likely to foster greater community support and staying power than a procedure that does none of these things. But the politics of data gathering and use is itself local, dependent upon the social context of particular places and problems. There is, therefore, a political geography of race data in the criminal justice system.

II

THE LOCAL GEOGRAPHY OF RACE

Sharon Davies, in *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, examines the literal, physical geography of racial disparity. Specifically, Davies explores the efforts of three states—Oregon, Washington, and Utah—who “have recently taken empirical steps to assess the extent to which minorities are over-represented in their respective criminal justice systems and to seek out the root causes of any over-representation observed.”¹⁸ These studies were apparently meant to prompt action to reduce disparities in each of these localities. The admirable quality of their admirable efforts has national implications in crafting a model for other jurisdictions to follow.

Although Davies gives differing grades to each state’s effort, she finds serious flaws in the chosen methodologies. The designers of these studies ignored guidelines crafted by scholars researching related questions over several decades. For example, much of the research ignored the ways in which biases at one decision point (such as whether to grant bail) can have an impact on later decision points (such as the ability to adequately aid counsel’s investigation). The research also failed to use appropriate statistical techniques, such as multivariate assessment, and to complement quantitative data with qualitative assessments. Yet qualitative assessments are needed to understand *why* certain trends are observed. Professor Davies’ first major point, therefore, is that far more accurate and useful methodologies can be devised for future studies, and she offers fairly specific guidelines for doing so.

More fundamentally, however, Professor Davies doubts whether these state investigations are even asking the right questions. She charges the researchers with wrongly accepting dichotomous thinking—*either* greater minority criminality *or* biased state action accounts for racial disparities, but not both. Relatedly, she sees them as engaging in “mono-causal thinking”—only one explanation can account for the disparities rather than a host of factors interacting to

18. See Davies, *supra* note 16, at 18.

bring about the final result.¹⁹ Finally, she sees the investigators as defining “bias,” “discrimination,” “racism,” and related terms in a misleadingly narrow fashion. Justice, Davies suggests, requires that future studies ask the right questions and use the right methods. Poorly-designed investigations into the wrong questions divert attention and resources from the right ones and undermine efforts at sound reform.

Frederick M. Lawrence shifts the Symposium’s focus from the geographically local to the subject-matter local. In his essay, *Enforcing Bias-Crimes Laws Without Bias: Evaluating the Disproportionate-Enforcement Critique*, Professor Lawrence grapples with the political left wing’s critique of hate crimes legislation. For some on the left, much of the pre-hate-crimes justice system was discriminatorily enforced against racial minorities.²⁰ There is no reason to believe that hate crimes laws should be any different, they maintain. Indeed, whites are likely instinctively to attribute racial hatred as the motive for a black-on-white crime. Whatever their benefits, therefore, hate crimes laws impose costs by likely worsening already extreme racial disparities that are not worth a candle. The theory justifying hate crimes legislation is fine. The problem is that, in practice, it is yet one more way to swell the population of young African-American males frittering away otherwise useful lives in jails or prisons.²¹

Lawrence rejects the left-wing critique. Although the empirical studies are sparse, Lawrence sees them as offering no evidence of anti-minority enforcement as a significant problem.²² To find such a problem, a baseline showing the numbers of bias crimes committed by various ethnic groups is required. Lawrence cautions that the data are too incomplete to draw firm conclusions about such a baseline. Alternatively, however, there are solid data on the trends in hate crimes law *enforcement* (rather than in hate crimes *occurrence*). Those trends show virtually identical percentages of hate crimes prosecutions brought against African Americans as the total percentage of prosecutions of African Americans for all crimes. These data suggest that hate crimes legislation at least does not worsen the racial disparities problem. Furthermore, a recent, intensive participant-observer study of the pseudonymous Central City Bias Task Force revealed an “over-representation of African Americans and Latinos as victims, and a slight under-representation of those groups as perpetrators.”²³

19. *See id.* at 44.

20. *See* Frederick M. Lawrence, *Enforcing Bias-Crimes Laws Without Bias: Evaluating the Disproportionate-Enforcement Critique*, 66 LAW & CONTEMP. PROBS. 49, 51–55 (Summer 2003) (summarizing the literature).

21. *See id.* (summarizing, and rejecting, this view).

