

FOURTH AMENDMENT FEDERALISM AND THE SILENCING OF THE AMERICAN POOR

ANDREW E. TASLITZ*

INTRODUCTION

For this symposium on Criminal Procedure, I have chosen to examine the implications of *Virginia v. Moore*.¹ *Moore*, it turns out, raises difficult questions about the extent, if any, to which Fourth Amendment rules require national uniformity or can in fact vary locally. But these questions, it turns out, also have implications about equal justice in search and seizure practices based upon race and class.

A. *Moore Described*

Moore dealt with a seemingly mundane issue. The Portsmouth, Virginia police, based upon a radio call, had stopped David Lee Moore for driving with a suspended license.² A Virginia statute identified this misdemeanor as a “non-arrestable” offense; the police could arrest for this traffic violation only under a small number of specified circumstances that were not present.³ Nevertheless, these officers did indeed arrest Moore, search-

* Welsh S. White Distinguished Visiting Professor of Law, University of Pittsburgh School of Law, 2008–09; Professor of Law Howard University School of Law; Former Assistant District Attorney, Philadelphia, PA; J.D., University of Pennsylvania, 1981; B.A., Queens College of the City University of New York, 1978. The author thanks his research assistants, Jasmine Modoor, Valerie Collins, Melissa Bancroft, and Emily Mari for their able aid; the University of Pittsburgh School of Law and the Howard University School of Law for their funding of this project; and Darleen Mocello for her outstanding typing and other secretarial services.

1. 128 S. Ct. 1598 (2008).

2. *Id.* at 1601.

3. *Id.* at 1601–02. Interestingly, Virginia did permit arrest for driving with a suspended license in local jurisdictions where “prior general approval has been granted by order of the general district court.” VA. CODE ANN. § 46.2-936 (2009). This willingness to allow localities to *decrease* protections for individual liberty, but apparently not to increase them, albeit with the apparent involvement of the local courts, may raise its own fascinating set of constitutional issues. However, the *Moore* Court cited this provision solely to point out that the provision was not triggered in the case before it because no such general order had been issued by the courts in the county in which Moore was arrested. *See Moore*, 128 S. Ct. 1602. The provision thus played no part in the Court’s subsequent reasoning and was, indeed, thereafter entirely ignored by the Court. Accordingly, partly because I am here critiquing the Court’s reasoning in *Moore*, and partly because I do not want to run too far afield of the major concerns of this essay, I see no reason to further address this provision here and leave any complications that it

ing him incident to that arrest and finding on his person sixteen grams of crack cocaine and \$516 in cash.⁴

A Virginia statute prohibited arrest (instead requiring the mere issuance of a summons) on the suspended license charge.⁵ That statute did not, however, provide for a suppression remedy (nor, for that matter, any other realistically available remedy)⁶ for its violation.⁷ Accordingly, Moore filed and lost a motion to suppress the evidence pursuant to the Fourth Amendment to the United States Constitution, arguing that state law permitted only a citation, not an arrest; however, Moore insisted that the Fourth Amendment recognized no exception for search incident to citation.⁸ In a bench trial, Moore was convicted of possessing cocaine with the intent to distribute, and sentenced to five years imprisonment.⁹

The remarkable thing about the case when it reached the United States Supreme Court is that the Court saw the issue as a simple one when it was not. All nine Justices agreed with the trial court's denial of Moore's suppression motion, with eight of the Justices signing onto a single opinion and the ninth, Justice Ginsburg, concurring in the judgment.¹⁰ Central to the Court's reasoning was a concern that allowing state statutory law to play any role—even as but one factor—in the Fourth Amendment “reasonableness” balancing process would create insuperable administrative problems¹¹ and foolishly permit Fourth Amendment law to “vary from place to

may raise for another day.

4. *Moore*, 128 S. Ct. at 1601.

5. *Id.* at 1602.

6. Numerous commentators have explored elsewhere the minimal value of current civil and disciplinary remedies for vindicating Fourth Amendment values and deterring Fourth Amendment violations. *See, e.g.*, Andrew E. Taslitz, *The Expressive Fourth Amendment: Rethinking the Good Faith Exception to the Exclusionary Rule*, 76 *MISS. L.J.* 483 (2006) (summarizing and analyzing many of these commentators' work and seeking to add to it). Even commentators who believe that adequate civil alternatives to the exclusionary rule can be imagined generally agree that such remedies do not currently exist. *See, e.g.*, Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 *U. ILL. L. REV.* 363 (1999). Only a plurality of the high Court seems to believe that current civil remedies are so effective as to render the exclusionary rule unnecessary. *See, e.g.*, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006). Addressing the value of civil and disciplinary alternatives in greater detail is beyond the scope of this article, but, for the purposes of this article, I assume that such alternatives do not yet provide any serious remedy for Fourth Amendment violations in the vast majority of cases.

7. *Moore*, 128 S. Ct. at 1602.

8. For a summary of Moore's arguments, see Brief in Opposition, *Moore*, 128 S. Ct. 1598 (2008) (No. 06-1082).

9. *Moore*, 128 S. Ct. at 1602.

10. *Id.* at 1608–09 (Ginsburg, J., concurring).

11. Concerning administrability, the Court considered state law complicated, requiring officers to make difficult case-specific judgments about whether statutory exceptions to the no-arrest rule applied in a particular case. *Id.* at 1607. The Virginia legislature, by enacting the statute, had implicitly concluded that police *were* fully capable of making these judgments.

place and from time to time.”¹²

B. Fourth Amendment Federalism

But sometimes, contrary to the Court’s position, Fourth Amendment law should vary based on geographic concerns.¹³ A local history of particular police abuses, local political obstacles to constraining the police, local administrative processes, the distribution of local criminal activities, and a host of other matters of geography might alter the state/individual balance that determines what indeed is “reasonable” or not.¹⁴ Geography therefore frequently matters and, I will argue here, geography mattered in *Moore* and can matter even more in future cases in a particular way, for the Court ignored a critical consequence of its decision: its potential to silence the po-

12. *Id.* at 1607 (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

13. See Brief for the Respondent at 46–54, *Moore*, 128 S. Ct. 1598 (2008) (No. 06-1082).

14. The Court has recognized, in a variety of pre-*Moore* decisions, that state-level and local interests do play at least some role, ranging from modest to heavy, in giving the federal Constitution meaning. See Brief for the Respondent, *supra* note 13, at 38–53 (summarizing many of these decisions). For example, as the respondent notes, the constitutional validity of roadblocks, inventory searches, and other administrative or special governmental needs searches and seizures varies with the details of various state and local laws, policies, practices, and purposes; the right to search, seize, or arrest upon probable cause itself turns on probable cause to believe that a particular state, federal, or local criminal law, which varies widely by geographical location, has been violated; and the size of state versus individual interests for the purposes of reasonableness balancing can likewise vary with local conditions. See *id.* at 11–23, 45–49, 52.

I find one aspect of the *Moore* Court’s reasoning particularly odd. The Court first concludes that state laws are irrelevant under the Fourth Amendment because otherwise its meaning would vary from state to state. Yet the Court next finds that the state’s choice to provide no remedy for violation of its own laws prohibiting arrests for certain offenses is entitled to great weight in the process of Fourth Amendment interest-balancing. See *Moore*, 128 S. Ct. at 1606 (majority’s opinion concluding that the state’s failure to provide a statutory suppression remedy for arrests for minor offenses showed that the state really did not consider its interest in preventing such arrests to be particularly large); *id.* at 1609 (Ginsburg, J., concurring) (rejecting most of the majority’s premises justifying its decision but nevertheless concurring in the result precisely because of the state’s statutory silence on a suppression remedy and because of her belief that disciplinary and tort remedies would be available and would be adequate). Looking at what the Court does as much as what it says, even in *Moore*, thus suggests that the Court does sometimes consider, other times not, state and local variations in Fourth Amendment reasoning. The Court simply fails to tell us expressly what principles, if any, guide the determination of when local non-uniformity matters and when it does not. At a minimum, the *Moore* Court has gotten it backwards from the perspective of a presumption of liberty. Such a presumption would counsel considering state statutory law under the Fourth Amendment only when it *expands* individual liberty, not when it *contracts* it. The Court seems to approach the problem from precisely the opposite direction. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004) (arguing for a presumption of liberty in interpreting any constitutional right); MILTON R. KONVITZ, *FUNDAMENTAL RIGHTS: HISTORY OF A CONSTITUTIONAL DOCTRINE* 69–70, 151–52, 158 (2001) (recognizing the Fourth Amendment as a fundamental right and concluding that “rights recognized as fundamental” are “therefore protected by the rule of strict scrutiny”). “Strict scrutiny” requires both a compelling state interest and use of the “least restrictive alternative” to justify state invasion of fundamental rights. See *id.* at 151–52 (in effect creating a hard-to-rebut presumption of liberty for such rights).

litical voice of poor urban racial minorities.¹⁵ This potential is not obvious, and it will be the task of this essay to explain why it is nevertheless likely to be realized. Here is a short summary, however, of the reasons for my conclusion: poor urban minorities, the political science literature reveals, rarely have much political influence on criminal justice policy at the state and federal levels; they do comparatively better at the local level.¹⁶ Yet the few state level victories that they do attain can be rendered nullities if the state is free to *seem* to award a victory while merely pretending to do so—that is, to create a right without a remedy, freeing the police to engage in just the sort of behavior that the rare political coalition that the poor manage to cobble together seeks to prevent.¹⁷ In other words, law enforcement benefits from state hypocrisy—from laws that say one thing but mean another—thus working to the detriment of less powerful racial minorities while leaving racial majorities relatively untouched.¹⁸ If equality values are

15. Cf. DAVID FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008) (critiquing the Court's tendency to create constitutional doctrine presupposing an assumed factual basis that the Court never tests, not even turning to social scientists to see whether they have, are, or will do so). Of course, the real problem in *Moore* was not only that the Court relied on factual claims unsupported by empirical data but that it also failed even to examine certain facts about the world that were arguably relevant to its decision, namely the plight of the urban poor. This was, however, not the only factual or legal issue that the Court ignored. Other relevant issues given no attention, or at best given short shrift, by the Court included these: What role, if any, should a legislature play in gauging state and individual interests generally, and not merely in the case before the Court, or should such interest-identification and balancing always be a question for the Court alone? In particular, what role should *state* legislatures play, if any, in the reasonableness balancing process under the Federal Fourth Amendment in other circumstances? What incentives would a rule contrary to that articulated by the Court create for states to enact meaty search and seizure policies? Attention to these broader questions would have implications for the narrower ones facing the Court. Moreover, these broader questions are all important ones related to, but subtly different from, those discussed here, but I leave these subtle questions for another day.

