When 2 or 3 Come Together

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ABSTRACT

This Article investigates policies that are responsive to crime in disadvantaged, urban neighborhoods from a community-based context. The vehicle is an analysis of a community-wide prayer vigil held in Chicago in May of 1997. The vigil resulted from a collaboration between the Chicago Police Department and hundreds of mostly African-American churches on Chicago's West Side. Strikingly, the local police district's commander facilitated the vigil. The Article explains the sociological and political significance of this collaboration by drawing on the "Chicago School" of urban sociology, and demonstrating theoretically and empirically the potential for collaboration, through the integration of key community institutions, to promote community capacity to resist crime and to complete residents' other goals and projects.

The Article then addresses constitutional questions. If collaboration between churches and the police, through religious activity,

enhances the community efficacy of poor minority neighborhoods, is there any way to reconcile the benefits of such activity with constitutional concerns about religious establishment? We focus on the extent to which African-Americans have been able to influence this jurisprudence through litigation rather than the internal structure of Establishment Clause jurisprudence. A review of the litigation reveals the particular nature of African-Americans' involvement in the development of Establishment Clause jurisprudence, and it demonstrates plainly the extent to which judicial sanction of church-state interaction has had, and continues to have, important racial consequences. African Americans, through representative litigating institutions, have consistently recognized the disparate impact of church-state partnerships; but the Court has never acknowledged the nonreligious implications of its Establishment Clause decisions. As a result, Establishment Clause jurisprudence is disconnected from the realities of disparate impact, and that is potentially problematic for African-American communities. Excavation of the realities of disparate impact is critical in assessing the extent to which modern church-state partnerships should be allowed, or even blessed, by the State.

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INTRODUCTION

This Article's title quotes biblical text from the Gospel of Matthew: "For where two or three come together in my name, there am I with them."[1] In May of 1997, these words were invoked as a kind of catchphrase by participants in a set of extraordinary undertakings between the Chicago Police Department (CPD) and hundreds of predominantly African-American churches on the West Side of Chicago (WSC). This collaboration began with a "call to action" by the local police commander and culminated in a community-wide prayer vigil in which groups of ten stood on designated street corners and prayed to end violence in their neighborhoods. On that day, not just two or three, but hundreds of West Side church members and police officers came together in prayer for their community.[2]

In using this phrase as our title, we mean to do more than highlight its use by participants in the joint police-church venture that is the subject of this Article. "When 2 or 3 Come Together" has sociological, political, and constitutional significance in the context of church-police collaboration in poor minority communities. As a sociological matter, the phrase brings to mind the potential for building a community's capacity to resist crime, and to complete other goals and projects of residents, through the integration of key community institutions. Its political significance flows from the connection between police and church leaders' deployment of this religious text and a subsequent change in WSC residents' perceptions of the legitimacy of local police in particular and local government in general. The constitutional significance of the phrase brings together the sociological and the political: if collaboration between churches and the police in religious activity enhances the community efficacy of poor minority neighborhoods, is there any way to reconcile the benefits of such activity with constitutional concerns about religious establishment? In other words, does the success of such ventures so depend on overt demonstrations of public religios-

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1. *Matthew* 18:20 (New International).
2. *See infra* notes 67-76 and accompanying text.

ity that the law and norms supporting separation of church and state are, perhaps hopelessly, transgressed?

Together, these three related themes constitute the central inquiry of this Article. Our primary project is to investigate policies that are responsive to crime in a community-based context, namely that of disadvantaged, urban neighborhoods. Accordingly, Part I begins by explaining the importance of community perspective in developing a crime prevention strategy, discussing specifically the notion of ecological crime policy. It then provides a sociological framework for understanding the ways in which policy can engender improved community social structure and norms of community-based crime resistance and reduction. In Part II, we describe the methods of collaboration between predominantly African-American churches in WSC and the Chicago Police Department, and tie that description to the sociological theory canvassed in Part I. Part II then offers empirical evidence supporting the theory that the sociological benefits previously described can be obtained through church-police collaborations. Part II concludes with an analysis of the factors that appear to be responsible for bringing the WSC prayer vigil to fruition.

Part III departs from sociological theory and explores the constitutional issues raised by church-police collaboration. Separation of church and state is a firmly rooted political value in the United States, and police-sponsored religious activity may be inconsistent with constitutional law, or at least constitutional *values*. Although we have no ready answer to this problem, we argue that a productive examination of this issue must consider both the racialized context in which contemporary Establishment Clause jurisprudence has arisen, and the relationship between African-American churches and the political efficacy of marginalized African-American communities. In this vein, Part III explores the extent to which the interests and needs of African-American communities have affected, and been affected by, judicial and political decisions regarding church-state collaboration.

I. CRIME AND COMMUNITY PERSPECTIVES

Crime as a problem is often conceptualized at the individual level. A "crime" occurs when one individual victimizes another individual. Because we typically think about crime in individual terms, criminal law policy inevitably focuses on fixing the particular individuals who commit crime as the primary process of crime reduction. Although a few criminal law policies address group criminality, such as accomplice liability or the crime of conspiracy, these laws are still animated by the notion of crime as a problem of individual offenders. It is, however, possible to approach crime policy differently. Rather than focus on what particular individuals do and aggregating up, one can conceive of crime problems from a community-level, or ecological, perspective. Ecological crime policy, in contrast to individual-level, offender-based policy, might focus on nonoffenders and promote third-party efforts to reduce opportunities for offenders to offend. Even more broadly, rather than focusing on penalizing lawbreakers, a community-based approach might seek to motivate entire groups of people, including potential offenders, to voluntarily abide by the law.

A. Community Social Organization and Collective Efficacy

In thinking about potential ecological crime policies, it is important to understand what it actually means to adopt a community-based perspective of crime. Clifford Shaw and Henry McKay pioneered the study of crime through a community lens.[3] Seeking to explain their earlier findings that juvenile delinquency remained high in certain areas of central cities despite population turnover, they rejected individualistic explanations of delinquency.[4] Instead, they looked to the processes by which law-breaking

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3. *See generally* CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENCY IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (rev. ed. 1969).

4. *See id.* at 315 ("It is clear from the data included in this volume that there is a direct relationship between conditions existing in local communities of American cities and differential rates of delinquents and criminals.... Delinquency—particularly group deliquency, which consitutes a preponderance of all officially recorded offenses committed by boys and young men—has its roots in the dynamic life of the community.").

behavior could be transmitted across generations.[5] They maintained that three structural factors—low economic status, ethnic heterogeneity, and residential mobility—led to the disruption of community social organization that, in turn, accounted for variation in crime and delinquency rates in a given area.[6] Because Shaw and McKay believed that the capacity of a community to maintain social control was a function of the structural context of that community, they looked to the community itself as the explanatory unit. Rather than try to figure out what motivated individuals to break the law, Shaw and McKay sought to explain why certain communities experienced high crime rates over time while others did not. Their methodology and focus on macro-level explanatory variables was a trailblazing approach at the time. Many of Shaw and McKay's contemporaries believed that associations between concentrations of African Americans and the foreign-born and crime in urban areas were due to the individual dispositions of group members, including genetic explanations for offending.[7] Shaw and McKay's theory explained why their colleagues were wrong.

Though Shaw and McKay's theory was ignored for quite some time, in the last fifteen years or so, it has made a comeback. Contemporary researchers have extended Shaw and McKay's work by solidifying the notion of community characteristics as distinct from the aggregated demographic characteristics of individuals who live in communities.[8] For example, in several studies researchers

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5. *See id.* at 174, 316-21.

6. Shaw and McKay found a substantial relationship between structural community factors and delinquency. They found a correlation of .89 between delinquency rates and Chicago community areas and a proxy measure for poverty—the number of families on relief. *Id.* at 146-47. They found a correlation of .60 between delinquency and population heterogeneity (percentage of foreign-born and Negro heads of families). *Id.* at 152-55. Both of these correlations are quite strong. *See* LAWRENCE C. HAMILTON, MODERN DATA ANALYSIS: A FIRST COURSE IN APPLIED STATISTICS 481 tbl.14.5 (1990) (explaining how to interpret the strength of correlations).

7. *See* ROBERT J. BURSIK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 25-27 (1993) (discussing contemporary scholarly disagreement over Shaw and McKay's findings and alternative explanations for high crime rates in urban areas).

8. The research is "ecological" rather than "psychological." A "fundamental assumption" of ecological research is that social systems "exhibit structural properties that can be examined apart from the personal characteristics of their individual members." BRIAN J.L. BERRY & JOHN D. KASARDA, CONTEMPORARY URBAN ECOLOGY 13 (1977).

have demonstrated that violence is associated with poverty and residential instability in neighborhoods, clarifying that violence is connected to neighborhood composition and not to the spatial distribution of individuals with particular demographic characteristics.[9] Additionally, researchers have recently made inroads in defining those characteristics that best enable social control and the realization of the common values of residents' community social organization.[10] In describing the continuous nature of community social organization, theorists have focused on three processes: (1) the prevalence, strength, and interdependence of social networks; (2) the extent of collective supervision by neighborhood residents and the level of personal responsibility they assume for addressing neighborhood problems; and (3) neighborhood residents' rate of participation in voluntary and formal organizations.[11] Their hypothesis is straightforward: when the processes of community social organization are prevalent and strong, crime and delinquency should be less prevalent, and vice versa.

A 1989 study by Robert Sampson and W. Byron Groves[12] very likely spurred the current revival of Shaw and McKay's work. Sampson and Groves examined the relationship between three components of community social organization—levels of teenage

9. *See, e.g.*, Douglas S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203 (1995) (describing how race and class segregation concentrates violent crime in poor, minority neighborhoods); Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, *in* 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 1, 48-63 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994) (summarizing the recent work applying social-ecological theory to explanations of the variation of criminal violence).

10. *See* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 20-21 (1996) (defining social organization as the ability of neighborhood residents to "maintain effective social control and realize their common goals"); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774, 777-82 (1989) (explaining that "social disorganization refers to the inability of a community structure to realize the common values of its residents and maintain effective social controls").

11. *See, e.g.*, WILSON, *supra* note 10, at 20 (offering these three characteristics); *cf.* Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, *in* CRIME AND INEQUALITY 37, 45 (John Hagan & Ruth D. Peterson eds., 1995) (identifying these factors in terms of formal and informal structural dimensions of community social disorganization).