22. *See* JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* (2002). Professor Bell’s book is of particular importance on this point. She conducted a brilliant in-depth ethnographic study of how hate crimes laws work in practice in the police department of a pseudonymous American city. Bell concluded that the police in that city generally enforced bias crimes laws in a racially non-discriminatory manner and with careful attention to avoiding infringements upon First Amendment freedoms. *Id.* at 181–84.

23. *See* LAWRENCE, *supra* note 20, at 64.

Data from Los Angeles and Chicago similarly contradict what we would expect to find, were the disproportionate enforcement critique correct.²⁴ To the contrary, the data suggest that whites are the primary targets of bias-crimes investigation and prosecutions. Accordingly, Lawrence insists, we can at least conclude that the critics of bias-crimes laws lack empirical data to support their critique, and, with perhaps less confidence, we can assert that bias-crimes laws simply are not enforced in a biased manner at all. Alternatively, even if it is assumed that criminal law enforcement generally is biased, then the right place to start is to identify and correct the overall systemic biases rather than to single out the one sort of crime that is designed precisely to attack the worst sort of racial bias in the American population more generally. Furthermore, says Lawrence, the critique of bias crimes is founded on an assumption that such laws were designed to protect particular minority groups as victims. But the justification for such laws is rather that all society is injured when any offender singles out a victim because of that victim's racial group membership *regardless of to which racial group he belongs*.²⁵ Lawrence, therefore, rests with the critics of bias-crimes law. That burden has not been met.

David Harris sets his sights on the profiling of racial minorities while they are driving on America's highways and walking on America's streets. In *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, Harris responds to the defenders of racial profiling.²⁶ Those who defend profiling rely on one of two related arguments. First, profiling works, that is, the police catch more wrongdoers with it than without it. Second, profiling is just good common sense because racial minorities really do commit crimes at a higher rate than do whites. Moreover, because non-whites are also victimized at a higher rate, profiling is necessary to offer equal protection from crime to the many law-abiding members of minority communities.²⁷

Concerning the first point, Harris maintains that if we select the right measure, profiling defenders are simply wrong. Profiling is *less effective* at catching bad guys than are alternative law enforcement techniques. The correct measure is the "hit rate" (rather than the rates of arrest or incarceration). A "hit rate" is "the rate at which police actually find criminals, uncover guns, and confiscate drugs when they perform stops and searches."²⁸ The data shows that hit rates are higher for whites than for blacks and Latinos. The police get a hit less often

24. See *id.* at 64–65 (summarizing the Los Angeles and Chicago data).

25. See Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739 (1999) (arguing that hate crimes laws promote individualized justice while protecting individual and group identity—regardless of skin color—and a broader American political culture that embraces equal respect for all and an anti-racist citizen character).

26. See David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 LAW & CONTEMP. PROBS. 71 (Summer 2003).

27. See generally MAC DONALD, *supra* note 3.

28. See Harris, *supra* note 26, at 81.

when relying on race as a factor than when relying solely on behavioral indicators of crime.

Harris is also wary about accepting the claim that racial minorities commit more crimes than whites. First, he explains, the relevant comparison population must not be all minorities but rather, for example, all minorities on the road. What percentages of minority drivers commit crime relative to white drivers? Some profiling defenders, such as Heather Mac Donald, are fond of citing a New Jersey study finding that minority drivers in that state speed at a higher rate than do whites.²⁹ Harris challenges the methodology of the study but argues that, even if the methodology is assumed to be sound, the study is irrelevant. There are many more types of traffic offenses than speeding; almost everyone routinely commits some sort of traffic offense, so offending rates do not explain stop rates, and speeding is indeed the reason for only a small percentage of traffic stops. More importantly, speeding may justify a stop but not a frisk or a full automobile search. Nor can speeding explain from whom the police seek to conduct consent searches of those stopped. Indeed, the data suggest a clear racial pattern in whom officers target for “consent” searches.³⁰ The crime rate for speeding neither explains nor justifies this difference. Additionally, the qualitative evidence—admissions by police officers themselves—supports racial stereotyping rather than sound race-related empirical judgments as the explanation for relative search rates of whites and racial minorities. Harris goes into far more detail on the specifics of what properly done data collection teaches about profiling than I can capture in this brief summary. But his bottom line is clear: Racial profiling is neither empirically justified nor effective. Indeed, it is so ineffective in catching the real bad guys as to endanger public safety.