16. See *infra* Part III.

17. See *infra* text accompanying notes 79–81.

18. I am here addressing the ways in which hypocrisy can have the *effect* of silencing the urban poor. Yet why, apart from equality values in the case of race, is hypocrisy more generally a constitutional ill? I plan to discuss this question elsewhere but believe that it merits at least passing attention here: the injury done to a republican-democratic state that disrespects its entire citizenry by attempting to look like it is actively solving a politically-salient problem when it is cynically doing no such thing is inconsistent with sound republican government. See, e.g., DAVID RUNCIMAN, *POLITICAL HYPOCRISY: THE MASK OF POWER FROM HOBBS TO ORWELL AND BEYOND* (2008) (making similar, but not identical, argument); Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1266–80 (2000) (discussing social benefits and dangers of purely symbolic legislation promising to right a wrong without a hope of actually doing so). One definition of “hypocrisy” is portraying one thing as if it is another, creating a kind of false impression or mask. See RUNCIMAN, *supra*, at 9–10. Not all lies are acts of hypocrisy, but lies by those with a (pretended) commitment to uphold meaningful discourse rise to the level of hypocrisy. See *id.* at 130–31 (making similar points building on a reading of the work of Jeremy Bentham). Hypocrisy thus misrepresents an essential aspect of the self or of the institution. See *id.* *Political* hypocrisy occurs when it partially or completely masks political power. See *id.* at 134. Explains political theorist David Runciman, “Bentham believed that one of the tests of the justice of a political act was whether public opinion would stand for it, because public opinion was expressive of the widest possible set of interests.” *Id.* at 136. But when political hypocrisy masks who is exercising power—when, why, how, and for what

at all relevant to post-Reconstruction reasoning under the Fourth Amendment,¹⁹ then ignoring this complication, even though it may not be determinative, is hard to justify.

C. Moore and the Geography of the Fourth Amendment

The application of this political complication to the situation in *Moore* is straightforward. The legislation at issue in *Moore* seemed to represent a victory for rich and poor alike, a judgment that the humiliation of arrest should be spared any person who is simply charged (not convicted, nor

purposes they are doing so—public opinion is misled and no longer serves as a measure of justice. *See id.* at 136. I would add that the masks created by political hypocrisy can also contribute to rendering citizens' opinion imperfectly "public,"—that is, not truly representative of *all* the individuals, groups, and interests in the polity *while still pretending to be so*. One kind of political hypocrisy thus breeds another. Public opinion, of course, cannot be expressed directly, for the "public" is not a single person who can speak with one voice. Accordingly, there must be institutions designed to foster the deliberation necessary to create public opinion and to provide mechanisms for expressing and implementing it. The State provides at least one such institution: the legislature. But political hypocrisy means that an unrepresentative legislature incapable of divining a truly "public" opinion will craft rules that instead are exercises of power by selected interests in society. Yet the legislature will righteously proclaim itself as acting for "the People," using that mantle to justify the State's exercise of its power to use force to compel obedience to the State's dictates. The criminal justice system involves, apart from the military, the most obvious and extreme exercise of the State's power to use force. That system therefore suffers the most from the ills of political hypocrisy. These observations, it must be emphasized, do not concern solely the practical point that hypocrisy alters the distribution of power in society in ways that might not be to some critics liking—that practical point being the subject of the rest of this essay. Rather, my observations here are meant to make a point about political *morality*, about what is right or wrong, just or not, in a democratic republic. Political hypocrisy can render the processes and outcomes of democratic institutions neither just nor legitimate, indeed not truly, or at least not fully, "democratic," at all. If true democracy, roughly defined here as a political system representative of the People, subject to their will, generally governed by the votes of the majority of individuals composing the People, but safeguarding the fundamental rights of minorities, is a political good, then hypocrisy is, correspondingly, a political evil.

This summary of the moral case against political hypocrisy, I should caution, oversimplifies things just a bit. As Runciman again points out, this time relying on the writings of novelist and political commentator George Orwell, some sorts of political hypocrisy are more good than bad. *See id.* at 174–88. Precisely because "the People" cannot speak, yet their authority to do so is what legitimizes a democratic republican state, we are forced to rely on such fictions as that the legislature speaks the People's will. But of course it does no such thing. Rather, the legislature consists of persons elected for the purpose of *representing* the People's will, but it is the resulting political body that in fact rules. The legislature thus misrepresents a fundamental aspect of itself as something that it is not, arguably a form of political hypocrisy. But this fiction *restrains* the legislature, for if it is to continue to appear to represent the will of the People, it cannot stray too far from doing its best actually to do so, for otherwise its hypocrisy will be manifest and cease to serve its function of concealing the real workings of power. A legislature that thoroughly abandoned even the need to mask the true workings of its power would cease to feel any constraints, devolving into an open tyranny of the few over the many. *Cf. id.* at 174–88 (articulating a similar argument). True political justice is thus an impossibility, but limiting the dangerous forms of hypocrisy that work to exclude some groups from having effective voice in the polity's operations while tolerating the more benign hypocrisies that restrain individuals wielding power can lead to a greater approximation of justice than does ignoring hypocrisy's central role in our politics.

19. *See generally* ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868* (2006) (reviewing the history demonstrating the central role of such equality values).

even yet tried) with a minor offense. Yet, because the high Court in *Moore* provided no remedy when the police choose to violate the statute, the police are free to do as they choose.

The mere existence of the legislation suggests, however, that state majorities would bring strong political pressure to bear if they routinely suffered from breaches of the statutory no-arrest mandate. But minorities would likely find it hard to muster the political power to raise a hue and cry should these violations fall only on those minorities. Subconscious and systemic forces thus make it easy for racial bias to kick in, with police more likely to conduct surveillance in poor urban neighborhoods populated by racial minorities, more likely stopping members of that group, and, upon finding a violation, more likely arresting them in contravention of the statute.²⁰ *Moore* permits the police thereupon to conduct a search incident to arrest, increasing the chances of finding contraband (likely, possession of illegal drugs). But drug legislation itself has been shown to have dramatically disparate racial effects.²¹ The result of *Moore*, therefore, is to deprive racial minorities of the benefits of facially neutral criminal justice legislation, to undermine police legitimacy among such minorities, to undercut minority willingness to seek state-level political solutions (and it is at the state and federal levels where the greatest power for criminal justice to make a difference resides), and thereby further to silence the voice of the poor in setting criminal justice policy.

Because my concern is with the potential political impact of *Moore*'s holding and with the Court's ignoring that impact, there is no need for me to review the rationale of the various *Moore* opinions here. Accordingly, Part II of this essay moves immediately to proving that poor urban racial minorities have little voice in state and federal-level criminal justice policy-setting, and examining why that is the case. Part II next explains why these same minorities do somewhat better at the local level, demonstrating that the silencing of the poor is not inevitable. Part III thereafter examines the circumstances under which poor minorities may nevertheless sometimes attain state-level criminal justice legislative victories. Part III ends with an analysis of how *Moore* sets the stage for effectively depriving the poor of even these rare victories while creating the *appearance* of doing no such thing, thus insulating the police from criticism and from pressure to comply with the legislation's seeming spirit. Part IV, the Conclusion, summarizes

20. See generally Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 L. & CONTEMP. PROBS. 221-98 (2003) [hereinafter *Racial Auditors*].

21. See, e.g., THE 2009 CRIMINAL JUSTICE TRANSITION COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS (2009).

what has come before, ending with a harsh critique of the *Moore* rule, or, more precisely, of the Court's apparent ignorance of the real-world consequences that its cramped constitutional methodology creates.

I. FOURTH AMENDMENT HYPOCRISY

A. *Why Poor, Urban, Racial Minority Voices are Not Being Heard at the Federal and State Levels of Government*

Two well-known political scientists have recently argued that federalism, in the sense of a division of power between state and federal governments, no longer serves a valid social purpose.²² Indeed, they maintain, many of the supposed virtues of federalism—such as providing government closer to the people and encouraging policy experimentation—are in fact better served at the level of the municipality, town, and village.²³ State government, they maintain, is often distant from ordinary people, more beholden to the powerful, and rigid and slow in responding to community needs.²⁴ I am not sure that these conclusions are always right, but at least in the area of criminal justice I will argue that they are too often right. Moreover, I maintain, the Court's divorcing of rights from remedies in *Moore* threatens to undermine the relatively few instances in which the state does better than usual in fairly serving the interests of *all* the people in legislating about criminal justice.

Understanding why these observations are correct requires an appreciation of just who gains an ear at the various levels of government in criminal justice policy. Much evidence suggests that entrenched criminal justice system government employees, well-resourced organized interests, those likely to benefit most financially from state legislation, and the white middle class are well-represented at the federal and state levels.²⁵ Poor urban racial minorities face terrific challenges in being heard at all, but their voices are particularly muted before state and federal legislatures.²⁶ At the level of the municipality, however, the reverse is true: poor urban racial minorities have a significantly louder voice in criminal justice affairs, while the voice of organized interests is sharply reduced.²⁷

22. MALCOLM M. FEELY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY & TRAGIC COMPROMISE* (2008).

23. *See id.* at 22–23.

24. *See id.* at 40–55.

25. *See generally* LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY AND THE POLITICS OF CRIME CONTROL* (2008).

26. *Id.* at 8.

27. *Id.* *See* STUART SCHEINGOLD, *THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND*

1. Who Gets an Ear

One recent study by political scientist Lisa L. Miller clearly shows the challenges facing racial minorities in the legislative process. Interestingly, Miller examined group representation at the federal legislature and compared it to that in the Pennsylvania state legislature and in two cities: Philadelphia and Pittsburgh.²⁸ Miller discovered that the groups most often appearing before, and presenting the most witnesses at, federal, Congressional, and Pennsylvania state legislative hearings were criminal justice and law enforcement institutional agencies: the police, immigration officials, judges, and Treasury and military officials.²⁹ Professional associations, including those of lawyers, doctors, and social service agencies were also well-represented.³⁰ Citizens' groups likewise had significant representation, but these groups were overwhelmingly single-issue groups, such as Mothers Against Drunk Driving, or Women Organized Against Rape.³¹ Broadly-representative, multi-issue citizens' groups, however, were weakly represented, in Congress constituting but 1.5% of the total number of witnesses, and in the state legislature, only 3% of all witnesses.³² The single issue citizens' groups and the criminal justice agencies, moreover, tended to be repeat legislative players.³³ The majority of professional groups repeatedly appearing are those who stand to benefit from government largesse and who have substantial resources to focus on a single-issue, or

CULTURAL OBSESSION 23 (1991) (“[T]he politics of the criminal process at the national level is more about authority than policy, while the converse is true at the local level.”). Scheingold’s comment might suggest a continuum from the federal level (crime control primarily about assertions of authority) to the state level (less so), to the local level (most policy-oriented, least about the assertion of governmental or majoritarian power). Whether such a continuum presents an accurate picture of reality or not, Miller’s study pictures state-and-federal-level crime politics as far more alike as mechanisms of social control of the urban poor than different relative to localities, though Miller herself at times implies the continuum’s existence. See MILLER, *supra* note 25, at 8 (“Thus, on the local level, pragmatism is likely to factor into crime politics, while moral panics and pressure from vested interests are likely to play into levels of government that are farther removed from the day-to-day realities of crime and violence.”).

28. See MILLER, *supra* note 25, at 21, 189–99 (describing the research design).

29. See *id.* at 22–27, 75–84, 95–119; *cf. generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 4–10 (2007) (arguing that recent federal and state legislative and executive branch policies have resulted in a system of elite “governance through crime” characterized by three features: (1) acting in the name of crime control or analogous problems legitimates governmental interventions; (2) but the crime control label masks other political motivations; and (3) the metaphors of crime control insidiously migrate to subtly alter governance in some more local institutions, such as schools, family, and the workplace—all with the predictable results of further isolating poor racial minorities, reducing judicial power as a check on governmental abuses, and undermining the democratic nature of American politics).

30. See MILLER, *supra* note 25, at 78–79, 101–03.

31. *Id.* at 67–69, 96–102.

32. *Id.* at 67–68, 81–84, 102–03, 117–18.