12. Sampson & Groves, *supra* note 10.

peer group supervision, prevalence of friendship networks, and organizational participation—and crime, using the British Crime Surveys of 1982 and 1984.[13] They found that, in 1982, unsupervised teen peer groups had the largest overall effect on self-reported personal violence offending rates.[14] In the same year, unsupervised teen peer groups also had the largest overall effects on both victimization by mugging and stranger violence.[15] Local friendship networks were substantially and negatively related to robbery, and organizational participation had significant inverse effects on both robbery and stranger violence.[16] The magnitude of the effect of formal organization participation on stranger violence and total crime victimization was not as large as the effect of supervision of peer groups and friendship networks; but the direction of the effect clearly supported theoretical predictions.[17] Perhaps the study's most important finding was that the community organization factors tested had a much larger impact on crime than did socioeconomic status.[18] There is every reason to believe that these findings are extremely robust. Sampson and Groves's work recently was replicated by Lowenkamp and his colleagues using the 1994 British Crime Survey. The replication demonstrated the strong mediating effects of local friendship networks, unsupervised teen peer groups, and organizational participation on the relationship between structural characteristics of neighborhoods and crime.[19] Lowenkamp and his colleagues also found that, after controlling for social disorganization measures, there was no statistically significant prediction of victimization, confirming Sampson and Groves's important result.[20]

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13. For a description of the data and methodology behind the study, see *id.* at 774-77. Note that the analysis in this piece potentially suffers from the problem described above because it attempts to characterize community-based processes through aggregated individual-level data rather than through more direct measures of community characteristics.

14. *See id.* at 792.

15. *See id.* at 788 tbl.2, 789 tbl.3.

16. *See id.* at 789 tbl.3.

17. *See id.*

18. *See id.*

19. *See* Christopher T. Lowenkamp, Francis T. Cullern & Travis C. Pratt, *Replicating Sampson and Groves's Test of Social Disorganization Theory: Revisiting a Criminological Classic*, 40 J. RES. CRIME & DELINQ. 351, 366 (2003).

20. *Id.* at 361.

The astute will recognize, however, that the community social organization processes identified by scholars do not have to be activated in favor of norms that support law-abiding behavior. They are simply a kind of infrastructure. For this reason, one of us has used the metaphor "norm highways" to describe these processes in other work.[21] The metaphor helps to clarify the fact that the social infrastructure of a community, by itself, can either inhibit or support crime. Whether infrastructure supports a community's efforts to resist crime will depend on the kinds of norms that are transmitted among individuals who live in a neighborhood. Like autos on an actual highway, norms can travel in any direction on "roads" of neighborhood social infrastructure. Thus, the "norm highways" of neighborhoods may facilitate crime as well as prevent it.[22]

It is not enough to point to social processes, for such processes may simply represent untapped potential to get things done. There is an important normative aspect of effective communities that must be considered. Ideally, communities exhibiting strong ties, high levels of organizational participation, and high levels of teen supervision also will be committed to activating these resources for the good of the community.

Researchers in the Project on Human Development in Chicago Neighborhoods (PHDCN) have developed a concept to capture normative dimensions of community efforts to resist crime. The PHDCN researchers coined a term, "collective efficacy," that is defined as neighborhoods' ability to realize the common goals of residents and maintain effective social control.[23] They found that collective efficacy explains a large component of the variation of

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21. *See* Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391, 395 (2000); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV 669, 676 (1998).

22. Sociologist Mary Pattillo-McCoy has established empirical support for the notion that tight social networks sometimes support criminal conduct on a community-wide basis. In researching Groveland, a black middle-class community in Chicago, Pattillo-McCoy found that dense social ties "positively affect[ed] ... informal and formal supervision of youth.... But ... Groveland's dense networks similarly allow for organized criminal enterprises." MARY PATTILLO-MCCOY, BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS 70 (1999).

23. *See* Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918-19 (1997).

violence in Chicago neighborhoods.[24] PHDCN researchers controlled for the effect of prior crime through a statistical technique.[25] They found, even after controlling for prior homicide, that collective efficacy remained statistically significant and negatively associated with homicide.[26] This correction is a critical one because in neighborhoods with high crime rates, residents may be unwilling to engage in acts of social control, and this unwillingness in turn facilitates criminal activity.[27]

To measure collective efficacy, PHDCN researchers used particularly innovative methods. Survey respondents were not asked about their *own* practices and opinions; instead, they were asked to assess what happened in their *neighborhood*. Specifically, researchers tapped into residents' assessments of neighborhood networks and practices, as well as their opinions about the extent to which people in the neighborhood shared the same values and trusted one another.[28] In this way, the researchers identified important community characteristics, paving the way for true ecological research.

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24. *See id.* at 918.

25. *See id.* at 922.

26. *Id.*

27. *See id.*

28. *See id.* at 919-20. PHDCN researchers measured practices of informal social control through a five-item Likert-type scale:

> Residents were asked about the likelihood ... that their neighbors could be counted on to intervene [when] ... (i) children were skipping school and hanging out on a street corner, (ii) children were spray-painting graffiti on a local building, (iii) children were showing disrespect to an adult, (iv) a fight broke out in front of their house, and (v) the fire station closest to their home was threatened with budget cuts.

Id.

To measure indicia of neighborhood social cohesion and trust, PHDCN researchers asked respondents how strongly they agreed that: (i) "people around here are willing to help their neighbors," (ii) "this is a close-knit neighborhood," (iii) "people in this neighborhood can be trusted," (iv) "people in this neighborhood generally don't get along with each other," and (v) "people in this neighborhood do not share the same values." *Id.* at 920. The last two items were reverse-coded. *Id.* The two measures of informal social control and social cohesion were then combined into one measure—collective efficacy. *Id.*

B. Building Social Capital

In communities that demonstrate the capacity to "get things done," two dimensions, one structural and the other normative, work together. The structural dimension is captured by measures of community social organization, whereas the normative dimension is captured by measures of collective efficacy. These two dimensions are species of social capital. James Coleman has described the concept of social capital: "Social capital ... comes about through changes in the relations among persons that facilitate action.... Just as physical capital and human capital facilitate productive activity, social capital does as well."[29] According to Coleman, social capital is realized through relationships.[30] In an attempt to clarify the sometimes expansively defined idea of social capital, Sampson, Morenoff, and Earls distinguish the structural dimension of social capital from the normative dimension.[31] In their view, community structural characteristics such as friendship networks and partici-pation in community organizations are potential resources that a community might use.[32] In contrast, a community-wide norm of adult supervision of neighborhood children for the purpose of social control is a positive goal-directed task that "activates" the resource potential found in friendship networks.[33]

To see how community structural and normative social capital dimensions work together, consider the social process dimensions already discussed. When adults in a community work together to promote a community-wide expectation that each will supervise the community's children collectively, increased supervision of youth peer groups should follow.[34] A community-wide expectation of youth

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29. James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S100-01 (Supp. 1988) (introducing and defining the concept of social capital, and noting that "a group within which there is extensive trustworthiness and extensive trust is able to accomplish much more than a comparable group without that trustworthiness and trust").

30. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 304 (1990).

31. *See* Robert J. Sampson, Jeffrey D. Morenoff & Felton Earls, *Beyond Social Capital: Spatial Dynamics of Collective Efficacy for Children*, 64 AM. SOC. REV. 633, 634-36 (1999).

32. *See id.* at 635.

33. *See id.*

34. *See* Coleman, *supra* note 29, at S102-03 (pointing to mutuality of obligation as an example of social capital); *see also* Sampson, Morenoff & Earls, *supra* note 31, at 647 tbl.5 (presenting a statistical model suggesting that neighborhood residents are more actively

supervision will not be meaningful unless substantial numbers of the community's adults believe they are obligated to participate. One can imagine many ways of inculcating such a norm, but an obvious way to encourage community-wide supervision of children is to threaten a social sanction for the failure to do so.[35] For such a threat to be credible, however, there must be connections, or social networks, among adults in a community that facilitate transmission of the norm from person to person. Without networks connecting adults, it is too easy for any one adult in the community to free-ride on the contributions of his neighbors without fear of sanction. All of this means that local friendship networks should reinforce the supervision of teen peer groups, which in turn leads to lower levels of both victimization and offending.[36]

Friendship networks might also create another form of social capital by facilitating information transmission among a community's residents.[37] Information channels may be especially important to residents of crime-prone neighborhoods in central cities. As noted elsewhere, "[u]rbanization is almost synonymous with densely populated communities, and population density can be a barrier to social capital formation among city-dwellers."[38] The problem for many city-dwellers is not that they have weaker acquaintance networks than non-city dwellers; rather, the problem is one of proportion:

> The networks that a city-dweller creates typically have less potential to include all of the individuals in a community with which a resident will come in contact. Put simply, high population density increases the number of strangers. Friendship networks ... make it easier for residents to identify who "belongs" and who does not.[39]

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involved in child supervision when others around are similarly involved).

35. *See* COLEMAN, *supra* note 30, at 244, 245 fig.10.1 (explaining the relationship between the emergence of a norm and sanctions).

36. *See, e.g.*, Sampson & Groves, *supra* note 10, at 788-89 (demonstrating that supervision of teen peer groups is associated with lower crime rates).

37. *See* Coleman, *supra* note 29, at S104.

38. Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 584 (1997).

39. *Id.*; *see also* CLAUDE S. FISCHER, TO DWELL AMONG FRIENDS: PERSONAL NETWORKS IN TOWN AND CITY 162 (1982) (discussing statistical evidence showing urbanites associate with approximately the same number of locals as residents of more rural locales, and noting that

Participation in formal organizations is another community structural factor that, theoretically, should reinforce the crime-reduction benefits of both teenage supervision and friendship networks.[40] Local formal organizations provide community residents with important opportunities to create overlapping relationships. Overlapping relationships subject the residents of a community to expectations and obligations in multiple contexts, and these obligations and expectations often are transferable across different contexts. The existence of multiple, overlapping relationships among a community's residents has important implications for crime prevention.[41] Friendships among neighbors that are reinforced through individual participation in church groups, PTAs, community policing organizations, and the like are very likely to increase supervision of teenage peer groups in a community and increase information transmission.

Recent empirical work refines the relationships between community social capital and crime reduction. Using PHDCN data, which measures community characteristics in a more sophisticated fashion than the British Crime Surveys, Jeff Morenoff, Robert Sampson, and Stephen Raudenbush demonstrated empirically that friendship networks, neighborhood organizations, and participation in voluntary associations appear to reduce violence through the promotion of collective efficacy.[42] The authors used sophisticated statistical models to disentangle the independent effects on homicide of structural dimensions of social capital, such as social ties, and normative dimensions of social capital, such as collective

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this makes urban residents less likely to be tied to any other given member of their locality than small-town residents).

40. Meares, *supra* note 38, at 584; *see also* Pamela Paxton, *Is Social Capital Declining in the United States? A Multiple Indicator Assessment*, 105 AM. J. SOC. 88, 100 (1999) (arguing that formal membership in voluntary associations often "provides further resources to solve collective problems and pursue specific goals in a large society").

41. *See* Coleman, *supra* note 29, at S108 (explaining the concept of appropriable social organization); Marvin D. Krohn, *The Web of Conformity: A Network Approach to the Explanation of Delinquent Behavior*, 33 SOC. PROBS. (SPECIAL ISSUE) S81, S83 (1986) (calling this process "multiplexity" and explaining that "if a person interacts with the same people in differing social contexts it is likely that his behavior in one context will be affected by his behavior in another").