Bernard Harcourt continues this Symposium’s survey of the local geography of race data. In his piece, *From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, Harcourt views racial disparities as, in part, a consequence of a broader development in criminal justice thinking: the ever-increasing trend in the twentieth century away from individualized to probabilistic assessment of actual and potential offenders.³¹ Harcourt challenges the accuracy of the picture painted by many criminal justice scholars of an early twentieth century “clinical model” that sought to understand and treat each offender as a unique person. Harcourt finds implicit in the clinical model the same sort of actuarial or probabilistic thinking that appears in the later twentieth century, in the form of sentencing guidelines. The central identifying feature of probabilistic thinking is that it treats offenders or suspects as members of a group rather than as special individuals. Thus, for

29. See MAC DONALD, *supra* note 3, at 31–34.

30. See ANDREW E. TASLITZ & MARGARET L. PARIS, CONSTITUTIONAL CRIMINAL PROCEDURE 312–49, 381–92 (1997 & Supp. 2002) (presenting a summary on the constitutional law of stops, frisks, automobile searches, and consent searches).

31. See Bernard E. Harcourt, *From the Ne’er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 LAW & CONTEMP. PROBS 99 (Summer 2003).

example, all offenders with three prior robbery convictions who are sentenced on a new robbery are considered to pose a similar risk of recidivism and to share a similarly evil character sufficient to merit similar sentences. Such an assessment may therefore ignore, or at least give little weight to, this particular offender's motivation for committing the robbery—such as his need to raise money to aid his seriously ill mother, or may dismiss his long record of charitable service to his community as irrelevant. He is judged primarily, even if not entirely, on the likely feelings and behavior of others in his group—a group with no independent identity other than that given to them by the law, a group that is literally created by the sentencing guidelines.

That the guidelines allow some room for judicial discretion and consideration of individual context does not alter Harcourt's thesis. All human reasoning embraces both a focus on what is unique and what is statistically probable. Individualized justice and group-based justice are less dichotomous than they are points on a spectrum.³² Actuarial reasoning moves far closer to group-think, however, than to its more individualized alternatives. Indeed, actuarial sentencing theorists recognize that not all members of a group will behave as the group stereotype predicts. Nevertheless, all group members are treated *as if* they fit within the group stereotype.

Harcourt sees the sentencing guidelines as but one example of group-think, finding its presence at various stages of the criminal process throughout the twentieth century. Other examples include group-think during the investigatory stages of the process when the state is dealing with mere suspects rather than convicts. Among Harcourt's examples of investigatory group-think are the drug-courier profile and the school-shooter threat assessment. But, Harcourt concludes, the actuarial model's growing influence on the investigatory phases can worsen racial disparities in law enforcement *even if members of a particular race do indeed commit certain crimes at a higher rate than those of other races*.³³ I will not steal Harcourt's thunder here by rehearsing his careful explanation, via a series of hypothetical (but realistic) mathematical examples of why this is so. Suffice it to say that he convincingly demonstrates that devoting ever-more resources to targeting law enforcement based on even accurate understandings of offending rates by racial groups will, over time, lead to increasing percentages of such groups being incarcerated when there is no corresponding increase in the rate at which the group actually offends. The problem is, of course, much worse if, as David Harris argues,³⁴ the provable offending rates for the targeted

32. See Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1 (1993).

33. For an analogous, though not identical, argument on this point, see FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 190–213 (2002). One author has recently argued that the American reticence to individualized justice has another, perhaps unexpected, consequence: pushing Americans toward harsher penalties than prevail in states more concerned with individual differences. See generally JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

34. See Harris, *supra* note 26, at 141.

racial group are far lower than is the police's perception of those rates. Harcourt recognizes that there could be confounding factors at work whose effects are invisible because we currently lack sufficient empirical evidence of their presence. Nevertheless, he cautions that there are strong reasons to believe that his thesis is correct: Police officers relying on race in the good faith belief that that is the most efficient and effective way to reduce crime will unwittingly worsen racial disparities far beyond what any empirical analysis would justify. Although other authors have noted that profiling can make assumed racial offending rate differences into an apparently self-fulfilling prophecy,³⁵ none has done so with Harcourt's mathematical clarity. More importantly, Harcourt explains how profiling's self-fulfilling nature can stem from a broader social phenomenon—actuarial thinking—that may create similar problems at many decision points in the justice process, and starkly highlights how statistical thinking can change the very world that we measure.