33. *Id.* at 77–79, 89, 99–107.

small-focused-set-of-issues, agenda.³⁴ Civil rights groups get some representation, but, apart from the ACLU at the state level, such representation is erratic and, again, generally single-issue-focused.³⁵

Government agencies and other institutions, furthermore, do more than appear at legislative hearings: they lobby overtly, engage in a wide range of informal personal legislature contact, and have “relatively unfettered access to legislators.”³⁶ The voices of Prosecutors, corrections offi-

34. *Id.* at 79, 81, 103, 118–19. That the poor have fewer material resources than the rich is, of course, true by definition. But philosophy professor Charles Karelis makes a fascinating argument about how the poor’s limited resources can work to limit their social, psychological, economic, and, I would add, political resources as well. Economists generally embrace the “law of diminishing marginal utility of consumption,” which can be expressed informally as “saying that the less of a good one consumes, the greater the satisfaction one derives from a little bit of it.” CHARLES KARELIS, *THE PERSISTENCE OF POVERTY: WHY THE ECONOMICS OF THE WELL-OFF CAN’T HELP THE POOR* 51 (2007). Given that the poor have little work, money, or education, the rational impoverished person should receive great satisfaction from these goods, thus being motivated to attain them. *See id.* at 57. But, explains Karelis, certain goods, “relievers”—those that “reduce pain, unhappiness, or misery,” *id.* at 67, follow a law of *increasing* marginal utility—that is, the satisfaction from consuming the good rises faster at higher levels of consumption and falls faster at lower levels. *See id.* at 67–68. For example, if you have six bee stings, enough pain-killing salve to quiet one sting does you little good, but enough to quiet all six stings would totally relieve your pain. *See id.* at 68. A different kind of good, “pleasers”—those “that cause positive experience, as distinct from removing negative experience,” *id.* at 73, do, however, generally comply with the more traditional law of diminishing marginal utility. *See id.* A third group of goods, “relievers/pleasers,” function as relievers at low levels of consumption but pleasers at higher levels. *See id.* at 74. “Examples include many basic goods—things that benefit virtually all consumers: food, shelter, clothing, *transportation, leisure, and opportunities to take part in community life.*” *Id.* (emphasis added). At insufficient levels, more of these goods serve merely to relieve pain, while at above-sufficient levels, they cause positive satisfaction. *Id.* Thus a poor person living six miles from a potential job given a transportation voucher reducing his walk to work by but one mile would have the pain of getting to work reduced but by so small an amount as not to make the voucher worth his while. *See id.* at 76–77 (using similar example). But a voucher enabling the poor potential worker to get the full six miles relieves all her pain while adding the joys, perhaps, of being able to read, talk, or sleep during the trip and the satisfaction that she will arrive at her destination able to face the working day without already being exhausted, clear of mind and ready to face a challenge. *See id.* at 78. At its simplest, this analysis suggests that the resources to travel to legislative hearings at often geographically distant state and federal capitals or to navigate the formal procedures and politics of these more socially distant institutions will limit the ability of the poor to participate in politics at higher levels of government. But at “sufficient” levels of transportation and political-education resources, the poor are more likely to push harder for participation at just these levels. Karelis’s economic analysis cannot alone explain the nature and degree of political action by the poor, but it is instructive nonetheless.

35. *See* MILLER, *supra* note 25, at 68–69, 97–99, 101, 106–07, 117. Miller notes further, concerning the ACLU, that, while its agenda is broad, its “focus on the rights of the accused, coupled with legal strategies that must necessarily emphasize specific instances of individual harm, risks further perpetuating a policy frame that obscures the more diffuse quality-of-life focus of urban citizen groups.” *Id.* at 117. The ACLU “is primarily focused on relatively narrow, individualistic aspects of the criminal process, for example, the death penalty, surveillance, and policing” that are in some respects “quite far afield from the concerns voiced” by broad citizens’ groups. *Id.* at 116. Although the ACLU may often be the only significant voice of the poor concerning crime control at the state and local levels, *see id.* at 116, and although it has long been a ubiquitous agitator for protecting the *legal* rights of all, *see* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (2d ed. 1999), it is precisely its almost-entirely lawyerly, legalistic emphasis that renders it an important but inadequate influence on criminal justice legislation aimed at the real concerns of the poor.

36. *See* MILLER, *supra* note 25, at 73–75, 88–89, 96–97, 103–05.

cials, probation departments, and crime commissions are loudly heard.³⁷ Although professional groups as a whole are also fairly active, the efforts of individual groups tend to be *ad hoc*, focusing on specialized interests particularly important to their members.³⁸

Legislators listen to these organized groups partly because of a belief in their expertise on complex issues.³⁹ Legislators also tend to look for fairly simple, specific, concrete solutions to readily-identifiable problems, and solutions that can be touted to the electorate.⁴⁰ Organized groups often provide just that, appearing with focused draft legislation and reams of supporting documents and research on narrow questions.⁴¹ These groups have a strong stake in such questions, money from state budgets or membership dues give these groups the resources to do their political job, and their repeat player status allows them to cozy up to state legislators and their staff.⁴² Furthermore, federal and state legislatures as a whole represent majorities—meaning middle-class whites—and many legislators cannot win re-election by catering to minority rather than majority needs.⁴³ A public too busy to investigate the facts and swayed by the fear-mongering of politicians using anxiety over crime as an electoral tool likewise defers to the expertise of these organized groups—particularly governmental ones—and demands that politicians make good on their tough-on-crime promises.⁴⁴ There are, therefore, strong political reasons for legislators to heed the word of groups who urge harsher criminal justice system policies that, within broad limits, expand the groups' own budget and power. State criminal justice institutions and single-issue citizens' groups thus tend to stress ever-harsher punishments and isolated, simplistic solutions to the complex problem of crime and its control.⁴⁵ These observations extend not

37. *Id.* at 73–76, 79–84, 88–89, 96–99, 116–19.

38. *Id.* at 89.

39. *Id.* at 80.

40. *Id.* at 81, 108–09. For a convincing explanation of why harsh criminal justice legislation appeals to much of the white electorate, see Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 HASTINGS L.J. 829 (2000).

41. See MILLER, *supra* note 25, at 72–73, 80, 107–12, 117–19.

42. *Id.* at 73–74, 77–79, 103–04, 118–19.

43. See, e.g., STEVE DOUGHERTY, HOPES AND DREAMS: THE STORY OF BARACK OBAMA (rev. ed. 2008) (noting that, prior to his election to the Presidency, Obama was the only African-American member of the modern United States Senate); DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS (1999).

44. See Kennedy, *supra* note 40, at 869–870; RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES 195–238 (2d ed. 1998) (summarizing the complex relationship among media portrayals of crime, audience perceptions of it, and policymakers' use of it, with a particular analysis of the role of appeals to fear).

45. See MILLER, *supra* note 25, at 8 (“National elected officials face a different set of constituent pressures than local ones because of their geographic and electoral isolation from the problem and, I suggest, because this isolation allows for the emergence of single-issue groups with narrow interests

simply to what is criminalized, but also to how police and prosecutors are allowed to—or encouraged to—do their jobs.⁴⁶

2. Who Does Not Get an Ear

Broad, informal citizens' groups, like neighborhood associations, lack the resources and technical expertise that larger groups have.⁴⁷ They rely less on data and study than on experience.⁴⁸ They are prompted to action by the pain that both crime and the reigning crime-fighting techniques bring to their lives.⁴⁹ They have no lobbyists, little money for travel or hiring lawyers, and are often skeptical of formal governmental processes.⁵⁰ Moreover, their experience teaches them that crime is a multi-faceted problem that requires multi-faceted solutions.⁵¹ Abandoned homes shelter crack addicts while darkened streets do the same for dealers; poor schooling leaves too many children without hope of decent employment, thus making them vulnerable to being lured into crime; unfair and aggressive police

whose problem definitions and issue frames intersect with prosecutors and police around punishing offenders.”).

46. *See id.* at 61, 73–75, 104–05.

47. *Id.* at 109–10. One representative of a community organization, the Regional Council of Neighborhood Organizations, that did make it to a state legislative hearing made the point powerfully after listening to the State Attorney General plead for greater resources for prosecutors, police, and prison:

It's hard to be sympathetic to people who come in here, such as the Attorney General's Office, and I think what they're doing is absolutely fantastic, [so] don't misunderstand me. But it's hard to be sympathetic to them when they say that they are underfunded. Let me tell you about need. We're not on a line item of anybody's budget. We give our time free, we search for a home or a church where we can have a community meeting . . . we have no staff. We frequently can't afford a telephone. We don't even have a typewriter sometimes. That's underfunding. And we're told that this has to be a team effort, and I feel like a disabled member of the team, and I'm not quite sure what I can do if only the generals and the colonels are receiving the funding and not us, the troops in the trenches.

Id. at 109.

48. *See MILLER, supra* note 25, at 161–63 (recounting illustrative testimony of community representatives at the local level).

49. *See id.* at 160–63, 170 (citizens groups are less punitive, more focused on harm-reduction, angry at police abuses, yet desirous of greater police presence, more concerned with prevention, redistribution, physical safety, and crime's root causes). One Pittsburgh councilwoman put it this way:

The community wants the bad guys locked up, they don't want their lives to be in jeopardy but they also want us to get the root of the drug dealing. . . . They really want to press the root issues. A lot of people feel it is a conspiracy to destroy African American communities and low-income communities. We don't make the drugs, we don't manufacture the drugs. It seems like there is somebody who is doing this to us. I don't buy into conspiracy theories but I do see their point. Guns and drugs aren't manufactured in those neighborhoods. The big boys and roots are in areas you'd never suspect.

Id. at 173 (author's interview of councilwoman).

50. *See id.* at 83–84, 103.

51. *See id.* at 174 (“They advocate for more police, but in the context of cleaner neighborhoods, more opportunities, and better schools, which requires a reallocation of power and resources. As the issue migrates to other legislative venues, the police message resonates, but much of the rest is left behind.”).

tactics produce community distrust that hampers police access to the citizens who can help in solving crimes; and poverty makes for small, crowded living quarters that drive bored youth onto the street, where trouble awaits them.⁵² These problems are shared by the entire community, uniting them in their fear, and many of the offenders are the children, siblings, friends, and acquaintances of the law-abiding.⁵³ These groups, therefore, tend to not to demand specific policies, but rather affordable housing, accountable and talented teachers, responsive, fair and caring police, and job programs as part of the solution to crime and a failing criminal justice system.⁵⁴ The overwhelming nature of these demands discourages legislator attention, for politicians find it hard to craft solutions that they can even claim to achieve short-term results from which they can reap political rewards.⁵⁵ Moreover, broad citizens' groups do not come armed with specific proposals, draft legislation, or expertly-written position papers.⁵⁶ These oversights can irritate legislators who complain that these broad citizens' groups do not know what they want and offer little help in the practical task of legislating.⁵⁷ Cultural differences complicate matters, as middle-class legislators defer to busy prosecutors or police chiefs, putting them on early in hearings so that they may get back to the task of protecting the community. Meanwhile, citizen representatives often are relegated to speak during the little time remaining at the end of the hearing—ignoring the speakers' need to catch buses home, for many cannot afford cars, and to arrive home early enough to pick children up from school or placate irate employers grudging about

52. *See id.* at 151–56 (neighborhood quality of life/crime connection), 171 (“[H]ousing, blight, police-community relations, economic development, education, and services.”); *see also* TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT, *supra* note 19, at 78–79.(explaining link between aggressive policing strategies and rising crime, combined with lower capture rates); Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 J. L. & CONTEMP. PROBS. 125, 167–168 (2002) (explaining connection between the housing quality of the poor and their greater presence on the streets).