42. *See generally* Jeffrey D. Morenoff, Robert J. Sampson & Stephen W. Raudenbush, *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517 (2001).

efficacy.[43] In essence, the authors found that dense networks alone are neither necessary nor sufficient to explain homicide rates; instead, networks appear to create the capacity for neighborhood residents to exert social control.[44] The authors present statistical models demonstrating that social networks are positively and significantly associated with collective efficacy.[45] Similarly, the models show that organizations and voluntary associations appear to operate indirectly on homicide by fostering collective efficacy.[46]

For neighborhood residents to use their capacity to exert social control, there must be a willingness on their part to activate this resource. The willingness to do this depends in large part on solidarity and mutual trust among neighbors—a trust and solidarity that is undermined by diverse and competing subcultures. Qualitative, ethnographic research best demonstrates the ways in which conflicting normative codes can undermine the extent to which residents of some communities must overcome high barriers to promote values consistent with law-abiding behavior.

In two ethnographic works, Elijah Anderson compellingly recounts how the weakened structural fabric of an urban community called "Northton" accompanied the transmission of two different sets of norms among residents of the community.[47] Anderson describes in great detail the clash between "decent" values (norms associated with hard work, family life, the church, and law-abiding behavior) held by some families in Northton and "street" values (norms associated with drug culture, unemployment, little family responsibility, and crime) held by others.[48] A central theme in Anderson's story of Northton is the gradual breakdown of a

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43. *See id.*

44. *Id.* at 548-49.

45. *See id.* at 550 tbl.4.

46. *See id.; cf.* Ruth D. Peterson, Lauren J. Krivo & Mark A. Harris, *Disadvantage and Neighborhood Violent Crime: Do Local Institutions Matter?*, 37 J. RES. CRIME & DELINQ. 31, 48-52 (2000) (finding that recreation centers, but not libraries or retail establishments, have a crime-reducing impact in extremely disadvantaged areas).

47. *See* ELIJAH ANDERSON, STREETWISE: RACE, CLASS, AND CHANGE IN AN URBAN COMMUNITY 56-76 (1990) [hereinafter ANDERSON, STREETWISE] (describing the impact of wider economic changes on the African-American community in Northton and introducing the notions of "decent" and "street" orientations); *see also* ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY 35-65 (1999) [hereinafter ANDERSON, CODE] (comparing "decent" families to "street" families).

48. *See* ANDERSON, STREETWISE, *supra* note 47, at 56-76.

community tradition involving the transmission of decent values by neighborhood "old heads" to neighborhood youngsters.[49] This breakdown accompanied the constriction of employment opportunities for the young, increased neighborhood transience, and increased crime.[50]

Anderson's ethnography of Northton reflects the predictions of social organization theory. As social networks in Northton weakened and contracted due to residential instability, unemployment, and increased drug use, a rival set of streetwise values flourished.[51] The streetwise norms that Anderson describes are at once a product of affirmative reinforcement of lifestyles that focus on drug use and crime, and a product of the vacuum created by the breakdown of broad social networks. For example, when work in the formal labor market is not available for significant numbers of a community's residents, a value system may arise among the jobless that affirms the pursuit of economic opportunities outside of the formal labor market and in the informal labor market, or even in the illegal drug economy.[52] Furthermore, when social networks in a community are weak and disparate, it becomes more difficult for the community as a whole to emphasize the importance of seeking work in the formal labor market.

Anderson's finding, that streetwise values did not completely overtake decent values in Northton, helps us understand the operation of collective efficacy in a community. While many in Northton continued to adhere to decent values, they still had to reckon with streetwise values in their daily lives because those values predominated among the community's youth and in public spaces.[53] Of course, any time there are competing value systems in a community, it is harder to establish a common value set—especially a value

49. *See* ANDERSON, CODE, *supra* note 47, at 204-05; ANDERSON, STREETWISE, *supra* note 47, at 69-76.

50. *See* ANDERSON, STREETWISE, *supra* note 47, at 56-98 (describing the relationship between economic changes in the Northton community and the attendant vulnerability of the community to crime—especially drug offenses).

51. *See id.*

52. *See* WILSON, *supra* note 10, at 66-72 (explaining that, in communities in which joblessness is prevalent, residents may internalize modes of behavior that are inconsistent with preference for work in the formal labor market, which is characterized by greater regularity in hours and consistency than informal and illegal labor markets).

53. *See* ANDERSON, CODE, *supra* note 47, at 98-106 (explaining how "decent" kids are impelled to "code-switch" and adopt "street" personas in public).

directed toward affirmative collective efforts to resist crime as opposed to norms that support withdrawal from public life. The problem is magnified, however, when the competition takes on a generational-conflict aspect.

For example, promoting a norm of community-wide supervision of teen peer groups is likely to be more effective when the level of social capital among adults exceeds that among teens in the community. If parents cannot count on one another to supervise each other's children, then individual parents have to counteract the norms developed by groups of teens—norms that may promote law-breaking behavior. Unfortunately, when the social capital among teens is high, which often is true in the communities with street gangs, individual parents face a dilemma. Each parent alone has little power to counteract the power of the teen group. Moreover, the power of the teen group may make the individual parent's task more intimidating, causing her to exert even less supervisory control than she otherwise would. This is, of course, a very general description of some of the mechanisms that underlie the withdrawal of Northton's "old heads" from community life.[54]

In her book, *Black Picket Fences*, Mary Pattillo-McCoy's description of "Groveland," a black middle-class Chicago community, stands in stark contrast to Anderson's description of disadvantaged Northton.[55] Pattillo-McCoy provides a rich account of the multiple ways that Groveland's residents exert social control over youth. For example, she recounts a local school council meeting in which one attendee stated, "[w]e have to take responsibility for all of our children. The same children that are beating up on our children are also our children. They go right around the corner when they go home. They are our children."[56] This statement captures the expression of collective efficacy through a particular institutional process, a school council meeting.

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54. For a quantitative demonstration of the dynamics described here, see Sampson, Morenoff & Earls, *supra* note 31, at 637 (finding that residents of disadvantaged neighborhoods have much lower expectations for shared intervention on behalf of children in public settings, even where the level of personal ties is not affected by concentrated disadvantage in neighborhoods).

55. *See* PATTILLO-MCCOY, *supra* note 22.

56. *Id.* at 78.

Pattillo-McCoy goes on to describe how participants at community meetings of block clubs, police beats, church groups, and the chamber of commerce, among others, devote a great deal of time to the issue of youth supervision.[57] Gangs and "gang-bangers" are the top concerns of Groveland residents.[58] In an effort to address gang issues, citizens employ strategies such as removing pay phones from the street, removing gang graffiti from buildings, hiring police monitors for playgrounds, and providing activities for at-risk youth.[59] Pattillo-McCoy's description provides real-life examples of the processes that Sampson and his colleagues describe through statistics. Yet Pattillo-McCoy also demonstrates how strong social networks can support "corporatized" gang activity as well. Pattillo-McCoy explains that Chicago's largest street gang, the "Black Mobsters," had a strong presence in Groveland and dominated a Groveland park fieldhouse and other parts of the neighborhood;[60] but she describes how the top "Black Mobster," Lance, is fully integrated into the community.[61] Lance makes sure that Groveland is clean because of self-interest in protecting his family, and due to the numerous activities of residents described above.[62] Lance is an agent of social control in the neighborhood, and the residents know it.[63] Pattillo-McCoy's ethnography demonstrates that, in the midst of seemingly effective community social organization, those involved in somewhat serious crime can exist quite peacefully alongside those who abhor crime.

C. Ecological Crime Policy

This review of the sociological literature affirms that crime is a community problem that can be usefully addressed from a community-based perspective. For example, one of us described

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57. *See id.* at 80-82.

58. *See id.* at 80.

59. *See id.* at 79-82.

60. *See id.* at 83, 85; *see also* Jeffery Fagan, *Gangs, Drugs and Neighborhood Change, in* GANGS IN AMERICA 39 (C. Ronald Huff ed., 2d ed. 1996) (describing "corporate gangs" as those gangs with elaborate, cohesive leadership structures that exist to make money and that mimic business in rules and group dynamics).

61. *See* PATTILLO-MCCOY, *supra* note 22, at 85-90.

62. *Id.* at 86.

63. *Id.* at 85-90.

elsewhere methods of designing policing strategies to promote crime-preventive aspects of community social organization.[64] Taking the community-based perspective seriously implies policy directed at third parties—*in addition* to offenders—and designed to enhance the likelihood that a community's crime rates will decrease. Thus, whereas crime policies such as reverse sting operations or anti-gang loitering ordinances may be particularly potent mechanisms for addressing the community-based nature of crime,[65] the theory outlined above makes clear that the police, or the state more generally, likely can promote community social organization through more direct mechanisms—mechanisms that create networks among individuals in a neighborhood or between key institutions.[66] For example, one of the specific charges of the City of Chicago's CAPS (Chicago Alternative Policing Strategy) Implementation Office is to help neighborhood residents start block clubs. The CAPS Office considers block clubs to be one of the building blocks of successful community policing in Chicago. The CAPS Office believes that these groups are effective mechanisms for focusing residents' attention on area crime problems. But, it is also true that the block club can function as an institution that brings individuals together who would not otherwise have an incentive to interact. In this way, policy that promotes block clubs also promotes opportunities for networking and establishing norm highways.

The next Part describes the WSC prayer vigil. We argue that the vigil helped to create a species of social capital in the form of connections among *institutions*, as distinct from individuals, that traditionally were not connected with one another. These connections, we think, could be activated in support of community efforts to reduce and resist crime.

II. THE CHICAGO PRAYER VIGILS

In May of 1997, the first community-wide prayer vigil to end violence against children was held on Chicago's impoverished West

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64. *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 217-27 (1998) (explaining how reverse drug stings and antigang loitering ordinances potentially could support community social organization).

65. *See id.* at 220-26.

66. *See supra* Part I.A.

Side.[67] The structure of the vigil was somewhat unique. Participants stood in groups of ten on designated corners—the same corners where lookouts often hawked contraband by calling out "Rocks and Blows!"—and prayed for peace in the community.[68] Following the prayer vigil, the group was joined by thousands of other community residents who went to a large park for a "praise celebration," which included music from a four-hundred-member gospel choir, food, and inspirational speeches.[69] While the event's size made it unique, the number of participants in the day-long activities was not its most remarkable feature. What was most remarkable about the vigil was that its key instigator was the highest-ranking police officer of the Harrison District, Commander Claudell Ervin.[70]

Commander Ervin's involvement in the West Side prayer vigil was the product of a vision he had received approximately six months before the event.[71] In the vision, the Commander saw community residents standing in groups of ten on street corners:

> The Lord blessed me in such a mighty way when he gave me visions of ten people on the corner. I could never understand why ten people. The word says where two or three are gathered, I'm in their midst. Why ten? But then on prayer vigil day, I see why ten. Ten makes a statement on that corner. Two, three

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67. The vigil covered an approximately fifteen-square-mile area bordered by North, Ashland, Cicero, and Austin Avenues. For media accounts of the day's events see Gary Marx, *Cop Believes West Side Has a Prayer: Harrison Commander Uniting Thousands for Vigil Against Violence*, CHI. TRIB., May 2, 1997, at 1; Dave Newbart, *Residents Take Faith to Streets for Vigil: Participants Pray for West Side Peace*, CHI. TRIB., May 4, 1997, at 1.