More research, Harcourt recognizes, is needed to confirm or refute his suggestion that actuarial thinking is itself one important cause of current racial disparities in the criminal justice system. Whether it is or not, however, his resounding caution that unthinkingly *acting* on even valid empirical data can unfairly worsen such disparities is one that he passionately exhorts policymakers to remember.

Joseph Kennedy, like Bernard Harcourt, turns in part to history as a way of understanding our current situation. Kennedy's concern, however, is not with how the criminal law is enforced, but rather with its substance. His focus is on the consequences of the War on Drugs. In *Drug Wars in Black and White*, Kennedy compares two drug wars—Prohibition, the war on whites, and the current drug war on African Americans.³⁶ That comparison turns on Kennedy's distinction between “vice” crimes and “real” crimes. “Vice” crimes are designed to contain a behavior that, when too widespread, can have ill social consequences. “Real” crimes target persons and behaviors that are evil and must, therefore, be obliterated. Society invests far more resources in the effort to obliterate than the effort to contain. Obliteration efforts can, therefore, have a much greater impact on affected communities.³⁷

Prohibition, argues Kennedy, was an era in which alcohol use was condemned more as vice than as evil. Narcotic drug use was similarly placed in the vice category in the early twentieth century. Prohibition did lead to an explo-

35. See, e.g., WU, *supra* note 33, at 190–213.

36. See Joseph E. Kennedy, *Drug Wars in Black and White*, 66 LAW & CONTEMP. PROBS. 153 (Summer 2003).

37. On the current drug war as an effort to obliterate entire communities, see generally MILLER, *supra* note 10, comparing the tactics used in the current assault on addicts to the measures used to contain, then decimate, Jewish communities in the early to middle years of Nazi Germany. For analyses of “vice” and histories of drug regulation, see generally RICHARD DAVENPORT-HINES, *THE PURSUIT OF OBLIVION: A GLOBAL HISTORY OF NARCOTICS 1500–2000* (2001); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES* (2001).

sion of federal prosecutions for alcohol-related offenses. But, as Kennedy demonstrates, the punishments imposed for these offenses were “typically quite low.”³⁸ Admittedly, the nation’s overall attitude toward criminal punishment was likely far less punitive than it is today. It was also a time, however, when the proportion of whites incarcerated overall relative to blacks was much higher than it is today. That emphasis on prosecution of whites was true for liquor offenses as well. Furthermore, liquor use was not viewed as itself “criminogenic” in the way that crack use is viewed today. Rephrased, alcohol use was not generally understood to drive the users toward robberies and burglaries to support their “habit.” Yet the opposite is true of the public’s current understanding of the ill social effects of crack cocaine dependency. Additionally, and perhaps most importantly, the sentences imposed for Prohibition-era liquor offenses were significantly shorter than the sentences for violent or frightening theft crimes, such as robbery and burglary.

By contrast, maintains Kennedy, today’s overall sentences are far more harsh than was true during Prohibition, but current sentences for narcotics or hallucinogen use are nevertheless far more punitive than is true for many other categories of current crimes. Correspondingly, the percentage of African Americans involved in America’s modern criminal justice system, and especially those suspected of drug abuse offenses, has risen dramatically. Even drunk driving is today still viewed more as a serious vice than as a “real” crime. Yet drug-users are portrayed as dangerous deviants, the source of myriad social ills, from violent crime, to a collapsing urban educational system, to poverty. Today’s drug users are portrayed as vampires, hell-spawn bent on sucking life’s blood from the body politic. To Kennedy, the modern embrace of hard drug abusers as evil slime who merit, and do receive, harsh penalties seems closely correlated to the enormous rise in the percentage ensnarement of African Americans in today’s War on Drugs. The correlation seems all the more worrisome given the apparently close connection during Prohibition between low punishment and high white involvement in the system. Kennedy recognizes that the correlation does not “prove” causation, but it does raise suspicions sufficient to justify further research. Kennedy does not favor the legalization of hard drug use. But he does hint at its de-criminalization, and at least argues for its re-characterization as “vice” rather than “real” crime. Given the lessons of history, he believes, the burden of justifying a contrary policy—a burden so far unmet—must be placed squarely on the drug warriors.

38. See Kennedy, *supra* note 36, at 164.

III

THE POLITICAL GEOGRAPHY OF RACE DATA

The remaining two pieces in this Symposium—mine and Erik Luna’s—focus on where to place race data collection on the map of current and potential political institutions.