53. *See* MILLER, *supra* note 25, at 159–60 (“I think in the African American community, the minority community, the Latino community, there’re [sic] many parents whose kids are having these problems and they’re not really advocating them being locked up.”) (quoting Philadelphia legislator); *id.* at 173 (“But at the local level, where the damage of crime is felt in personal, familial, and community terms, such a coupling [of victims’ needs with harsher punishment] is much more tenuous.”).

54. *See id.* at 107–09; *supra* notes 49–51 and accompanying text.

55. *See id.* at 108 (“Broad citizen groups bring to legislators a set of problems with depth and breadth that have few simple policy solutions. The convergence of citizen organizations interested in quality-of-life concerns and a legislative process that seems most amenable to policy-oriented groups results in a highly restrictive venue for these broader groups.”).

56. *Id.* at 107–08.

57. *See id.* (“One legislative staffer expressed open hostility towards [such] groups[:] ‘Those groups. . . They don’t ever have a solution, they just say ‘the cops are going in and making [unfair] stops.’”). When such groups do make specific policy proposals, they tend to involve “out-of-the-box,” redistributive thinking alien to state legislators’ understandings of the problem or law enforcement’s priorities. *See id.* at 110.

giving the speakers time off to pursue their “personal business.”⁵⁸ The result, explains Miller, is that broad citizens’ groups “make up a tiny fraction of the ‘interested parties,’ a miniscule portion of witnesses at hearings, and an almost imperceptible percentage of personal contacts with legislators” at the state and Federal levels.⁵⁹ Further magnifying the problem, most of these broad groups also consist of poor urban minorities in which legislators from farm country, small towns, and white middle-class neighborhoods often have little interest.⁶⁰

B. Why Poor, Urban, Racial Minority Voices are Heard Locally (but in a Whisper)

1. Who Gets an Ear Redux

The situation is quite different at the level of municipal government. Crime can dominate the lives of the poor. The law-abiding are fearful, lose what money they have to thieves, take insufficient advantage of services that may be offered at night, face medical expenses they can ill-afford, and suffer community disruption that makes political organizing difficult.⁶¹ When some of them do get politically active, however, they can elect City Council representatives who live in the same neighborhoods and are motivated to fight for similar interests.⁶² Furthermore, they are geographically

58. See MILLER, *supra* note 25, at 111–12; cf. generally OWEN M. FISS, *A WAY OUT: AMERICA’S GHETTOS AND THE LEGACY OF RACISM* (2003) (arguing that the de facto geographic, economic, and political isolation of the residents of America’s ghettos is so intractable as to require but one solution: giving residents vouchers enabling them to leave).

59. MILLER, *supra* note 25, at 103.

60. See *id.* at 112. One Democratic Pennsylvania Senator bemoaned this emotional and cultural distance between most state-level legislators and the urban poor:

The more you get away from where it [crime] begins, the more you’re talking about [just] a bad guy that has committed a crime. . . . What are we going to do? Without knowing or caring whether he has a family, who’s supporting him, what ties he has to the community or she has to the community. And you don’t care how he got there. It’s too bad, it’s too late.

Id.

61. See 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* 13–14 (Tracy L. Meares and Dan M. Kahan eds., 1999) (making similar point, though overestimating racial minority political power); J. Cathy Cohen & Michael C. Dawson, *Neighborhood Poverty and African American Politics*, 87 *AM. POL. SCI. REV.* 286–302 (1993) (arguing that traditional types of political activity, such as voting, giving money to candidates, and volunteering in partisan political organizations are much diminished in severely impoverished neighborhoods relative to more affluent ones).

62. See MILLER, *supra* note 25, at 125–26, 135–36. For background on the socio-political histories of Pittsburgh and Philadelphia, see Peter C. Buffum & Rita Sagi, *Philadelphia: Politics of Reform and Retreat*, in *CRIME IN CITY POLITICS* (Anne Heinz, Herbert Jacob & Robert L. Lineberry eds., 1983); Matthew Countryman, *From Protest to Politics: Community Control and Black Independent Politics in Philadelphia, 1965–1984*, 32 *J. URBAN AFFAIRS* 813–61 (2006); *SOCIAL CAPITAL AND THE CITY: CIVIC ENGAGEMENT AND PARTICIPATION IN PHILADELPHIA* (Richardson Dilworth ed., 2006); BARBARA

close to City Hall should they wish to pursue formal means of being heard.⁶³ But they also have at their disposal an array of informal means: protests, vigils, strikes, *ad hoc* rallies, and unexpected visits to legislators' offices.⁶⁴ Moreover, crime is so prevalent in the neighborhoods which spawn these groups that the groups seek broad, long- and short-term solutions, rather than the relatively narrow ones usually offered by more organized groups.⁶⁵ Police are also often seen as part of the problem and bring with them a history of policing as a symbol of racial oppression.⁶⁶ The importance of police-community relations in local crime politics cannot be overstated. As one political scientist explained:

A . . . consistent theme is the long history of criminal justice institutions as tools used by elites for the maintenance of racial inequality, directed most harshly, though not exclusively, at African Americans. This is particularly true for relations with local police departments. "Black Americans," one African American police officer has noted, "Find that the most prominent reminder of his [*sic*] second-class citizenship are the police. . . ." Blacks consistently express less confidence than whites in the criminal justice system, significantly less confidence in the police, more fear that the police will arrest them unfairly, and substantially less certainty that the police treat all racial groups fairly. Even when socioeconomic status and encounters with police are held constant—which

FERMAN, CHALLENGING THE GROWTH MACHINE: NEIGHBORHOOD POLITICS IN CHICAGO AND PITTSBURGH (1990).

63. See MILLER, *supra* note 25, at 176, 179. Miller elaborates:

While the perils of federalism are potentially a problem in a lot of policy areas, those involving the poor—a category blacks and Latinos fall into disproportionately—are most likely to feel its effects. It is one thing to rally your friends and neighbors to the Tuesday city council meeting or get a dozen people to show up and call themselves Citizens for Less Crime, More Safety, and a Better Quality of Life. It is quite another to gain tax-exempt status, a lobbyist in the state capital, specific policy proposals, knowledge about the criminal code, and complex legislative sessions, not to mention the savvy to frame policy solutions in ways legislators might respond to.

Id. at 179. A Pennsylvania general assemblyman, who earlier in his career had been a Pittsburgh City Council member, explained the difference between local grassroots politics and more formal state politics this way:

I felt more of a lobbying effort at local level than I do at the state level. When grassroots push happens, they want it done overnight. At the state level, things happen much more slowly . . . there is very little will to get what some groups want done actually done. It's too big, too complex, people feel like they never get a straight answer. Locally [Pittsburgh], there are only nine members and the mayor. The runaround is shorter, there are few people to point the finger to. Eventually someone has to fess up to [the] reason why they're blocking what [these groups] want. Whereas with over two hundred—or, at federal level, over four hundred legislators it's easy to pass the buck. There is a faster return on the grassroots at the local level. It's harder to pass the buck locally. Legislators are in close proximity to each other.

Id. at 176 (quoting interview with this legislator).

64. *Id.* at 128–29, 137–38.

65. See *id.* at 148; Taslitz, *supra*, note at 20, at 224–248. (summarizing the efforts of poor, racial minority community members in Cincinnati to achieve longer-term, more comprehensive solutions to the problem of alleged police abuses in that city).

66. See MILLER, *supra* note 25, at 124–25, 162–64.

themselves help account for attitudes toward the criminal justice system—race is a significant factor in citizen attitudes toward criminal justice institutions and actors.⁶⁷

While there was a time in American history when states and municipalities shut poor racial minorities out of politics even more than did the federal government, the civil rights movement—itsself the expansion of an effective franchise for minority groups—combined with explosive periods of racial violence to open up local legislatures enough for the poor to take advantage of the greater ease of access to the local corridors of power.⁶⁸ With that access came loud demands for reform of the police, for a more equal balance between crime control and civil liberties, greater police accountability, and more attention to the underlying causes of crime.⁶⁹ Local legislators may be limited in what they can do, but they find it impossible to ignore entirely the constant local public pressure for action to regulate the police and to improve the problems of crime and the criminal justice system.⁷⁰ Indeed, local councilmen are often far better-versed about a range of criminal justice issues than their state and federal counterparts.⁷¹ These local legislators are also very familiar with the local citizens' groups—sometimes a dizzying array of them—and their informal actions and protests.⁷² One result is that broad citizens' groups also represent large percentages of the witnesses testifying at local legislative hearings, meet regularly with local police officials, and share ideas and information with them.⁷³ They engage in more formal action too, including lobbying, while using threats to go to the media as an effective tool to get councilmen to

67. *Id.* at 124. *See also* DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, tables 2.12, 2.13, 2.24, 2.25, available at www.albany.edu/sourcebook/tost_2.html (last visited Oct. 25, 2009); SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELEONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA (4th ed. 2004); Ronald Weitzer & Steven A. Tuch, *Racially Biased Policing: Determinants of Citizen Perceptions*, 83 SOCIAL FORCES 1009–30 (2005).

68. The complex nature of the *history* of how relatively greater power flowed to poor urban racial minorities at the local level relative to higher levels of government in many areas is beyond the scope of this essay but is nicely summarized in MILLER, *supra* note 25, at 44–48, 79–84, 171–73.

69. *See id.* at 6, 123–25, 141–42, 162–65; Taslitz, *supra* note 20 at 224–225. Some of these efforts are bearing fruit. *See* DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTATIVE POLICING (2005).

70. *See* MILLER, *supra* note 25, at 124–25, 133–38, 144–46. A Pennsylvania House Democratic representative understood well the local dynamic:

Local officials are living in those communities, they're confronted by community leaders who can't make it to Harrisburg, saying, "If we did this, clean up this neighborhood. . ." It's more real and pragmatic and more visceral at the local level. Those local officials don't leave their place of work and go off somewhere else. They're here all the time.

Id. at 112.

71. *See id.* at 135–38, 143–46, 149–56.

72. *See id.* at 128–41, 143–46, 149–56.

73. *See id.* at 130–38, 146–56, 166.

come to neighborhood meetings, and to do so with an attentive ear.⁷⁴

2. Who Rarely Even Shows Up

Perhaps because of the power of these groups, however, and partly because of the more limited financial resources in most municipalities, criminal justice agencies tend to shy away from local lawmakers.⁷⁵ And, what little contact they have with local lawmakers tends to focus on administrative issues, like salary increases, improved working conditions, and other employment issues.⁷⁶ They may see local government as hostile to their interests in criminal justice matters, so they seem to focus their energies on higher levels of government, including efforts to promote legislation to preempt local reform measures and attempts to craft more comprehensive solutions.⁷⁷ None of this is to suggest that city councils are controlled by urban racial minorities, for local officials have many other groups to whom they must answer, and many material and political obstacles which they must navigate.⁷⁸ But, in terms of criminal justice policy, poor racial minorities tend to have a much greater and more effective voice at the lower levels of government than at the higher ones.⁷⁹

However, the concentration of urban racial minority voices at the local level has important limiting consequences. Local government efforts to improve the criminal justice system are restrained severely by resource and authority concerns.⁸⁰ States have far greater relative resources and power to effectuate criminal justice policies, especially in addressing the broader systemic, redistributionist reforms sought by neighborhood reformers.⁸¹

74. *Id.* at 137–41.