68. Detailed information about the first vigil was gleaned through numerous interviews of participants and key organizers. The initial interviews with key vigil participants were conducted on May 22, 1997; June 11, 1997; and June 12, 1997. Following these initial interviews, a list of potential interviewees was constructed by reviewing sign-in sheets from the planning and evaluation meeting for the first prayer vigil. Additionally, fliers were distributed in local churches and interviewees were asked about others who might be interested in talking about the vigil. Finally, those who agreed to an interview were offered a small monetary compensation (ten dollars). Fifty-five interviews were conducted between 1997 and 1998. Forty-one of these interviews were with individuals who represented institutions. All interviews were conducted after promises of confidentiality according to Human Subject Research Regulations at the University of Chicago, so the interviewees' names, with the exception of one who granted express permission, will not be revealed in this Article. The description of the 1997 WSC prayer vigil is taken from these interviews.

69. *See supra* note 68.

70. Marx, *supra* note 67.

71. *Id.*

people, well, you know, what you all doing? You all really ain't doing nothing. But ten folks on the corner covers the whole corner. You got to go around them.[72]

To act on the vision, Commander Ervin sent letters to hundreds of churches in the Harrison Police district, extending an invitation to church leaders to attend a meeting at the police district head-quarters.[73] That the commander invited church leaders to meet with him was not particularly noteworthy; community policing in Chicago was and continues to be premised, at least in part, on outreach to key neighborhood leaders,[74] and churches are central to disadvantaged African-American communities in Chicago and elsewhere. Indeed, it is not a stretch to say that churches are *the* central institution in these communities. As sociologist Sandra Barnes has commented, "the historic Black Church has been found to be an important economic, political, social, and psycho emotional buffer for African-Americans."[75] In light of the key role of churches in WSC, it made sense for Commander Ervin to seek out church pastors.[76] In fact, interviews with key participants and institutional representatives revealed that Ervin's immediate predecessor, Commander Bolling, also had tried outreach to church leaders in the Harrison District. Bolling's efforts, however, proved unfruitful. Bolling attempted to involve area church leaders in community policing by inviting them to attend meetings in large Baptist churches in the Harrison District. Bolling reasoned that, as the Baptist denomination was the most prevalent among churches in the Harrison Police District, he could attract a large number of ministers by cultivating ties with the leaders of the most established

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72. Interview with Claudell Ervin, Commander, Chi. Police (May 22, 1997). Commander Ervin gave his permission to be identified in any published work associated with the WSC prayer vigils.

73. *Id.*

74. *See* WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 145-46 (1997) (explaining that churches constituted a "separate analytic focus" given that churches were key in several of the prototype districts).

75. Sandra L. Barnes, *Priestly and Prophetic Influences on Black Church Social Services*, 51 SOC. PROBS. 202, 202 (2004).

76. For a multidimensional discussion of the social role played by black churches, see C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990). *See also infra* text accompanying notes 127-33 (charting the close connection between religion and African Americans).

churches. However, the only pastors who typically showed up to the meetings Bolling planned were the pastors of the host churches.

Commander Ervin's strategy to attract local ministers differed from Commander Bolling's approach. Ervin invited the pastors from various denominations to attend a meeting at *police headquarters* as opposed to church buildings. And, interestingly, he signed the invitation letter with an Old Testament scripture. In contrast to the poorly attended meetings convened by Commander Bolling, Ervin's meetings were well attended by area ministers. It was during these meetings at the Harrison District Headquarters that the police and pastors collaborated to plan a prayer vigil.

A. The West Side Vigil as an Example of a State-supported Social Organization

The church/police collaboration that occurred in several WSC communities[77] beginning in 1997 presented such a poignant example of a state-supported community social organization endeavor that it prompted a study. Over two years, multi-faceted data was collected to assess the impact of two community-wide prayer vigils facilitated by the police.[78] The goal of the research was to explore whether the potential benefits of the theories of social organization

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77. WSC is comprised of seven local Chicago Community Areas either in whole or in part: West Garfield Park, East Garfield Park, Austin, Humboldt Park, West Town, Near West Side, and North Lawndale. According to 2000 Census Data, the Eleventh District accounts for 2.8% of the total population of Chicago and ranks nineteenth among the twenty-five districts in terms of population. See RESEARCH & DEV. DIV., CHI. POLICE DEP'T, BIENNIAL REPORT 1999/2000, at 11 fig.3c. In 1997 there were sixty-nine murders in the Eleventh District, more than in any other district. See RESEARCH & DEV. DIV., CHI. POLICE DEP'T, ANNUAL REPORT 1997, at 16 fig.6c. The same was true in 1998, 1999, and 2000. See RESEARCH & DEV. DIV., CHI. POLICE DEP'T, ANNUAL REPORT 1998, at 10 fig.4c (noting that in 1998, the Eleventh District had seventy-one murders, 10.1% of the city's total); RESEARCH & DEV. DIV., CHI. POLICE DEP'T, BIENNIAL REPORT 1999/2000, at 12 fig.4a (noting that in 1999, the Eleventh District had seventy-nine murders, 12.3% of the city's total); *id.* at 13 fig.4b (noting that in 2000, the Eleventh District had sixty-seven murders, 10.6% of the city's total).

78. Data was collected through four instruments administered between 1997 and 1999: (1) Two mail surveys administered in 1997, after the first prayer vigil, and in 1998, after the second, in an attempt to gauge the level of institutional participation and the impact on institutional linkages because of the vigils; (2) a survey of the population of police officers in the Harrison District; (3) a randomized phone survey of 506 respondents from the WSC area; and, (4) fifty-five open-ended interviews (fourteen individual-level and forty-one institutional-level) designed to obtain first-person descriptions of WSC, to probe attitudes toward the community, relevant institutions, and the prayer vigil, and to get a sense of the vigil's impact.

and collective efficacy discussed in Part I could be realized on the ground. The study design was constructed keeping in mind that improved relations between churches and the police can assist neighborhood residents concerned about crime in three related, yet structurally different, ways. The first structural path concerns the vertical relationship between the police and the church. The second structural path emphasizes improvements that flow from tighter and more prevalent horizontal relationships among key community institutions. And the third path involves the individual relationships that neighborhood residents have with one another. This analysis reflects an application of Albert Hunter's three-level schema of social control.[79]

Hunter asserts that community social control occurs at three levels: private, parochial, and public.[80] The private level is the most basic, and is comprised of an individual's family and friends—those with whom the person is closely connected. Social control is achieved informally through mechanisms such as support and mutual esteem at one end, and ridicule, criticism, and even ostracism at the other.[81] The next level of social order is the parochial.[82] Individuals at this level, while connected, do not have the same sentimental attachments that are found at the private level.[83] As a result, there is a much greater likelihood for the formation of important "weak ties" at the parochial than the private level.[84] Hunter points to the public level as the final level of social control. The public level comprises resources external to the community such as bureaucratic agencies

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79. See Albert Hunter, *Private, Parochial and Public Social Orders: The Problem of Crime and Incivility in Urban Communities, in* THE CHALLENGE OF SOCIAL CONTROL: CITIZENSHIP AND INSTITUTION BUILDING IN MODERN SOCIETY: ESSAYS IN HONOR OF MORRIS JANOWITZ 230, 230 (Gerald D. Suttles & Mayer N. Zald eds., 1985).

80. *Id.*

81. *See id.* at 232-33.

82. *See id.* at 233-34.

83. *See id.*

84. These ties are "weak" because the relationship between two people weakly tied is less intense than the relationship between close family and friends. Mark Granovetter, who wrote the classic article on the topic, has shown, however, that such "weak ties" may be critical for job searchers. *See* Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1369-73 (1973); *see also* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 319-21 (2000) (emphasizing the economic value of weak ties, which may be more likely to lead to job opportunities for those whose strongest ties are within economically disadvantaged communities).

like the police and other instrumentalities of government.[85] The major difference between this level and the other two is that the public level of social control relies uniquely on its legitimate monopoly on coercion and force to produce order. Hunter describes the criminal justice system as the "ultimate" source of social control.[86]

The public level can legitimately use force to produce order; however, this force alone cannot produce society's desired level of social control because of resource limitations and other formal constraints, such as constitutional law.[87] Social control at the public level is produced through formal sanctions—the threat or actual imposition of coercion; therefore, compliance at this level is produced through instrumental means. To produce an effect, instrumental means of producing compliance depend, to a large extent, on an individual's fear of sanction.[88] If one assumes that people will comply with a rule only if the threat of coercion is present, then it follows that instrumental methods of social control are contingent upon the commitment to increasing the use of force if necessary. This means that instrumental means of producing compliance can be costly.[89] For example, if deterrence is achieved by maintaining a certain probability of detection of rule-breakers, then authorities must be willing to devote resources to maintain or increase the level of police to ensure they meet the requisite probability of detection.

In contrast to social control produced at the public level, social control produced at the private and parochial levels is generated through informal means and, therefore, is more likely to utilize normative rather than instrumental methods of compliance.[90] Given the limitations of formal social control, social control often is produced informally and normatively at the private and parochial levels.[91] Individuals voluntarily conform to others' expectations by internalizing community norms.[92] In some situations, the compliance produced through the intermeshing of the personal and parochial

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85. *See* Hunter, *supra* note 79, at 238.
86. *Id.*
87. *See id.* at 238-39.
88. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 56 (1990).
89. *See id.* at 65.
90. *See id.* at 23-24.
91. *See id.*
92. *See id.* at 24-26.

levels of social order looks much like compliance produced by the instrumental means at the public level—sometimes people comply because they fear informal sanctions imposed externally.[93] However, the individual who complies for normative reasons does so because she feels an *internal* obligation to do so.[94]

Social networks among friends and neighbors harness personal knowledge and trust among family, friends, and neighbors to create internalized expectations of obligation to conform to social norms.[95] Thus, Hunter's schema of private and parochial social orders complements the theories of social organization and collective efficacy described in Part I. Whereas those theories help to explain how neighborhood residents resist crime through informal means without always resorting to the police and other criminal justice entities, Hunter's three-level schema explains the relationship between a community's informal and formal efforts to produce safety.[96]

Drawing on Hunter's schema, one can see how improved relations between the police, at the public level of social control, and churches, at the parochial level, potentially benefit neighborhoods plagued by crime. Newly formed connections between churches and the police in WSC could produce a new species of social capital to be directed toward violence control. For example, by interacting with church leaders and parishioners, the police likely would gain access to new sources of information to assist them in criminal investigations. Such interactions might make church leaders and parishioners more willing to identify offenders who victimize them, which in turn would allow the police to more efficiently locate offenders.[97] If more offenders are located and arrested, then the certainty of punishment increases and so does the level of formal deterrence. Church leaders, on the other hand, could parlay a stronger relationship with the police to gain better access to municipal government resources.

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93. *See id.* at 24, 59 tbl.5.1.

94. *See id.* at 24.

95. *See supra* Part I.B.

96. *See generally* Hunter, *supra* note 79.

97. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN UNITED STATES, 1999 STATISTICAL TABLES, tbl.103 (indicating that some victims do not report victimizations to police because they believe police to be uninterested, inefficient, or biased).

Perhaps even more interesting than the benefits that flow from better vertical relationships, between churches and police, is the way in which those improved relations on the vertical plane can translate into stronger connections among the churches themselves. If the prayer vigil led to stronger connections among these key institutions, Hunter's theory suggests that an improved community context for social control would obtain.

B. Empirical Evidence Regarding Changing Social Structure in WSC

1. Before the Vigil

Ideally, linkages between parochial and public levels, represented in this study by churches and the police, must be prevalent and strong to promote optimum conditions for effective social control at the community level. Prior to the 1997 prayer vigil, linkages between the police and WSC churches were quite weak. Most of the churches surveyed reported only occasional contact with police.[98] Semistructured interviews with church leaders reveal a more complex story. In addition to being only "occasional," it would appear that the contact between police and churches in the area studied could best be characterized as *reactive*: leaders called police when they needed them. The responses of a young associate Baptist minister, the senior pastor of a three-hundred-member church in East Garfield Park, and the executive director of an interfaith organization are indicative:

> Interviewer: Okay. I want to talk about the police. How would you characterize your organization's relationship, past relation-ship, we're talking pre-vigil, with the local police?
> Reverend Associate Baptist: They don't bother us. We don't bother them.

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98. In a mail survey of area churches administered shortly after the 1997 Vigil, thirty of sixty-one respondents characterized their contact with police as "occasional friendly contact." In another survey administered after the 1998 Vigil, thirty-two of sixty-one respondents noted that they had "occasional contact" with the police. Eighty-five percent of these respondents characterized their contact with police as "cooperative." But, importantly, about seventeen percent of respondents maintained that they had *no contact at all* with the police.

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> Interviewer: How would you characterize your church's
> relationship with the police before the prayer vigil?
> Pastor of Community Church: We really did not have
> one.... And if we needed them we called them.

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> Interviewer: How would you characterize your church's
> relationship with the police before the prayer vigil?
> Community Leader: I guess I would characterize it the
> same way I characterize a private citizen (inaudible), very
> little contact. And that's about it. Very little contact.

At first glance, the reactive nature of the relationship between
WSC churches on the one hand, and police on the other, might not
be particularly remarkable. When one recalls, however, that the
residents of the Harrison Police District faced extraordinary crime
problems,[99] it becomes significant that the community's key civil
institution made little effort to work with the primary governmental
entity charged with addressing crime on a more proactive basis. One
might also say that, to the extent that contacts between Harrison
District churches and police created a relationship between the two
key institutions, that relationship was not harnessed in favor of
collective efficacy.

In contrast to the relationship between the churches and the
police, there were more numerous and prevalent linkages among
WSC churches. However, the data reveal two features of inter-
church collaboration which suggest that the full potential, for
directing social organization to solve community problems, was not
fulfilled. First, many of the links were *intra*denominational. Second,
the social capital in these links was not directed, as a normative
matter, to the problem that the community rated at the top of its
list: crime.
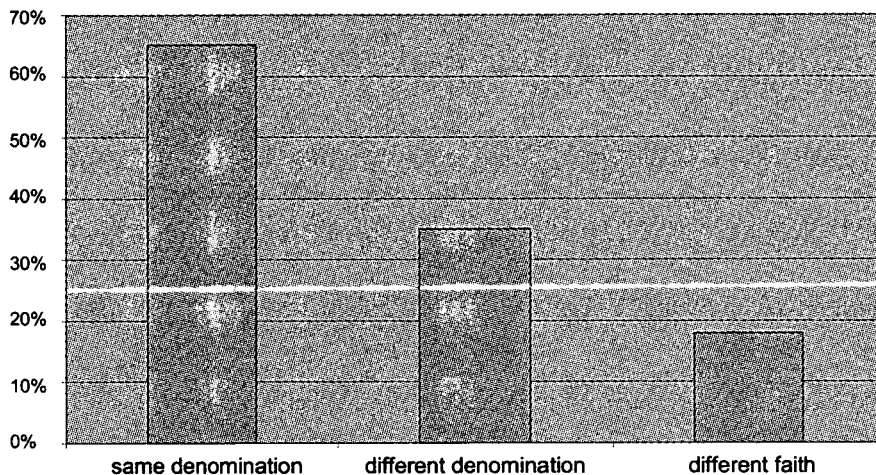
In a mail survey to churches, church leaders were asked to
characterize their level of contact with organizations of (1) the
same religion, (2) the same religion but different denominations,
and (3) organizations of different faiths. The following graph

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99. Crime statistics show that WSC has long had the highest concentration of homicide
in the city. In 2002 the homicide rate of 75.5 per 100,000 was three times the city's average.
See Andrew Papachristos, Tracey Meares & Jeffrey Fagan, *Attention Felons: Evaluating
Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. tbl.1 (forthcoming 2007).

illustrates the relative levels of frequent contact church leaders claimed to have with these three different groups.[100]

We argued above that the reactive nature of limited relationships between WSC churches and the police prevented the groups from

Fig. 1: Contact among church leaders by denomination and faith.

harnessing their relationship in favor of collective efficacy.[101] The data suggest that a parallel problem existed with respect to goals for which the relationships among WSC churches were harnessed. Specifically, the data indicate that, prior to the prayer vigils, the networks among area church leaders were not primarily—or even secondarily—directed toward everyday problems facing the community. To the extent that church leaders were working together, it was rarely for the purpose of addressing chronic community problems such as crime. For the most part, when area church leaders met collectively, they did so for the purpose of addressing traditional church business. For example, one interdenominational group of African-American WSC ministers met regularly to update each other on new ministries or to allow new ministers to try out

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100. The responses to the church mail survey are not truly representative of the population of the area. They are, however, more representative of the actual prayer vigil participants. The data represented in the graph collapses the respondents from two waves of mail surveys.

101. *See supra* notes 98-99 and accompanying text.

sermons. Occasionally the group dealt with civil rights issues, but they did not organize to deal with an issue of everyday living, such as crime. In the words of a senior Baptist minister,

> [t]he ministers and churches have always been in the forefront in segregation and many issues. In the past, we have responded mostly to a crisis. This time, the commander called us together and said we're going to make a change in the community because of the problems, not because of one particular thing that was going on. This time it brought together many, many people because of wanting to make a change in our every day living.... But this have [sic] seem to held us together because more than just ministers, the communities, the police department came together and though we had those type of movements before, not in this particular way, not this kind of motivation. It brought together more fellowship even between the churches, not just to respond to a crisis but communication and moving and being on the same wave length.[102]

Wes Skogan and Susan Harnett, who have completed an in-depth study of community policing, documented a similar phenomenon. Of approximately fifty religious organizations that they surveyed, fewer than ten percent had a crime-prevention mission.[103] Moreover, C. Eric Lincoln and Lawrence Mamiya's survey of black churches reflects our data. In their survey, of the sixty percent of respondents who participated in any ongoing projects that required interdenominational cooperation, only two percent (thirty churches) stated that they cooperated with churches of other denominations on social-oriented programs such as drug or alcohol abuse, crime, welfare, or housing.[104] To put this in perspective, consider Lincoln and Mamiya's research demonstrating that 7.2 percent of those churches that engaged in interdenominational activities participated in interracial cooperation with white churches.[105] It is reasonable to assume that for the most part the white churches to which survey respondents referred were located outside the respondent church's neighborhood. Thus, according to the most extensive survey of black

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102. See *supra* note 68 for information regarding interview methodology.
103. *See* SKOGAN & HARTNETT, *supra* note 74, at 145.
104. *See* LINCOLN & MAMIYA, *supra* note 76, at 156 tbl.22.
105. *See id.*

church activity to date, it was more likely for black churches to work with a church from another sect outside of the neighborhood, as a demonstration of interracial unity, than it was for the black churches to engage one another across denominational lines on a problem as important to local parishioners as crime.

2. After the Vigil

To assess the potential social organization benefits, and costs, of the WSC prayer vigil, both respondents who participated in the vigil and those who did not were asked questions that tapped into the two dimensions of social capital: structures and norms.[106] Because of a particular interest in assessing Hunter's ideas regarding parochial level integration,[107] institutional leaders were asked whether they formed new relationships with other institutional leaders as a result of participation in the vigil. Similarly, we assessed changes in affect by asking institutional leaders about the likelihood of harnessing new relationships for cooperative efforts.

With respect to structure, the survey results reveal that about fifty percent of respondents stated that they have formed between one and five new relationships as a result of participation in the vigil. With respect to the affect dimension, church leaders were asked whether their opinions regarding various community institutions had changed, and whether they believed that coopera-tion between the leader's own organization and various types of community organizations was more or less likely. The following two charts summarize these data.

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106. *See supra* note 29 and accompanying text.
107. *See supra* Part II.A.

Fig. 2. Changes in church leaders' opinions following prayer vigil.

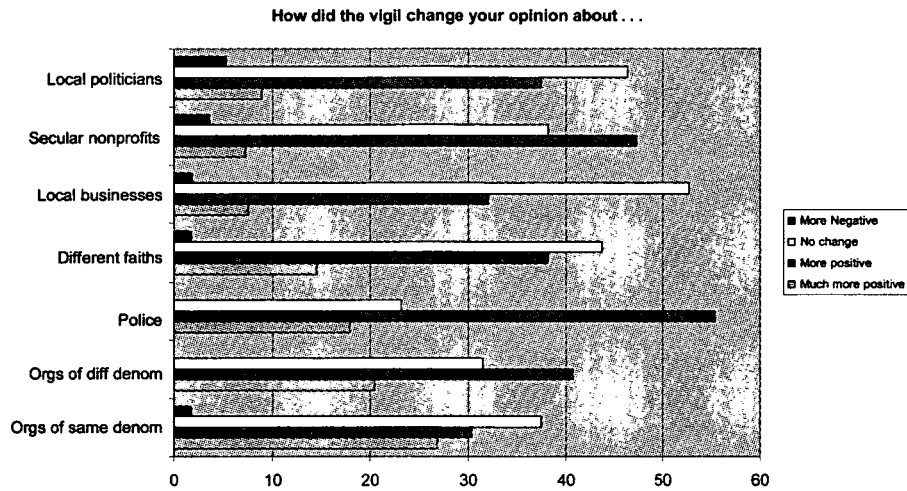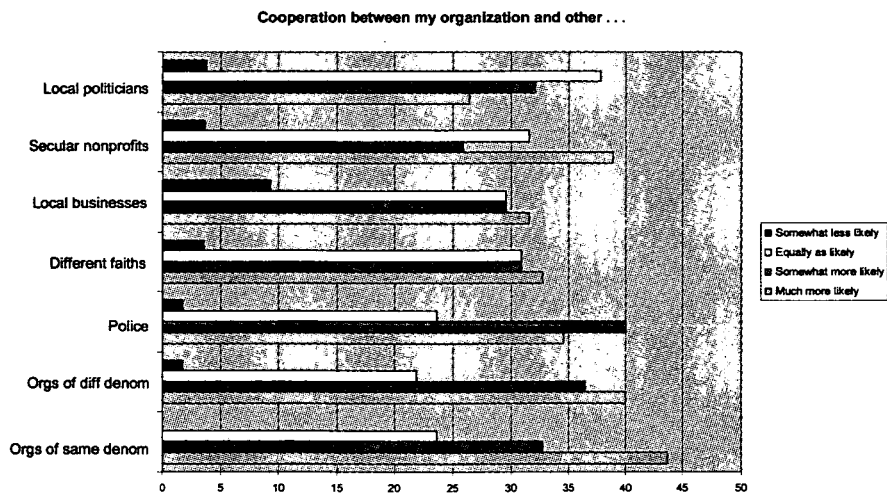**How did the vigil change your opinion about . . .**

Fig. 3. Changes in cooperation between church leaders and
community institutions following prayer vigil.