Luna recognizes the importance of data to guide action. He is, however, more interested in minorities’ perception of racial injustice at the hands of the police than its reality. These mere perceptions, whether accurate or not, he argues in *Race, Crime, and Institutional Design*, have numerous ill consequences, including citizen reluctance to aid the police in combating crime, increased criminality in certain neighborhoods as law loses its legitimacy, a neighborhood culture that lionizes certain criminals as anti-heroes, police under-enforcement of the law to avoid contact with indignant citizens, and mass civil disobedience and violence between minority citizens and the law.³⁹ Data collection and revelation can play a part in improving police-community relations because transparency and accountability breed trust. But data-focused efforts must be understood as but one piece of a broader effort to rebuild police–community trust. Therefore, Luna argues, the sources of current distrust must be identified and internal police institutions redesigned to address the causes of mutual suspicion.

Luna surveys the literature on minority community distrust of the police to craft a laundry list of the causes of distrust, including: (1) minority over-representation at every stage of the criminal process, (2) systemic under-enforcement of the criminal laws in minority neighborhoods, (3) police brutality and abuse of force, and (4) harassment by the police, such as by racial profiling or by degrading actions like strip searches, never apologizing to the innocent, and unnecessary destruction of personal property. Luna also catalogues a list of the reasons for such troubling police behavior, specifically: insular management, poor recruitment and training, racial prejudice, isolation from the community, a warrior mentality, poor supervision of street officers, an obsession with quantitative evaluation, and a secretive police culture. The mirror image of these reasons, argues Luna, therefore offers a multi-pronged solution to the problem. Thus among Luna’s suggested changes are modernized management emphasizing “client” (namely, citizen) teamwork and feedback; collaborative decision-making (such as using civilian advisory boards); improved recruitment; enhanced training; better discipline and oversight; and replacing quantitative performance measures with qualitative ones, such as doing-justice and empathy-creation, as hallmarks of a job well done. He finds support for his belief that these efforts will increase the citizenry’s trust in the police in psychological research on procedural justice, the teachings of behavioral law and economics,

39. Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 187 (Summer 2003) [hereinafter Luna, *Institutional Design*].

and his own concept of “transparent policing.”⁴⁰ This last concept “essentially contends that affected community members should be able to observe and scrutinize the judgments of law enforcement, as well as their underlying rationales, and to have a say in the formation and reformulation of these decisions.”⁴¹ Effective public scrutiny is thus essential to a comprehensive strategy for building the mutual trust required by a sound theory of policing.

My own piece, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, seeks to build an alternative strategy for achieving precisely the sort of transparency of which Luna writes.⁴² My focus is primarily on non-governmental organizations (“NGOs”) like Amnesty International, Human Rights Watch, and the American Civil Liberties Union, and on independent governmental organizations such as the United States Commission on Civil Rights. Each of these organizations, I argue, combines institutional independence with data collection and dissemination—the data being in the form of both numbers and narratives—to regulate the police. This regulation is done in ways that are analogous to how financial and operations auditors regulate corporations. Whereas traditional auditors use information to improve the power of *economic* markets, independent citizen police auditors use data to improve the functioning of *political* markets. This difference is as important, however, as the similarities between NGO-style and traditional auditors. Political auditors act as specialized mechanisms for giving the citizenry an oversight role, another check on governmental abuses.⁴³ But political auditors also play a critical role in energizing an otherwise compliant citizenry.

To illustrate this auditing function at work, I explore three case studies: (1) the American Civil Liberties Union’s combination of traditional lawsuits with creative data-gathering efforts, particularly in battling racial profiling and in addressing community distrust of the police in the wake of recent racial violence in Cincinnati; (2) the use by Amnesty International of expose-like reports and media-intensive “country campaigns” against police brutality; and (3) the revelation by the United States Commission on Civil Rights of widespread suspicionless stops and frisks of racial minorities by the Street Crimes Unit of the New York City Police Department. These case studies reveal the respective strengths and weaknesses of the various scrutinizing strategies. The case studies also illustrate two insights. First, *how* data are collected and disseminated can be politically as important as what the data reveal. For example, in Cincinnati, a collaborative process was used to collect data from all the stakeholder groups, including racial minorities and the police, concerning each group’s attitudes,

40. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

41. See Luna, *Institutional Design*, *supra* note 39, at 200.

42. See Taslitz, *Racial Auditors*, *supra* note 17.

43. Cf. Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709 (1999) (arguing that the post-Reconstruction Fourth Amendment embraces a role for an activist, informed citizenry in policing the police).

experiences, and goals for the future. Additionally, each stakeholder group was involved in later ongoing processes for monitoring data on, and correcting, future police performance. This collaborative model of data collection and dissemination seems to have done much to improve police-community trust.