75. *See id.* at 141–43. Local criminal justice agencies are often so busy simply doing their jobs—responding to crime and addressing internal organizational issues—that they lack the resources to devote full-time staff to local lobbying. *Id.* at 143. Police will, of course, attend City Council hearings when invited by Councilmen and will on certain issues occasionally initiate Council contact. *Id.* at 141–42. But the more common local pattern is “relatively quiescent police advocacy” on criminal justice policy. *Id.* at 142. Police apparently see state legislators as both more receptive to law enforcement positions on such policy issues and more able to garner the resources for action, for it is the state level at which police aim their limited political resources. *See supra* text accompanying notes 28–46, 54–60, 75.

76. *See* MILLER, *supra* note 25, at 141 (“Most local legislators in this study regarded the police as highly reactive, lobbying local legislators primarily on issues related to employment conditions.”).

77. *See supra* text accompanying notes 28–46, 54–60, 75.

78. *See* MILLER, *supra* note 25, at 144.

79. *See id.* at 156 (“Such intense citizen pressures can hardly be ignored by local lawmakers.”). Said one Pittsburgh City Council member: “There is more to worry about from grassroots [at the local level] because they can really hurt you at the polls.” *Id.*

80. *See id.* at 12 (noting that the most dramatic growth in crime control spending over the last twenty years has occurred at the state and national, rather than the local, levels).

81. *See id.* at 60–61 (noting that local groups often raise questions “well beyond the capacity of the city council to address”), 166 (noting that local groups often make demands that “run afoul” of

Yet state legislators largely ignore poor minority voices, and, as noted above, those voices offer very different perspectives from those currently dominating state politics: these alternative groups seek systemic changes focused more on prevention, community healing, victim needs, and offender rehabilitation than offender punishment. Recent psychological research helps to explain why state legislators' perspectives differ so dramatically from those in minority neighborhoods, as I next explain.

C. *In a Different Voice: Urban Minorities and Therapeutic Justice*

Cognitive psychologist Michael Wenzel and his colleagues, in a recent literature review, articulated a particularly relevant theory concerning when individuals prefer punitive, retributive responses to crime, and when they prefer restorative justice responses to rule-transgressions.⁸² Retributive responses are unilateral, seeking punishment of the offender in proportion to the harm he has done.⁸³ Such responses are coercive, requiring neither the offender's agreement to the punishment nor his intellectual or emotional acceptance of its wisdom.⁸⁴ Restorative justice responses, by contrast, seek to heal the victim, the offender, and the community.⁸⁵ Restorative justice processes require the offender's agreement to participate and to accept certain consequences.⁸⁶ Moreover, such processes aim to make the offender accept that he has done harm, to take responsibility for it, and to express sincere remorse.⁸⁷ Retribution aims at unilateral, external censure, while restoration ultimately seeks collective choice and offender self-censure.⁸⁸

1. Retributive Responses

Although restitution can repair material harm, rule transgressions also

bureaucratic capabilities, as when they ask for drug houses to be bulldozed, for asset forfeiture funds to come back to the community, or for local unemployed persons to tear down billboards, and that local lawmakers operate at the bottom of a multi-tiered political structure that provides them with virtually all the feedback and almost none of the control).

82. See Michael Wenzel, Tyler G. Okimoto, Norman T. Feather & Michael J. Platow, *Retributive and Restorative Justice*, 32 L. & HUM. BEH. 375 (2008).

83. See *id.* at 378 (emphasizing unilateral nature of retributive justice); Andrew E. Taslitz, *The Inadequacies of Civil Society: Law's Complementary Role in Regulating Harmful Speech*, 1 U. MD. L. J. OF RACE, RELIGION, GENDER & CLASS 306, 334–37 (2001) [hereinafter *Civil Society*] (emphasizing proportionality requirement of retributive justice).

84. See Wenzel, *supra* note 82, at 378.

85. *Id.* at 376, 378.

86. *Id.* at 378.

87. *Id.*

88. *Id.* at 379–80.

impose symbolic harm.⁸⁹ When a transgression is interpreted primarily as one that insults or humiliates the victim, thus lowering his status and at least momentarily rendering him powerless, retributive punishment penalizes the offender for this symbolic harm.⁹⁰ The punishment must come from the community if the sanction is to be seen as recognizing the victim's true personal worth; the community, in a sense, acts on behalf of the victim.⁹¹ When a robbery occurs, the robber implicitly sends a message to the victim that, "Your needs for money, safety and security are subordinate to mine, you and thus your suffering worth less than mine."⁹² Philosophers Jeffrie Murphy and Jean Hampton explained the process thus:

One reason we so deeply resent moral injuries done to us is simply that they hurt us in some tangible or sensible way; it is because such injuries are also *messages*—symbolic communications. . . . Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us—and thus it involves a kind of injury that is not merely tangible and sensible.⁹³

If retributive punishment allowed the offender a choice and a voice in his fate, and also sought his moral improvement and rehabilitation, it would empower, rather than disempower, the offender, and thus undermine the goal of bringing the offender down a peg to send the message that he is worth no more than the victim.⁹⁴

2. Restorative Responses

But transgressions viewed less as insulting than as a rejection of societal values create a collective moral tension: a sense that one member of the group is challenging the very values that define the group as what it is.⁹⁵ Explains psychologist Neil Vidmar, "An offense is a threat to community consensus about the correctness—that is the moral nature—of the rule and hence the values that bind social groups together."⁹⁶ Restorative justice,

89. See *id.*; J.M. Darley & T.S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY & SOC. PSYCH. REV. 324 (2003) (justice demands extend beyond restitution); F. HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 267 (1958) ("What is necessary is that the deeper sources of [the offender's] actions, the sources that impart the full meaning to the harm and that most typically have reference to the way [the offender] looks upon [the victim], should be changed.")

90. See Wenzel, *supra* note 82, at 379–80; Taslitz, *supra* note 83.

91. See Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059 (2007).

92. See Taslitz, *supra* note 83, at 314–17 (offering similar examples).

93. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 25 (1988).

94. See Wenzel, *supra* note 82, at 379–81 (choice and voice); Taslitz, *supra* note 83, at 314–17 (equal worth).

95. See Wenzel, *supra* note 82, at 380–81.

96. Neil Vidmar, *Retribution and Revenge*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 42 (Joseph Sanders & V. Lee Hamilton eds., 2000).

when successful, reaffirms these definitional group values.⁹⁷ Renewal occurs by consensus, a consensus that *includes the offender*.⁹⁸ Accordingly, restorative justice requires the offender's voluntary participation, and aims to persuade him to accept and reaffirm core community values; this re-endorsement of those values can occur only if he expresses sincere remorse.⁹⁹ By definition, *sincere* remorse must be *chosen*, not coerced.¹⁰⁰ Restorative justice thus aims at achieving a dialogue of mutual respect, equal voice, with the goal of healing the victim, the offender, and the community.¹⁰¹

3. Exile

Of course, the same transgression might be perceived as both implicating status *and* community values, but usually one interpretation of the offender's conduct will be primary.¹⁰² Where status/power concerns are primary, for instance, retributive responses will dominate.¹⁰³ Yet, such responses can elicit resistance by the offender—a stiffened spine *against* community values.¹⁰⁴ Thus, retribution leaves open the question of why one community member still rejects the community's values, a source of social discomfort.¹⁰⁵ This discomfort can be resolved by the literal and symbolic *exclusion* of the offender from the community.¹⁰⁶ As Wenzel puts it, “[i]f offenders are no longer regarded as members of the community (symbolically, by withholding from them rights members typically have, or physically, by locking them away), their dissent no longer causes uncertainty or threat to the value consensus . . . although the consensus has then a reduced range.”¹⁰⁷

97. See Wenzel, *supra* note 82, at 381. (“Indeed, the offender's re-endorsement in the form of remorse and apology could contribute more to the validation of those values than the preaching of the righteous who ‘knew better all along.’”).

98. *Id.* at 381–82.

99. *Id.* at 381–83.

100. *Id.*

101. *Id.* at 381, 383–84.

102. *Id.* at 381–82.

103. *Id.* at 382.

104. *Id.*

105. *Id.*

106. *Id.*; Neil Vidmar, *Retributive Justice: Its Social Context*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* 291 (M. Ross & D.T. Miller eds., 2002) (exclusion as “apostates”); J.M. Marquez & D. Paez, *The “Black Sheep Effect”: Social Categorization, Rejection of Ingroup Deviates, and Perception of Group Variability*, 5 *EUROPEAN REV. OF SOC. PSYCHOL.* 37 (1994).

107. Wenzel, *supra* note 82, at 382.

4. Status Competition versus Belonging

But Wenzel's most important insight is that status competition is an *inter-group* phenomenon, one in which offender and victim are seen as distinct, "self and non-self," so that one person's gain is the other's loss.¹⁰⁸ Healing, by contrast, assumes similarity: the offender and victim as wounded parts of a single social body seeking restored health. Indeed, Wenzel posits that what benefits one part of the body benefits another and the social organism as a whole.¹⁰⁹ Accordingly, when parties lack a common identity, they are more likely to see rule-transgressions as insults to status, eliciting a retributive response.¹¹⁰ When they share a common identity, they are instead more likely to see such transgressions as challenges to shared values, eliciting a healing response.¹¹¹ Social distance thus promotes retributive punishment, and social closeness tends to lead to restorative justice remedies.

Granted, each of us has a sense of belonging to many different groups, and two distinct groups may nevertheless share a higher-order, more inclusive group.¹¹² The degree to which the commonality of the higher-order or the separateness of the lower-order identification is most salient turns on the situation.¹¹³ But two processes can make differences prevail over similarity. First, there can be a "functional antagonism" between two groups, particularly where the victim's group sees itself as holding values *relevant* to the situation that are different from the offender's group.¹¹⁴ Second, the victim's group might view its values as more "representative and normative of the inclusive group generally."¹¹⁵ Consequently, the offender's group becomes defined as "deviant or subversive."¹¹⁶ Racial minority status has repeatedly been shown, at least at the subconscious level, to trigger a physical fear of those belonging to other races.¹¹⁷ The minority race's

108. *Id.* at 383.

109. *Id.*

110. *Id.* at 382–84.

111. *Id.*

112. *See id.* at 384; S.L. GAERTNER & J.F. DOVIDIO, REDUCING INTERGROUP BIAS: THE COMMON INGROUP IDENTITY MODEL (2000); J.C. Turner, *A Self-Categorization Theory*, in REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY (A. Hogg, P.J. Oakes, S.D. Reicher & M.S. Wetherell eds., 1987).

113. Wenzel, *supra* note 82, at 384.

114. *See id.* (making similar point); Turner, *supra* note 112 (first articulating the "functional antagonism" idea).

115. Wenzel, *supra* note 82, at 385.

116. *Id.* at 385.