Cooperation between my organization and other . . .

Each of these charts summarizes the newfound potential for greater social organization in WSC. By and large, after the vigil, church leaders had more positive views of other key institutions in WSC than prior to it. Moreover, leaders claimed an increased likelihood of cooperation among these institutions for the purpose of getting things done in the community. Additionally, church leaders stated that they felt better about the community's prospects after the WSC prayer vigil. Fully eighty-two percent of respondents believed it was more likely after the prayer vigil that the community could get organized to help itself. Fifty-eight percent of respondents felt that, after the vigil, the police were more concerned about the well-being of the community's children and the community itself. Even thirty-nine percent of respondents felt that, after the vigil, the city government would help WSC improve.[108]

It is important to note here that the data summaries above include both church leaders who participated in the prayer vigil *and those that did not*. Almost a third of our respondents did not participate in the vigil, yet they appear to have been influenced in a positive direction merely by their awareness of the event. While eighty percent of vigil participants reported feeling more positive about the police after the vigil, fifty percent of nonparticipants claimed the same. Not one of the nonparticipants reported feeling more negative about the police after the prayer vigil. Similarly, while vigil participants were more likely to register intense feelings about the likelihood of future cooperation with important community institutions, nonparticipants still registered positive feelings about the likelihood of future cooperation.[109] This finding is quite striking and suggests that the WSC prayer vigil had an impact on the community that extended beyond the particular participating individuals.

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108. Note, however, that in answer to this question, 46.3% of respondents felt that it was no more true after the vigil that the city government would be helpful.

109. For example, fifty percent of participants claimed that interdenominational cooperation was much more likely in the future compared to only ten percent of non-participants, but majorities of both groups were positive about the likelihood of future cooperation—seventy-seven percent of participants and fifty-three percent of nonparticipants respectively.

The in-depth interviews help to motivate these findings—especially in terms of individual expectations about the community's prospects. A Catholic priest summarized his feelings this way:

> I think the prayer vigil, number one, is a challenge to every individual church, organization or whatever: What are you doing? Are you doing anything? It's time to get busy. It's time to do some things.[110]

Creating expectations for action is a critical component of collective efficacy.[111] The fact that WSC institutional leaders were better connected after the vigil provides the structural predicate to reinforce this expectation, just as Hunter would predict.[112]

The data is inadequate to allow a complete assessment of the extent to which these new linkages, along with rejuvenated enthusiasm for community control, have translated into concrete projects; but telling anecdotes abound. For example, researchers attended meetings of the interdenominational Minister's Alliance that was formed to promote prayer vigils subsequent to the 1997 WSC prayer vigil. It was not uncommon to see secular service providers using Alliance meetings to promote their services, and post-WSC prayer vigil meetings featured social service purveyors. At one meeting an organization encouraged pastors to sign up children to receive free school supplies; at another, representatives of the CPD asked ministers if they would help to recruit new police officers from their congregations. The ministers again functioned as certification intermediaries, but this time the certification was for the primary benefit of the police instead of for the benefit of congregants.

Other meetings focused on crime policy. One meeting was devoted to the level of support that ministers would offer to the City's original antigang loitering law. Another meeting was devoted to proposed legislation known as "SODA orders," or stay out of drug area orders, which were designed to exclude individuals who had been convicted of selling drugs from WSC neighborhoods, provided that the individual did not live or work in the designated neighborhood. These examples clearly indicate the extent to which an

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110. See *supra* note 68 for information regarding our interview methodology.

111. *See supra* text accompanying notes 33-36.

112. *See supra* notes 79-96 and accompanying text.

improved vertical relationship between the police, representing the public level of social control, and the church leaders, representing the parochial level of social control, led to an increase of social capital for residents of WSC.

We noted above that Hunter's three-level schema predicts that higher levels of integration between the public and parochial levels could provide WSC church leaders with the opportunity to gain more access to municipal government resources.[113] That state of affairs appears to have taken place in WSC postprayer vigil. Less obvious, however, was that the newly formed relationship between WSC ministers and the local police would provide the ministers with increased *political* efficacy. After the prayer vigil, one key minister was appointed to serve on the City's Police Board—the first minister to hold such a position.[114] Another young pastor was appointed to a high-level position in city government related to community policing.[115] Perhaps most interesting is evidence that the postprayer vigil relationship between WSC church leaders and the police enabled church leaders with power to better hold the CPD accountable to the community's interests. Consider the following telling case.

Several months after the May 1997 prayer vigil, one young minister from the East Garfield Park neighborhood encountered two CPD officers arresting a neighborhood man. The man did not attend the young minister's church; nonetheless, the minister decided to find out what was going on. The CPD officers asked the minister to step away from the arrest scene, which was unfolding peacefully, but the minister refused. The circumstances that followed were contested, but the conclusion of the events was clear—the minister was arrested.

As the minister was processed at the Harrison District headquarters, Commander Ervin saw him and recognized him on his way out of the building. No doubt because of the newly formed relationship with area ministers, Commander Ervin asked a lieutenant, the highest ranking officer in the building, to see to the minister's needs

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113. *See supra* Part II.A.

114. Rev. Johnny L. Miller, pastor of the seven-hundred-member Mount Vernon Baptist Church was appointed to Chicago's Police Board in 1998.
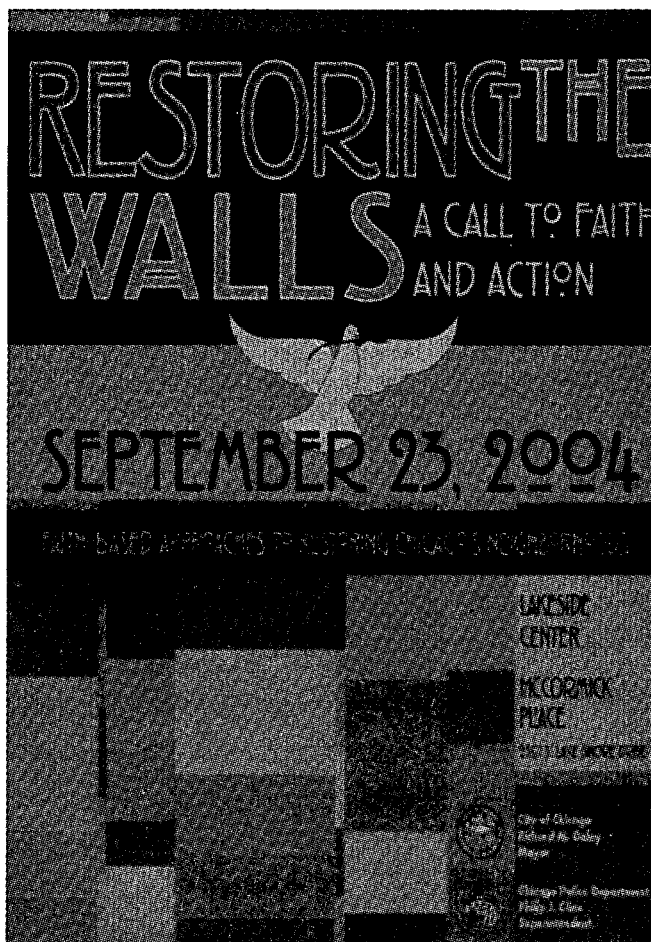
115. Rev. Vance T. Henry was appointed CAPS Implementation Director on September 10, 2000.

in the Commander's absence. When Commander Ervin returned to headquarters to speak to the minister himself, he learned that the minister had already invoked his right to remain silent and to speak to a lawyer, so Commander Ervin was not allowed to talk to the young man. That evening, several of the ministers from the Alliance held a press conference complaining about racial profiling in WSC. Other ministers met in a group with the Commander to settle the dispute. After several meetings, the dispute was resolved.

What is interesting about this incident is Commander Ervin's demonstrated urgency to solve the dispute. After the WSC prayer vigil, the Commander's relationship with the ministers was an important source of his legitimacy in the community. Commander Ervin depended on the ministers' favor to develop the community's trust in him. While the pastors' relationship with the Commander and the CPD was not critical to their position as leaders in the community, the relationship certainly enhanced their position in the community as heads of central institutions. Many of the ministers who participated in the WSC prayer vigil believed that their relationship with Commander Ervin enabled them to procure resources for the community, from the CPD and from the City, that they had not been able, or had not been *as* able, to procure prior to the establishment of a stronger vertical relationship between WSC churches and the police.

In a sense, this crisis enhanced the benefits of the relationship from the ministers' perspective. Although the ministers were motivated in part to protect the honor of one of their own, the incident allowed the ministers to demonstrate to the community, and to the police, that collaboration with the police would not inevitably lead to their being co-opted by the police. The police learned an important lesson as well. They learned that the social capital in their relationship with the ministers had to be tended and guarded. In other words, they learned the potential cost of being an agent of the community rather than vice versa.

It is not a stretch to say the WSC prayer vigil was a key event that motivated critical rethinking of community policing in Chicago. After the vigil, the City became much more interested in fostering local grassroots events for the benefit of community policing.

Moreover, churches and faith-based institutions have become an even more prominent feature of Chicago's CAPS strategy. In September of 2004, the City of Chicago and the CPD sponsored a huge gathering of faith-based leaders; it was a day of workshops devoted to community economic empowerment, offender reentry, grant writing, HIV and public health, responding to the hip-hop generation, and public policy reform.

2007] WHEN 2 OR 3 COME TOGETHER 1351

3. Implementing the WSC Prayer Vigil

This Article has presented a picture of the linkages among WSC churches, and between the churches and the police, both before and after the landmark 1997 community prayer vigil.[116] The data strongly suggests that important linkages have been formed between key community institutions, linkages that did not exist prior to the vigil. We turn now to a critical question: how did this happen?

As a first pass at answering this question, it is useful to pose a different query: what were the structural barriers to cooperation among the churches themselves? The answer to this question became clear after only a small number of interviews with church leaders. The governance structure of the predominantly Protestant local churches in WSC, while facilitating democratic participation by members, created collective-action problems for coordination among the leadership of individual churches.