Second, race played a role in each of these case studies in mobilizing the citizenry. That observation leads me to explore the empirical data concerning the political emotions—the kinds of emotions that inspire political action. Most political behavior is habitual. Thus Democrats usually vote Democratic, and Republicans Republican, though the voters may be quite ignorant of many of the details of the candidates' character and positions. But citizens' degree of enthusiasm for a candidate or issue affects the strength with which a habit is followed or whether it is followed at all. Thus citizens unexcited about a particular candidate may simply not go to the polls. Research reveals that African Americans often have an unusually strong sense of group loyalty and solidarity.⁴⁴ Therefore, they are likely to be strongly politically motivated when they perceive a threat to the safety of the group, an assault on the race as a whole. An emphasis on racial disparities in policing is thus an effective strategy to motivate African Americans, the group most affected by police behaviors and most in need of police protection, to agitate for change.⁴⁵

The long-term success of change requires, however, support from multi-racial coalitions and from the white majority. Previous cycles of reform after dramatic revelations of police abuse, followed quickly by abandonment of those reforms or even reaction against them, have demonstrated the importance of this observation. Yet whites frequently come to understand, at least at a subconscious level, black criminality as the real problem and the cause of a need for aggressive policing. Precisely because political attitudes and behavior are habitual and resistant to change, whites, no matter how well-meaning, are unlikely allies. But, empirical studies show, vivid and novel information can generate political anxiety, and such anxiety renders political actors ripe for change. The vivid personal narratives and powerful statistical picture painted by racial auditors can generate precisely the necessary anxiety among at least a significant portion of the white population. That anxiety must be generated, however, by appeal to the white sense of political honor—the need to live a life consistent with one's principled code about how to live a good life. Many whites share a principled commitment to racial equality as central to our constitutional order. When confronted vividly with the inconsistency between principled aspirations and less-principled realities, many whites can come to see police reform as a battle for the common good at the heart of the republic. Just as many whites were over time moved to change their hearts, minds, and actions

44. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 85–91 (2002).

45. Taslitz, *Racial Auditors*, *supra* note 17, at 265.

by the civil rights movement,⁴⁶ so can the persistent revelations of truth by racial auditors prod whites to join the quest for combining fair policing with safer streets.

The police, like any large human organization, learn to follow a local honor code governing their behavior within the organization. But, studies also show, when localized codes are exposed to the light of day, broader social honor codes reassert themselves within the organization. Constant sunshine can therefore restore errant officers to honorable behavior as judged by broader American political honor codes that embrace equality and respect for others. Accordingly, my piece concludes with ruminations about ways that “racial auditors” can improve their strategies while institutional police department reforms can bring auditors closer to needed information without sacrificing independence. In this way, auditors better recognize that “today, liberty’s life depends on an engaged, activist citizenry goading America to live up to the best of its principles and dreams.”⁴⁷

IV

CONCLUSION

Diverse views are offered by the various participants in this Symposium. Taken as a whole, the Symposium authors support neither the stereotyped views of the political right nor those of the political left; there is indeed much said here to please and to anger persons holding views at both extremes. What I hope that this Symposium accomplishes, however, is the sensitizing of readers to the importance of holding data-informed views. Equally importantly, I hope that readers will see much concrete evidence here that the mere decision to rely on data, the choices made about how to collect and disseminate it, and the candor with which decision-makers acknowledge its strengths and weaknesses each has important political implications. Each such choice profoundly affects both the distribution of power among societal groups and the degree of trust between the state and its citizens. Achieving such trust is ultimately the beating heart of a healthy republic.

46. Cf. DONALD T. PHILLIPS, MARTIN LUTHER KING, JR. ON LEADERSHIP: INSPIRATION & WISDOM FOR CHALLENGING TIMES 52–67 (1999) (explaining how Martin Luther King’s strategy for social change in the mid-twentieth-century Civil Rights Movement was carefully calculated to change white hearts and minds); HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES, 1492–PRESENT 452 (1999) (“King’s stress on love and nonviolence was powerfully effective in building a sympathetic following throughout the nation, among whites as well as blacks.”).

47. See Taslitz, *Racial Auditors*, *supra* note 17, at 297.