117. *See, e.g.,* Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121 (2006); Andrew F. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants' Example*, 37 SW. U. L. REV. 1091 (2008) [hereinafter

members thus come to be linked by the majority to crime.¹¹⁸ A spate of empirical studies demonstrate this phenomenon, from judges meting out harsher sentences to offenders with “Afro-centric features,”¹¹⁹ to police using more aggressive interrogation techniques with black suspects than white ones,¹²⁰ to employers evaluating black applicants with minor criminal records more negatively than identically-situated white applicants.¹²¹ Residential and educational segregation heighten the sense of difference, minimizing opportunities for members of different groups to get to know one another well enough as individuals to trigger individualized-assessments and a sense of group commonality over stereotypical assessments and a sense of group division.¹²²

5. Implications

This analysis has significant implications for Fourth Amendment federalism. Poor urban blacks, for example, are both socially and geographically distant from middle-class white legislators.¹²³ This distance, therefore, encourages a feeling of division between the two groups rather than of commonality as members of a higher order group: “Americans.”¹²⁴ Legislatures are likely, therefore, to respond to rule-transgressions by poor blacks with retributive anger. But poor urban blacks should instead respond to rule-transgressions by “their own” with restorative impulses to return the offender and victim to a newly-healed community. These disparate responses are precisely what we observe.¹²⁵ Yet both groups purport to be part of the more-inclusive nation. If the minority group therefore perceives its members who transgress as treated more harshly precisely because their racial and class membership excludes them from the broader American community, that breeds minority resentment and protest.¹²⁶ Nevertheless, the minority may seek the majority’s aid as part of the latter’s obligation to

Wrongly Accused Redux].

118. See Taslitz, *Wrongly Accused*, *supra* note 117, at 126–128; *Wrongly Accused Redux*, *supra* note 117, at 1099–1108, 1112–16, 1118–21.

119. Taslitz, *Wrongly Accused*, *supra* note 117, at 126–127.

120. See *id.* at 130–133.

121. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 64–72 (2007); *Wrongly Accused Redux*, *supra* note 117, at 1102–07.

122. See Jeannine Bell, *Hate Thy Neighbor: Violent Racial Exclusion and the Persistence of Segregation*, 5 OHIO ST. J. CRIM. L. 47 (2007) (residential segregation).

123. See MILLER, *supra* note 25, at 112, 117–19, 181.

124. Cf. Taslitz, *Racial Auditors*, *supra* note 20, at 282, 297 (discussing the opposite: how closing social distance can enhance a sense of commonality with broader groups).

125. See *supra* text accompanying notes 65–74.

126. See Taslitz, *supra* note 20, at 244–48 (offering the example of violent protests against racial profiling in a major city), 288–90 (discussing social benefits of less violent forms of protest).

aid members of the more inclusive community who are in need.¹²⁷ When these cries for help are either not heard or not heeded, the minority group may feel insulted *as a group* and further isolated from the more inclusive whole.¹²⁸ This too seems to be what is happening all too frequently.¹²⁹

D. Occasional State-Level Faux Minority Victories and Their Consequences

However, it is also not true that poor urban racial minorities never prevail at the state level. They do sometimes succeed in being heard,¹³⁰ and logic suggests that this should most often be true in two situations: (1) where majority and minority interests coincide;¹³¹ and (2) where horrible, extreme abuses or repeated ones, especially those occurring in multiple communities—unjustified beatings or killings of citizens by police being prime examples—gain so much media attention or prompt such dangerous protests, such as riots, that the problem becomes impossible to ignore if the state is to show even a minimal commitment to equal justice and the protection of its citizenry.¹³² Indeed, it is likely that at least one of these circumstances explains the Virginia statute in *Moore*: either too many middle-class whites were complaining of arrests for minor traffic violations, or too many arrests of racial minority group members for minor violations ended in violence or other high-profile abuse.¹³³

But this is precisely the danger that the *Moore* rule creates: if the state can adopt a statute that *seems* to protect a criminal procedural right, such as protecting individuals, communities, and the people from the invasions of privacy, property, and liberty involved in arrests for minor traffic offenses, while in fact providing no remedy to make those victimized whole or to

127. See Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 395–96 (2009).

128. See *id.* at 414; Taslitz, *supra* note 20, at 266–69; Taslitz, *Civil Society*, *supra* note 83, at 373–76.

129. See *supra* text accompanying notes 47–60, 67–68.

130. See MILLER, *supra* note 25, at 108–09 (offering examples of success at being heard).

131. Cf. 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, 370–71 (2002) (arguing that racial minorities most often make civil rights gains when the white majority's self-interest converges with that of the minorities').

132. See, e.g., Taslitz, *Racial Auditors*, *supra* note 20, at 244–48 (discussing political gains made by racial minorities concerning police reform after race riots in protest against police abuses, albeit gains made at the local level).

133. It is hard to know from the legislative record whether this is in fact an accurate description of how the statute came to be passed because the record is sparse and ambiguous. But whether racial or class coalitions in fact had anything to do with the statute's adoption is less important than the reality that the *Moore* decision changes political calculations for minorities concerning criminal justice matters for a wide range of future issues.

give police serious incentives to comply with the law, then no *real* right exists. Yet the existence of the *faux* right can placate the very political forces that on rare occasions allow poor racial minorities to affect state-level criminal justice policy. Even worse, however, such symbolic, band-aid solutions can, as ample research shows, give police discretion that may—even if because of subconscious motivations—be used disproportionately and aggressively against racial minorities. Thus police might refrain from arresting whites for minor traffic offenses but feel less constrained from making similar arrests of blacks. Whether this was true in *Moore* itself, and whether either of the two situations maximizing minority voices were actually present in Virginia, does not, however, alter the conclusion that the *Moore* rule unacceptably raises the *risk* of such unequal treatment in future cases, and of silencing the political voices all too rarely heard at the state level. Stephen J. Fortunato, Jr., a former Associate Justice on the Rhode Island Superior Court, made this very point forcefully, shortly after the *Moore* opinion was rendered:

What is not mentioned in the Supreme Court opinion—but what can be ascertained in lower court decisions, including that of the Virginia Supreme Court when it reversed Moore’s conviction—was that the “Chubs” mentioned in the original radio transmission [reporting someone driving on a suspended license] was not Moore but rather a man named Christopher Delbridge. Also, one of the police officers explained at the suppression hearing that they had ignored Virginia law relative to the issuance of citations in such circumstances because it was “just our prerogative; we chose to effect an arrest.”

But the most important fact in this case—one which was ignored by the Virginia courts, the Supreme Court, and the few media accounts of this case—is that David Lee Moore is African-American.

Justice Scalia and his equally myopic and complacent colleagues refuse to address the problem of racial profiling—or “driving while black”—that has been widely discussed in law and political science journals, as well as reported anecdotally by black males—both ordinary citizens and those who enjoy professional or political prominence.¹³⁴

Fortunato saw the *Moore* decision as completing a process begun in *Whren v. United States*,¹³⁵ where the Supreme Court held that the subjective racial bias of officers in conducting a search and seizure was irrelevant to its reasonableness under the Fourth Amendment:

Around the country, scholars, lawyers, community activists and even many progressive law enforcement officers are trying to eliminate the

134. Stephen J. Fortunato, Jr., *Supreme Court OKs Racial Profiling*, IN THESE TIMES, www.inthesetimes.com/article/3685/supreme_court_oks_racial_profiling (May 19, 2008).

135. 517 U.S. 806 (1996).

scourge of racial profiling. But read together, the *Moore* and *Whren* rulings demonstrate the Supreme Court's impatience with municipal and state efforts designed to circumscribe arbitrary police behavior often motivated by racial stereotyping.¹³⁶

One response to this criticism of the *Moore* rule is that a contrary rule would simply lead states to abandon even symbolic action, or at least the *possibility* of administrative sanctions on wayward officers. But if I am right that these sorts of state statutes pass only in circumstances of unusual political heat and urgency, then "do nothing" will not be a viable political alternative to suppression. The legislature will pass the statute and accept the cost of the suppression remedy: giving poor minorities appropriate remedies for the injuries to their constitutional rights, and prompting police administrators to do what they can to comply with those rights.

III. POTENTIAL FLAWS IN THE HARD VERSION OF THE THEORY

A. *The Objection that Urban Minorities Can Protect Themselves*

Critics might raise this objection to the theory I articulate here: If poor racial minorities have adequate political power at the local level, as they especially should in cities where racial minorities in fact constitute *that city's majority*, should not the local political system provide adequate protection against police abuses? Assuming *arguendo* that this criticism is valid, the scope of my critique would be limited, but its logic would not be so constrained.

For example, state troopers often have jurisdiction over traffic violations on the interstate highway system.¹³⁷ Because the state enabling laws pre-empt local ordinances in such a situation, a *state* law creating a right without an effective remedy would still leave police free to abuse their discretion—that is, to arrest someone purportedly for a minor traffic violation for which arrest is barred under state law, and then to conduct a "search incident to arrest." If the search produced contraband, drug charges would be filed; if no contraband is found, the arrestee would be released.¹³⁸ Similarly, a minority resident of a city with a protective ordinance who travels in a city in his home state that lacks such an ordinance would not be protected from arrest for a traffic violation in the latter location. Yet, such travelers are not community members in the areas where they travel, and thus lack political power to correct the abuses they endure. Indeed, that

136. Fortunato, *supra* note 134, at 2.

137. See N.J. STAT. ANN. § 53:1–11.1 (West 2009); N.C. GEN. STAT. ANN. § 20-188 (West 2009).

138. *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008) (providing an example of a search incident to arrest).

reality creates an incentive for police in the city lacking a protective statute to focus unjustified arrests on sojourners rather than city residents. Thus, the result from leaving matters entirely to the local political systems is, for example, that racial minorities (who may already face an increased risk of traffic stops relative to whites) traveling in cities lacking protective ordinances may face unequal protection of the laws while traveling. This inequality burden imposed on minority travelers is not lessened by any significant political power they hold in their home towns. If equal protection is a value that should inform Fourth Amendment reasonableness, this is indeed a troubling result. A statewide problem can only be cured by a statewide fix.

Of course, there may be similar problems if residents of a state with a protective ordinance cross into a state without one. One way to avoid the problem altogether would be for the United States Supreme Court to hold that arrests for minor traffic offenses punishable only by a fine are never reasonable anywhere in the nation under the Fourth Amendment, because the state's interest in detention is small while the invasion of the individual's privacy and liberty interests is substantially larger. But this is a path that the Court firmly refused to take in *Atwater v. Lago Vista*.¹³⁹ It partly refused to do so because it was not convinced that such arrests were a significant nationwide problem.¹⁴⁰

But what if such arrests are shown to be a significant problem within a particular state, and that state's people, through its legislature, recognize the problem by passing a statute prohibiting arrests for such offenses? Once the state recognizes the problem—that the state's interest in arrest is too small to justify it given the harm that it does—it also necessarily recognizes that these arrests are *unreasonable*. Arguably, the Court should give great deference to such a state legislative judgment.¹⁴¹ The Court should not, however, give the same deference to the legislature's judgment to provide no statutory remedy for violation of the state's no-arrest statute precisely because of the dangers outlined here: abuse based upon race and class. Even a locally powerful racial minority will be far less able to correct such statutory flaws at the state level precisely because that is a governmental level at which such a minority has little voice.¹⁴²

B. The Objection that the Fourth Amendment Will Vary from "Place to

139. 532 U.S. 318 (2001).

140. *Id.* at 353.

141. *Cf.* U.S. CONST. amend. XIII, § 2 (specifying that enforcement powers specifically belong to Congress).

142. *See* MILLER, *supra* note 25, at 8.

Place"

1. Fourth Amendment Precedent and Policy

But this approach seems counterintuitive for another reason: it creates a "local" Fourth Amendment, one which varies from place to place. As I explained in an earlier footnote, the Court's doctrine often permits a wide variety of local variations in Fourth Amendment outcomes.¹⁴³ Moreover, the Court has *defined* reasonableness as a balancing of state against individual interests,¹⁴⁴ and it seems logical that those interests can vary geographically. Of course, there are administrative costs associated with having local variations in rules, and those can be reasons to prohibit such variations in some instances.¹⁴⁵ But Moore and his amici offered compelling explanations for why such administrative costs are usually small.¹⁴⁶

Leading Fourth Amendment scholar Tracey Maclin has made similar points powerfully in a fictional dissenting opinion (written by him as a pretend member of the United States Supreme Court) to the Court's decision in *Whren*,¹⁴⁷ a case often understood as holding that subjective racial pretext by officers making a traffic stop is unconstitutional under the Fourth Amendment.¹⁴⁸ The defendants in *Whren* had argued not for a truly subjective test but rather that, if police materially deviated from the usual standards or practices of the local police department so that a reasonable officer under those circumstances would not have made the stop for the reasons given, the stop would be considered unreasonable.¹⁴⁹ The Court rejected this proposed test, partly because of concerns, similar to those in *Moore*, regarding local variations in police practices, and partly because of a fear that the test was in fact a cover for a subjectivity alien to the objective reasonableness inquiry required by the Fourth Amendment's text.¹⁵⁰

The first argument, however, says Maclin, "is not a serious objection."¹⁵¹ This is so, he explains, because current Fourth Amendment doctrine already permits considerable variation based upon local police

143. See *supra* note 14.

144. *U.S. v. Place*, 462 U.S. 696, 703 (1983).

145. *Virginia v. Moore*, 128 S. Ct. 1598, 1607 (2008).

146. See Brief for the Respondent, *supra* note 13, at 50–54.

147. See 517 U.S. 806 (1996).

148. See Tracey Maclin, *United States v. Whren: The Fourth Amendment Problem with Pretextual Traffic Stops*, in *WE DISSENT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS: TALKING BACK TO THE REHNQUIST COURT 90* (Michael Avery ed., 2009).

149. See *id.* at 97.

150. See *Whren*, 517 U.S. 815.

151. Maclin, *supra* note 148, at 110.

practices. Thus, the result in a Fourth Amendment case frequently “depends upon whether police are following departmental rules or standardized procedures.”¹⁵² Likewise, “[i]n other contexts, seizures that are exactly similar in scope and operational procedures are distinguished on constitutional grounds depending upon the intent of the police,” while in “still other cases, the legality of the search or stop sometimes turns on the presence or absence of minute factual detail.”¹⁵³ Explains Maclin,

For example, an inventory search of a car conducted in Alabama pursuant to standardized policy is permissible under the Fourth Amendment, while the same inventory search conducted in Arizona in the absence of standardized policy is impermissible. Similarly, under our precedents, a roadblock that seizes vehicles is permissible if established with the intent to detect drunk driving or to check the license and registration documents of the motorist. . . . Thus, the Court proffers an exaggerated and unconvincing objection when it states that the seizure in this case would be permissible in a jurisdiction that did not have a departmental policy against plain-clothes officers making traffic stops. . . . The law books are full of Fourth Amendment rulings that turn on fact-bound distinctions. The important point here is that Officer Soto’s actions deviated from the usual practice in the District of Columbia. What an officer would have done in New Jersey or Alaska is irrelevant in determining whether *this* stop was arbitrary.¹⁵⁴

Concerning the Court’s second argument—that the defendant’s proposed test was a cover for a purely subjective approach to constitutionality—Maclin raised a related argument. Maclin contends that it is true that the point of the proposed test is to discourage racial profiling; however, the proposed test itself is entirely objective: what were the usual standards and practices of the local department, and did these officers in this case substantially deviate from them?¹⁵⁵ The defendant’s test also assumes that there are, or, rather, must be, clearly identifiable departmental standards. But that, argues Maclin, is all to the good because such arbitrary searches and seizures are at the core of the definition of police conduct as “unreasonable.”¹⁵⁶

Maclin was, of course, writing about truly local variations in departmental policies. But if geographic variations at the municipal level can sometimes be consistent with the dictates of the Fourth Amendment, I can-

152. *Id.*

153. *Id.*

154. *Id.* at 110–11.

155. *See id.* at 110.

156. *See id.* at 109.

not see why state-level variations would not also be sometimes permissible. There are only fifty states but thousands of municipalities and smaller communities. Concerns about variation are thus much smaller when working with the state as a unit than the locality. Maclin's logic should still control.

2. Broader Considerations of Constitutional Law and Policy

Moreover, as Professor Mark D. Rosen aptly explains, the Court has often allowed geographic variations in constitutional rules involving particular communities.¹⁵⁷ Military bases, Native American reservations, and public schools are all local communities in which the precise scope of the controlling constitutional test varies in such diverse areas as free speech, due process, and search and seizure.¹⁵⁸ Some constitutional tests indeed expressly embrace local variation, so much so that, according to Rosen, "geographical nonuniformity of constitutional requirements . . . is a mainstay of American constitutionalism."¹⁵⁹ Perhaps the most obvious example of a test expressly embracing local variation is the test for whether speech is obscene, and thus unprotected under the First Amendment. Material is obscene if, taken as a whole, (1) it appeals to the prurient interest, (2) depicts or describes sexual conduct in a patently offensive way, and (3) lacks serious literary, artistic, political, or scientific value.¹⁶⁰ The first two prongs turn on each juror's assessment "of the average person in the community or vicinage from which he comes."¹⁶¹ In crafting this test, the Court expressly rejected a uniform national rule:

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.¹⁶²

Rosen does not argue that local variations should be the rule. Rather, he argues that a normative question must be posed whether the national community's interests are best served by some measure of local variation,

157. See generally Mark D. Rosen, *Our Non-uniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129 (1999).

158. See *id.* at 1134, 1138–41, 1149–61. Rosen concedes that the tribal court opinions are "quasi-constitutional" in nature, but that is a distinction without a difference for their logic and illustrative role is thereby unaltered. *Id.*

159. *Id.* at 1133.

160. See *Miller v. California*, 413 U.S. 15, 24 (1973).

161. *Hamling v. U.S.*, 418 U.S. 87, 104 (1974).

162. *Miller*, 413 U.S. at 32–33.

and, next, whether such variation is fairly administrable.¹⁶³ He complains that, though courts permit such variation, they consider the option too rarely and confine it unwisely to narrow contexts.¹⁶⁴

He offers guidance for answering these questions by exploring three techniques that courts use to localize rules. These techniques turn on understanding the difference between “rules” and “standards.” Rules articulate concrete factual circumstances that activate them or that are “otherwise determinate in the community.”¹⁶⁵ Standards rely on abstractions containing the underlying goal animating the law.¹⁶⁶ Constitutional doctrine, Rosen argues, develops in three stages: first, the courts translate the constitutional text into the goals it is meant to serve; second, they translate the goal into a legal test, usually in the form of a standard, though there might be rule-like components; and third, they derive true rules that stem from the standard.¹⁶⁷

Courts correspondingly achieve non-uniformity explains Rosen, in three primary ways. The first way, “tailoring,” applies the existing standard but with an eye toward the unique circumstances and needs of local communities.¹⁶⁸ The second way, “re-standardizing,” crafts an entirely new standard for a specific community or set of communities.¹⁶⁹ The third way, “re-targeting,” alters the goal of the constitutional provision in a way that embraces occasional local variation.¹⁷⁰ Rosen further argues that the case to be made for local variation is strongest where it is necessary to create or preserve norms that sustain the community and where the general society has a particular interest in that community’s continued existence.¹⁷¹

“Tailoring” aptly describes Maclin’s suggested approach: namely, that local community needs lead (or should lead) to varying local police practices that are relevant to whether a particular police action departing from those practices is “unreasonable” under the Fourth Amendment.¹⁷² Rosen himself offers a number of Fourth Amendment or Due Process search-and-seizure-related examples. One example that earned his approval involved a

163. See Rosen, *supra* note 157, at 1134.

164. See *id.* at 1134–35.

165. See *id.* at 1142.

166. See *id.* For a particularly enlightening analysis of standards versus rules, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 104 n.35 (1991).

167. See Rosen, *supra* note 157, at 1142–43.

168. *Id.* at 1144.

169. *Id.* at 1144–45.

170. *Id.* at 1145–46.

171. See *id.* at 1149–50.

172. *Id.* at 1144.

tribal court's redefining "probable cause" to take into account the "customary and traditional ways of the Hopi people."¹⁷³ Rosen was far more critical, however, of two more well-known search and seizure cases. In *Pratt v. Chicago Housing Authority*,¹⁷⁴ a court struck down a Chicago Housing Authority policy to conduct "sweep" searches without probable cause in a housing project that had suffered from intense violent crime, and where the vast majority of the residents enthusiastically supported the policy. Rosen argued that the overwhelming support of the residents indicated that there was no *local* reasonable expectation of privacy under the extreme conditions of violence, so the Fourth Amendment should not have barred the searches.¹⁷⁵ Rosen recognized that this might have meant that a majority within a local minority community would rule.¹⁷⁶ But, he maintains, the Court already recognizes that Fourth Amendment privacy expectations must be "reasonable," that is, must reflect community rather than idiosyncratic expectations.¹⁷⁷ Furthermore, majority views are only a component of any constitutional analysis and could be rejected if strong normative considerations counseled otherwise.¹⁷⁸

Rosen's second search and seizure example to which he took umbrage involved gang ordinances and anti-gang injunctions: for example, prohibitions on gang members "loitering" in certain neighborhoods.¹⁷⁹ Illinois courts struck down such an ordinance on void-for-vagueness grounds,¹⁸⁰ but California courts upheld an analogously-phrased anti-gang injunction.¹⁸¹ The Illinois courts, Rosen complained, worried about harassment of the innocent, including of joggers, those hailing taxis, and those stopping to get out of the rain.¹⁸² But to Rosen the relevant question was very different: whether the language was "sufficiently definite to persons living in a city thick with street gangs."¹⁸³ Rosen preferred the reasoning of the California Court, which began its opinion by emphasizing that "[a] contextual application of otherwise unqualified legal language may supply the clue to a law's

173. *Hopi Tribe v. Kahe*, 21 I.L.R. 6079 (Hopi Tr. Ct. 1994).

174. 848 F. Supp. 792 (N.D. Ill. 1994).

175. Rosen, *supra* note 157, at 1167-68.

176. *Id.* at 1168.

177. *Id.* at 1169.

178. *See id.*

179. *Id.* at 1173-76.

180. *See City of Chicago v. Morales*, 687 N.E.2d 533 (Ill. 1997), *cert granted* 523 U.S. 1071 (1998). The United States Supreme Court did ultimately strike down the *Morales* ordinance as void-for-vagueness, but its reasoning was not relevant to the local variation question. *Chicago v. Morales*, 527 U.S. 41 (1999).

181. *See People ex rel. Gallo v. Acuna*, 929 P. 2d 596 (Cal.), *cert. denied* 521 U.S. 1121 (1997).

182. Rosen, *supra* note 157, at 1174.

183. *Id.*

meaning, giving facially standardless language a constitutionally sufficient concreteness.”¹⁸⁴ Concluded the Court, prohibitions against “confronting,” “annoying,” or “harassing” were not constitutionally vague when read in the context of the local needs.¹⁸⁵ That context involved numerous instances of gangs threatening or actually physically harming residents. In this context, concluded the court, there is “little doubt as to what kind of conduct the decree seeks to enjoin.”¹⁸⁶

It does not matter whether I agree with Rosen’s positions concerning these specific examples. The point is that, where plausible, an inquiry concerning the wisdom of local tailoring should be made. Ultimately, normative considerations will determine the outcome of any particular inquiry, but courts should not be close-minded to making it. Furthermore, the more extreme technique of re-standardizing can be wise, as Rosen explains, where those with expert knowledge of local idiosyncracies make the case that a different standard should govern.¹⁸⁷ Finally, he argues that re-targeting, at least in the form of adding to the goals of the constitutional provision, often makes particular sense if the added goals include enhancing rights to participate in governance, or to train citizens for the character of political expression needed in a sound government.¹⁸⁸ These factors matter because political participation goes to the heart of the American idea of what it means to live in a republic.¹⁸⁹

My argument here is that the situation in *Moore* presented exactly the last circumstance: a need for local variation that would enhance citizens’ political participation, and would help train them in the character of skepticism about governmental use of force that helps citizens to be effective watchdogs against abuses.¹⁹⁰ To the extent that Fourth Amendment doctrine does not expressly embrace these citizen-participation and citizen-training goals, they should be added. I am not, however, necessarily arguing for re-standardizing because I believe the current standard, properly applied, can readily be tailored to meet community needs. The Fourth

184. *Gallo*, 929 P.2d at 612.

185. *Id.* at 612–13.

186. *Id.* at 613.

187. *See Rosen*, *supra* note 157, at 1176–78.

188. *Id.* at 1145–46, 1159–60; *see also Downey v. Bigman*, 22 I.L.R. 6145 (Navajo 1995) (reformulating Sixth Amendment jury trial right as embracing the goal of participatory democracy).

189. *See generally TASLITZ*, *supra* note 19, at 276 (arguing for an approach to privacy that is not based on judicial tyranny).

190. *See Andrew E. Taslitz*, *Slaves No More! The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. L. REV. 709 (1999) (discussing the nature of the modern “monitorial citizen”).

Amendment's text prohibits "unreasonable" searches and seizures.¹⁹¹ The Court has largely defined that text, at least where history provides no clear, determinate answer (and I believe that it rarely does) as meaning that reasonable actions are those where governmental need outweighs infringements on privacy, property, and locomotion.¹⁹² My argument is simply that there is good reason to believe that the state's interest in having no remedies when police violate local arrest statutes adopted by a state—effectively conceding their necessity under local conditions—does not outweigh the resulting harm to individuals and communities. If, however, a court were to insist that the impact on communities, rather than only individuals, is irrelevant, then I would re-standardize to take such community harms into account.¹⁹³

C. The Objection that Minorities Would Not Want Protection

I concede that in the space I have here I have not offered anything like a full defense of either of my last two points: that state legislative judgments of unreasonableness merit judicial deference, and that a "local" Fourth Amendment at least sometimes makes sense, having noted above that I leave such more complete defenses for another day. My argument thus does depend on certain assumptions that I find convincing but that others might not.

Yet, is it a valid assumption that in cities where minorities are in the majority, or where they are at least a sizeable portion of the local population, that the minorities will have enough political power to protect themselves in the area of criminal justice? (Remember that I have thus far accepted that assumption in this section, though solely for the sake of argument). My argument here has been only that minorities generally do *better* politically in the area of criminal justice at the local level than they do at the state level. But I have *not* argued that poor, urban racial minorities either control local legislative outcomes or even have an equal voice there.¹⁹⁴ Indeed, the empirical data cited here supports quite the opposite conclusion: that minorities' local victories are often (though not always) modest or ephemeral, albeit still far more significant than at the higher levels of government.¹⁹⁵

191. U.S. CONST. amend. IV.

192. See ANDREW E. TASLITZ, MARGARET L. PARIS, & LENESE C. HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE (3d ed. 2007).

193. See TASLITZ, *supra* note 19, at 259–60 (summarizing the argument that *group* voices and *group* harms are relevant to determining Fourth Amendment reasonableness).

194. See *supra* text and accompanying notes 22–34.

195. See MILLER, *supra* note 25, at 145–46, 165, 177. Explains Miller, "[t]he findings outlined here

Still, says the critic, my argument nevertheless suggests that local legislatures should do better than state or federal ones in controlling police abuses like those in *Moore*. But there is little, if any, evidence of local legislatures passing better remedial legislation concerning arrests for minor offenses than do the states.¹⁹⁶ One critic reading an earlier draft of this article argued that there was a good reason for this: poor urban racial minorities are more concerned about their own safety—about police *under*-enforcement than about police abuses or *over*-enforcement. Granted, said this critic, minorities, like majorities, prefer having both safety and respect, but, if forced to choose, minorities prefer safety every time, and they prefer it so strongly that, if they get it, they are not going to complain. Where they will complain is when they get neither safety nor fairness.¹⁹⁷

But that last scenario, I think, is not likely to be a rare circumstance.¹⁹⁸ Moreover, if minorities get neither safety nor fairness, that would seem to be an indication that they in fact lack sufficient local political power in the area of criminal justice in the first place. That lack of political power might indeed be what explains the lack of protective local legislation, not the

are not suggestive of a halcyon local political environment where there is widespread agreement on quality-of-life concerns or an environment for crime policy debates in Philadelphia and Pittsburgh that lacks the NIMBYism and other parochialisms that have been so well documented in local contexts.” See *id.* at 145–46. “On the contrary,” she continues, “citizen groups are often quarreling with legislators, the police, government agencies, and, often, each other.” *Id.* at 146. Moreover, research in other areas widely recognizes that poverty limits political participation, though Miller notes black political participation is more likely to increase somewhat where there are more black elected political representatives, something perhaps more likely to be true at the local than the state levels of government. *Id.* at 165. Yet even where citizens’ groups do get active locally, “they operate in a highly constrained environment, struggling to keep active under extreme conditions, including stress from losing loved ones to violence, fear of violence, and limited resources.” *Id.* Furthermore, neighborhood representatives tend to stress the needs of their specific neighborhood, which may differ from those of other neighborhoods, undermining broader local coalitions, while further class and race subdivisions within local minority communities exacerbate internal tensions. *Id.* at 166. On the severe limits on minority political success even at the local level, Miller finally notes:

[L]ocal crime politics is a mess of self-interested, frustrated groups eager to hold lawmakers’ feet to the fire in any way they can. Groups come and go sometimes without leaving any trace of their presence, save a few lines at a legislative hearing or a vague name imprinted in the mind of a local lawmaker. Many groups inject complaints and rage into policy debates with little sense of how to resolve them. Groups (and individuals) run up against recalcitrant public officials or simply make demands that administrators are unable to meet. Sometimes they insist on policy solutions that have demonstrably little impact but simply make them feel better. They demand more and more police while simultaneously criticizing police for inadequacy and corruption. They seem to know little about the policy solutions they want and even less about how to get them.

Id. at 177.

196. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

197. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

198. See Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003).

absence of a problem. Absent more detailed local empirical data, it may be hard to tell in any individual case whether silence is thus the result of *silencing*, or of comfort with the local status quo. Where there is silencing and where the harms done are severe, of course, local minorities may seek ways outside the formal legal system to make their pleas heard, as occurred when riots broke out in Cincinnati several years ago over decades of perceived police racial profiling and physical abuse.¹⁹⁹ Where avoidance of such violence and the protection of minorities against even subconscious racial bias in policing are at stake, we should err on the side of protecting against abuses instead of awaiting empirical data on the extent of minority political power in every locality in the nation. My critic ultimately agreed with a softer version of my thesis: namely, that, whatever the degree of local minority political power over policing, there is good reason to believe that there will be much less such power at the state level, and that might make state legislation providing a no-arrest right without a remedy a relevant Fourth Amendment concern. This softer version of my thesis still makes the point that the Court may have oversimplified the issue it faced in *Moore*.

D. The Objection that Minority and Majority Interests Coincide

A different sort of objection takes an opposite tack, arguing that it is unlikely that state legislation recognizing rights that on paper should protect minorities (but do not in practice) has anything to do with minority power or minority concerns in even rare cases.²⁰⁰ But this argument strengthens, rather than weakens, my thesis. If state-level legislation that may incidentally and theoretically benefit minorities passes only because of majority concerns about protecting themselves, then if that legislation in practice in fact does not protect minorities, minorities will lack the political clout to correct the problem. One major cause of such failures is legislation that creates a right without a remedy. Where that occurs, courts perform a helpful constitutional function if they provide the missing remedy, thus creating an incentive for the legislature to fix the problem. Of course, the exclusionary rule is not the only conceivable effective remedy. But I think it unlikely that existing state or federal civil rights or tort actions or police disciplinary actions will be effective deterrents. If a state created and implemented a more effective deterrent in its no-arrest legislation, then that

199. Marie McCain, *Grand jury indicts 63 in looting, violence*, CINCINNATI ENQUIRER, http://www.enquirer.com/editions/2001/04/21/loc_1grand_jury_indicts.html (Apr. 21, 2001).

200. See Chris Chambers Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws*, 88 MARQ. L. REV. 299 (2004).

might change the constitutional calculus, though that would ignore the value of functions of the exclusionary rule beyond deterrence.

A final objection might be that I have addressed a problem unlikely to arise much in the future. The argument is that majorities have caught on to the dangers of remedy-less statutes to their own privacy and locomotive interests and so will not make similar mistakes in this area. For example, North Carolina legislation permitting use of electronic speed passes at tolls bars using the electronic devices to pursue speeding or other legal claims.²⁰¹ The devices may only be used to ensure payment of tolls.²⁰² That protects everyone by limiting the legislation's scope. I am not sure I see why, however, majorities will extend such thinking to all motor vehicle code revisions. Everyone wanting to take certain routes must pay a toll, white or black, rich or poor. The physical obstacle of the toll both cannot be avoided. But not everyone violating motor vehicle laws will be arrested. If majority whites do not expect to be arrested, they have no incentive to change no-arrest legislation.

More importantly, however, I am not limiting my argument to *Moore*-like legislation. Rather, I wanted to create awareness that seemingly neutral legislation affecting privacy and locomotive rights may plausibly at times create a danger of race-and-class-based abuse in practice and that Fourth Amendment doctrine can affect the incentives for states to correct the problem. I also wanted to begin exploring the idea that the Fourth Amendment's meaning can sometimes vary geographically. *Moore* serves simply as an example to begin that conversation.

CONCLUSION

Accordingly, I do not claim that in this brief essay I have even come close to proving my case. Indeed, I probably have raised as many questions as the number to which I have suggested answers. But I do suggest that I have made a plausible case—a case sufficiently plausible to demonstrate that this one argument is a complex and troubling one overlooked by the Court and meriting attention. Indeed, I see *Moore* as but one example among many in which the Court either ignores issues of race and their links to class, or mentions but summarily dismisses them in its Fourth Amendment jurisprudence. It is important at least to take these issues more seriously.

Ultimately, my goal has simply been to serve as gadfly, to try to

201. N.C. GEN. STAT. §§ 20-63, 14-3.1.

202. N.C. GEN. STAT. § 20-63.

prompt new ways of thinking about the roles of the intersection of politics, race, class, and geography in interpreting the Fourth Amendment. That project is barely begun here and I hope will be continued by me and by others intrigued by the possibilities. If your interest is piqued, even if only to disagree with me, then my job is done.