One hurdle to coordination among WSC churches was their wide diversity of denominations and faith traditions. Survey respondents were a mix of church leaders from fifteen different Protestant denominations, including Lutheran, Methodist, Pentecostal, A.M.E., Christian Disciples of Christ, Baptist, Church of Christ, Church of God in Christ, Christian Reformed, Non-Denominational, and Independent. To refer to these many denominations as simply "Protestant" belies the variation among them in terms of faith practice norms, liturgy, and training of the pastors themselves. Once we add to this mix survey respondents representing the Catholic Church and the Seventh-Day Adventists, few would be surprised to learn that many respondents' answers demonstrated distrust among ministers of various denominations and religious practices. Tellingly, one Protestant minister responded that he had had contact with church leaders of a *different* faith—Catholic priests.[117]

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116. See *supra* Part II.B.1-2.

117. The historical antagonism between Catholics and some Protestants, especially evangelical Protestants, has a long history in the United States. *See, e.g.,* ROBERT WUTHNOW, THE RESTRUCTURING OF AMERICAN RELIGION: SOCIETY AND FAITH SINCE WORLD WAR II 72-76 (1988). The interviewer (Meares) did not get the sense that the Protestant minister being interviewed held animus against Catholics; rather, he just had not worked with many

Denominational cleavages in WSC are supported by demographic differences between sects. There is, of course, a great deal of demographic variation among congregations within denominations, but it is also true that denominations are known to have distinctly different demographic characteristics. For example, in their landmark study of black churches, Lincoln and Mamiya found that black Methodists traditionally tend to come from the middle-income bracket, while the majority of Pentecostal Church of God in Christ (COGIC) members are working class or working poor.[118] Baptist churches represent the largest chunk of churched African Americans and reflect a diversity of social classes,[119] whereas a 1993 study of African-American Catholics indicates that they have higher median incomes than individuals with any other typical African-American religious affiliation—exceeding the median income of Baptists by almost $4000.[120] These income differences likely accompany variation in educational attainment, occupational achievement, and the like among members of the various sects. Church organization leaders often serve different, but overlapping, parts of the WSC community. They therefore are located in various social networks and operate within different spheres of influence. All these factors present barriers to communication among church members and church leaders. Yet the same factors portend a great yield, in terms of social capital, should the church leaders manage to overcome barriers. Obvious benefits of increased contact among individuals from different denominations include an increase in access by the more disadvantaged individuals to jobs, opportunities, and *life expectations.*[121]

A second hurdle to coordination among WSC churches was individual, as opposed to institutional, in nature. WSC churches, by and large, are denominations in which the minister serves at the

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Catholics.

118. *See* LINCOLN & MAMIYA, *supra* note 76, at 172.

119. *See id.*

120. *See* BARRY A. KOSMIN & SEYMOUR P. LACHMAN, ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY 256, 265 (1993).

121. *Cf.* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 60 (1987) (explaining that concentrated disadvantage results in social isolation, or "the lack of contact or of sustained interaction with individuals and institutions that represent mainstream society").

pleasure of his congregation.[122] As such, the pastors of these churches must attract congregants for support. Interviews with church leaders revealed that simple competition among WSC ministers, for congregants who could contribute to the collection plate, played a large role in keeping the ministers from working with one another.

Commander Ervin was identified in interview after interview as the individual who could address the various barriers to communication among WSC church leaders. A Methodist minister had this to say:

> Interviewer: Do you think that all of the churches would have got together and had an event like the prayer vigil if the police had not been involved?
> Methodist Minister: It would have taken a leader of someone to bring them together and I don't see anyone in the West Side area that could have gotten all of the churches involved as they did.
> Interviewer: Why? Why is that? When you say you don't see—Methodist Minister: Because of denominational barriers. Seventh Day Adventist would not have come out if I had started it. The Baptist would not have come out if the Seventh Day Adventist had started it. The Catholics would not have come out if the Baptist had started it. So it took an outside interest that could draw all of them together.

A Baptist minister agreed:

> Baptist minister: ... I'm involved in another project where we are actually trying to pull together the leadership from the seven major black denominations. And we've been at this thing several months, and it's not happening. It is not happening at all. And

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122. Lincoln and Mamiya document that in 1989, 38,800 churches were organized under the National Baptist Convention, U.S.A., Inc., the National Baptist Convention of America, or the Progressive National Baptist Convention. *See* LINCOLN & MAMIYA, *supra* note 76, at 31, 35, 37. This number represents sixty-four percent of the churches of traditionally African-American denominations. African-American Methodist (AME) and Pentecostal denominations make up the remainder. *See id.* at 54, 58, 64, 84 (documenting the number of churches in three AME denominations and the number in the COGIC denomination). Lincoln and Mamiya note that Baptist pastors are not appointed to a church by a higher ecclesiastical authority. *Id.* at 42. Churches belonging to the COGIC denomination, while not as freestanding as Baptist churches, tend to exercise considerable autonomy. *Id.* at 85-88.

it's always scheduling, scheduling. No, you know. Sometimes persons may be more inclined to participate in something that is called together by a body other than a denomination, you know. Yeah. Probably participation of ministers would not have occurred on the scale that it did had it been had I called or something like that.

A community development corporation (CDC) officer commented on the same point:

Interviewer: Do you think that, you know, assuming that a church had the resources to do it, do you think that they could have pulled it off?
CDC Officer: No.
Interviewer: Why not?
CDC Officer: Because like any other groups of people in the world there are factions. There are the Baptists, there are the Catholics, there are the Lutheran, there are the Protestant, there are the everybody. And each group has a central figure that they look up to. For instance, there's a contingent of pastors who look up to Reverend (inaudible) because he has been there for years and he knows and he has the wisdom, and so they follow him. Younger pastors (inaudible), they follow him. Reverend X over on President Street, he's another very powerful minister. He has a contingent of pastors who follow him and adore him and look to him for wisdom. You would have had to bring all of those factions together. Now, those are power bases with those ministers. And this minister does not get along with that minister, and that minister doesn't get along with that minister, and this faction is not cooperating because this minister says no. So I think the commander as the central point of power in many ways was able to bring the factions together. That's where he came in. He went to this pastor who had this group and said, listen, we really need to pray, we need to bring everybody together and we need to, you know, do this on one accord, and I want to work with you and I want to work with Reverend (inaudible), I want to work with this one, I want to work with that one. And (inaudible) that came together.[123]

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123. See *supra* note 68 for information regarding our interview methodology.

Note, however, that in promoting the WSC prayer vigil, Commander Ervin had to overcome more than the significant communication barriers among the participating churches. He also had to overcome WSC residents' skepticism of police, born of the traditionally antagonistic relationship between the churches and the police in Chicago's African-American neighborhoods. Highlighting these two hurdles suggests that a simple request, by a high-ranking local police leader, of the churches to work together, would be inadequate to motivate the churches to work with the police or with each other. There is additional evidence to buttress this conclusion. As noted earlier, Commander Ervin's predecessor, Commander Bolling, reached out to WSC church leaders with little success.[124] However, Commander Bolling's approach did not work. Why not?

The answer is that it took a combination of individual religious outreach from a position of organizational neutrality. To achieve higher levels of collaboration between the police and church leaders, it was necessary for Commander Ervin to meet the pastors on their terms. Not surprisingly, operating on the ministers' terms meant speaking from a religious standpoint. In twenty-six of the forty institutional-level interviews, respondents emphasized the commander's religiosity. His spirituality was important to vigil participants—they repeatedly drew attention to it as they explained why his efforts met with success.

Highly churched[125] WSC residents were attracted to Commander Ervin's spirituality. Respondents tended to discuss the commander's spirituality in two ways, though several cited both as important. In the first category were those who described the commander as a deeply religious man whose spirituality was a force to be reckoned with. The second category of respondents referred to the commander as a Christian or as churched—descriptions which mean largely the same thing in WSC. These individuals suggested that the

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124. See *supra* pp. 1335-36.

125. Our randomized phone survey shows that seventy-five percent of WSC residents reported attending church. Approximately fifty percent reported attending church weekly, and ninety percent reported attending at least once a month. *But see* C. Kirk Hadaway, Penny Long Marler & Mark Chaves, *What the Polls Don't Show: A Closer Look at U.S. Church Attendance*, 58 AM. SOC. REV. 741, 742, 744-46 (1993) (demonstrating that church attendance rates for Protestants and Catholics are, in fact, approximately one-half of generally accepted levels).

commander's success was at least partially the result of his religious affiliation.

Both of these aspects of religiosity were important to gain the trust of WSC ministers. The effectiveness of the commander's strategy can be seen in the interview responses. The young associate Baptist minister referred to above suggested that the commander's religiosity helped overcome the objections of those who distrust the police:

> First, they didn't want to be a part of it because it was a police commander. It was the police, to long it up, it was the police. But then after seeing he was truly a man of God—proved himself for the most part—then they came on board and got involved in it, and word of mouth went around and other people started coming out.

Another WSC community leader put it this way: "I don't believe it was really organized by the police. I believe it was organized by a Christian who happened to be a policeman. And that's a world of difference."[126]

To understand the appeal of Commander Ervin's persona as a man of faith to the many religious leaders interviewed during this study, a deeper understanding of the central role of the churches to many African-American residents is helpful. Domestic and transnational polls have long supported the fact that "American blacks are, by some measures, the most religious people in the world."[127] Compared to white Americans, African Americans "attend church more frequently, participate in other church-related affairs more often, and belong to more church-affiliated organizations."[128] Our randomized telephone survey of WSC residents is in accord with this research. Eighty percent of the African-American respondents mentioned attending church at least once a month—the model response was weekly—compared to forty-three percent of white

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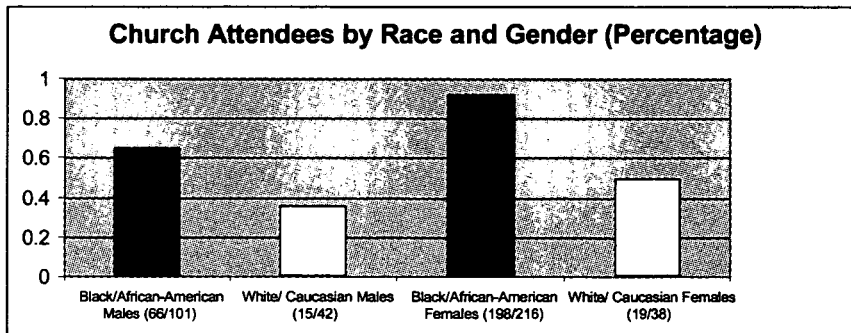126. See *supra* note 68 for information regarding our interview methodology.

127. GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90'S, at 122 (1989).

128. Christopher G. Ellison & Darren E. Sherkat, *The "Semi-involuntary Institution" Revisited: Regional Variations in Church Participation Among Black Americans*, 73 SOC. FORCES 1415, 1415 (1995).

respondents.[129] In addition to registering a connection with church institutions, African-Americans are more likely than other groups to say that God is important in their lives.[130] Even African Americans who are not current church members, or who do not regularly attend church, report praying *daily* in high numbers.[131]

Given this background, the special resonance that religious references and church culture have for many African Americans, WSC residents included, is not very surprising. Church culture provides a blueprint for neighborhood activities, regardless of whether they are explicitly religious in nature. Familiar music and hymns, catchphrases of encouragement ("Amen!" "Say it, brother!"), a preacher-like tone and delivery of a message, and commonly used scriptural references, are not, for many African Americans, shibboleths of their faith; rather, they are parts of a cultural toolkit to which broad and diverse community groups have access. Mary Pattillo-McCoy sums up the importance of Church culture for African-Americans:

> The power of prayer, Christian imagery, and call-and-response interaction lies not only in the possibility of realizing concrete

Church Attendees by Race and Gender (Percentage)

Black/African-American Males (66/101); White/Caucasian Males (15/42); Black/African-American Females (198/216); White/Caucasian Females (19/38)

129. The above chart provides more texture and detail regarding WSC church attendance. This chart does not include those who identified themselves as Hispanic, Mexican, Asian, or as belonging to some other ethnic group.

130. *See* GEORGE H. GALLUP, JR., RELIGION IN AMERICA 1996, at 52, 53 (1996).

131. *See* Robert Joseph Taylor, *Correlates of Religious Non-involvement Among Black Americans*, 30 REV. RELIGIOUS RES. 126, 132 (1988). Only eighteen percent of those African Americans surveyed who never attend church, or who have no church affiliation, report never praying at all. *Id.*

results from particular supplications, but also in the *cultural*
familiarity of these tools among African-Americans as media for
interacting, conducting a meeting, holding a rally, or getting out
the vote. Black church culture constitutes a common language
that motivates social action.[132]

In her work, Pattillo-McCoy recounts numerous incidents in which
participants of secular meetings probably unthinkingly incorporated
religious activities and references simply because that was the way
to do things.[133]

In Commander Ervin's case, however, it was not business as
usual. For Ervin, the decision to choose from among the church
cultural menu as opposed to the police secular one was deliberate
and meaningful.[134] His audience understood his decision in that way
and took it to heart.[135] As a CDC officer astutely recognized, Ervin
did not shed his identity as a police officer by adopting church
culture as a strategy of action to bring churches closer to the police.
This officer downplayed the fact that the commander was
"churched" and emphasized that the commander was a man of faith
who also wielded power as a civic servant:

> CDC officer: Well, he is involved in a church, but his central
> point of power was the fact he's a spiritual man. And he is a
> police commander, okay. Now, if it had been Police Officer Ava
> Columbus[136] it wouldn't have worked even still because they
> would not have looked to her for leadership. They would not
> have come together voice. They came together because he's the
> commander of this district, and he employs 350 police officers
> (inaudible) at will. And that's his power.
> Interviewer: Okay.
> CDC officer: So [community leaders] would respect that.[137]

So far, emphasis has been placed on Commander Ervin's role in
bringing the many (mostly African-American) churches into a closer

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132. Mary Pattillo-McCoy, *Church Culture as a Strategy of Action in the Black Community*,
63 AM. SOC. REV. 767, 768 (1998).

133. *Id.* at 767.

134. *See supra* pp. 1335-36.

135. *See supra* p. 1336.

136. A pseudonym.

137. See *supra* note 68 for information regarding interview methodology.

relationship with the CPD. However, it is necessary to emphasize
that he was also critical to facilitating the creation of more linkages
among the churches themselves. In light of Hunter's theory of social
control,[138] this aspect of the prayer vigil may have been its most
important result—especially given that it was spectacularly
interdenominational. Interestingly, while it would appear that the
commander's access to church culture was probably the most
important factor that motivated individual church leaders to come
to the table with him as a police officer, it was the commander's blue
uniform and stripes—his role as a police officer and agent of the
state—that helped him to bring the interdenominational groups to
sit down with each other.

As an agent of the state, Commander Ervin was able to take on
an official position of neutrality that most of the participants
recognized. In his role as a public official, he was able to serve as a
mediator among the members of the interdenominational group so
that all of the church leaders could sit down together at the table.
Commander Ervin's persona as a state actor offered a different
benefit of neutrality. He was able to bring the pastors together not
only because he did not represent any particular denomination, but
also because he was not a pastor himself. This was critical in a
world in which church leaders are in competition with one another
for congregants.[139] As a police officer with no church congregation of
his own, Commander Ervin presented little threat to WSC ministers
despite the fact that he organized a high-profile religious event.
Without his own church, Commander Ervin was unlikely to draw
congregants away from any of the WSC ministers' churches—a
practice referred to as "sheep-stealing." Illustrative are the com-
ments of three pastors: an elderly Baptist minister of a storefront
church, the pastor of a nondenominational and interracial church,
and a Catholic regional officer of a national interdenominational
religious organization:

> Elderly minister: Well, it looks like most of your ministers that
> he want to do something himself instead of being, you know,
> unified. You know, together we stand and divided we fall....
> [L]ook, sometime it's jealousy, you know. Some of them want to

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138. For a discussion of Hunter's three-level schema, see *supra* Part II.A.

139. *See supra* notes 122-23 and accompanying text.

be their own churches and then when he get a little ahead, then
he won't help the guy that, you know.
                              ***
Interviewer: Well actually—let me ask you this. Do you think
that the churches could have come up with this idea? That this
would have—if Commander Ervin hadn't been there that the
vigil would have —
Reverend Nondenominational: No. No. I don't think so. And
that's because I think, because I think the churches mirror sort
of the larger society and then there's all kinds of competition
among us, distrust among churches, and it's real petty stuff. I
mean I (inaudible) membership kind of stuff, and so in this sense
you needed somebody outside the neighborhood.
                              ***
Interviewer: But you were saying, and let me just make sure I
understand this, that [a particular minister] could have the
vision or maybe he has the right attitude, but it sounds as if —
Religious Organization Leader: There would be competition.
There would be ego problems.
Interviewer: But people don't perceive the commander to be in
competition with them?
Religious Organization Leader: No. He's not a pastor of a
church.[140]

Given these dynamics, it should now be clear why Commander
Ervin was successful in making connections to churches and
subsequently creating a cohesive interdenominational group, while
his predecessor, Commander Douglas Bolling, was not. Commander
Ervin deployed religious language to invite the ministers to work
with him, but he conducted meetings at the police headquar-
ters—neutral state turf. Commander Bolling, in contrast, invited
the ministers to the table with the neutral language of the state, but
held meetings at particular churches—typically Baptist. It is not
surprising that he failed.

While the effect of the commander's religiosity and his role as a
police officer served distinct roles in organizing the prayer vigil, in
reality these two facets worked together to reinforce one another.
For example, the strategy was not effective simply because the
commander used religious language to invite the ministers to come

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140. See *supra* note 68 for information regarding our interview methodology.

together. It was the fact that a *police officer* was using religious language that intrigued the ministers and made them come out.[141] In the ministers' experience police officers did not use religious language in their official capacity, and they certainly did not propose prayer vigils on corners.[142] The ministers also likely had their own folklore regarding constitutional constraints on state actors, which contributed to the power of the commander's invitation.[143] In short, the ministers' understanding of the commander's role in the WSC prayer vigil was that he was doing something that he was not supposed to do. As such, his audience interpreted his actions as costly to him, and because his actions were so interpreted, the ministers did not doubt his sincerity. By engaging in conduct that could subject him to stringent criticism by his superiors, the commander was able to signal to the ministers that he was trustworthy.[144] The commander's signal, in turn, enabled the ministers to confer legitimacy on him, and by extension on the CPD—at least to a certain extent. In effect, the ministers acted as certification intermediaries. They "vouched" for the police leader, who formerly held a position of distrust.

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141. *See supra* text accompanying note 123.

142. *See supra* pp. 1355-56.

143. This point did not come out directly in any of the ministers' interviews. In fact, only individuals affiliated with the police or municipal government even mentioned the constitution or related concerns. Elsewhere, it has been suggested that even those line officers who supported the WSC prayer vigil and believed it to be consistent with ideas of community policing might still believe that police officers should participate in prayer vigil activities only on their "own time" because of some sense of internalized, yet unarticulated constitutional norms. *See* Tracey L. Meares, *Praying for Community Policing*, 90 CAL. L. REV. 1593, 1626-29 (2002). Similarly, WSC ministers likely have a body of assumptions about the law, or "legal consciousness," that informs their ability to assess the credibility of government actors such as Commander Ervin. *See, e.g.*, Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens About Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055, 1059 (2000) (explaining that legal consciousness refers as much to how people do not think or speak about the law as it does to what they do think and speak about it).

144. *See* ERIC A. POSNER, LAW AND SOCIAL NORMS 18-27 (2000) (explaining a model of cooperation and the production of social norms whereby individuals signal to one another by engaging in costly behavior to prove credibly that they are "good" rather than "bad" types).

III. A HISTORY OF CHURCH AND STATE IN BLACK COMMUNITIES

The data reviewed in Part II suggests that, unlikely as it might seem at first glance, activities such as the WSC prayer vigil can contribute to a community context that promotes opportunities for community residents to work together to achieve higher levels of safety, and general efficacy, in their neighborhoods.[145] Because of these features, the WSC prayer vigil could be characterized as a particularly innovative example of community policing. It is also undeniably true that the collaboration between the CPD and WSC ministers described here implicates the First Amendment to the U.S. Constitution—specifically the First Amendment's Establishment Clause.[146]

The First Amendment prohibits Congress from making any "law respecting an establishment of religion."[147] In the landmark case, *Everson v. Board of Education*,[148] the Supreme Court offered a resounding interpretation of this language, declaring that the First Amendment requires "a wall of separation between church and State"[149] that "must be kept high and impregnable."[150] More specifically, the majority asserted, public funds cannot be used "to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[151]

In the sixty years since *Everson*, the Court has decided more than fifty cases under the Establishment Clause.[152] To assert that this long line of cases has been the subject of criticism is an understatement. Although there have been many attempts to identify an internal logic in the Court's line of reasoning, judges and legal scholars have been able to glean only general principles that are

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145. *See supra* Figures 1 & 2.
146. U.S. CONST. amend. I. The First Amendment also prohibits laws that interfere with the free exercise of religion, but this portion of the clause is for the most part not relevant to the purposes of this Article.
147. *Id.*
148. 330 U.S. 1 (1947).
149. *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1879)).
150. *Id.* at 18.
151. *Id.* at 16.
152. John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 287 (2001).

difficult to apply in all but the most extreme cases of government support to religion.[153] Our goal here is not to puzzle through the internal structure of the Court's opinions to assess the relevance of the Establishment Clause to the WSC prayer vigil. We will instead focus on the extent to which African Americans have been able to influence Establishment Clause jurisprudence, and the ways that that jurisprudence has influenced them. A review of the litigation reveals the particular nature of African-Americans' involvement in the development of Establishment Clause jurisprudence, and it demonstrates plainly the extent to which judicial sanction of church-state interaction has had, and continues to have, important racial consequences.

African Americans, through representative litigating institutions, have consistently recognized the disparate impact of church-state partnerships, but the Court has never acknowledged the non-religious implications of its Establishment Clause decisions. As a result, there is a disconnect between Establishment Clause juris-prudence and the realities of disparate impact that is potentially problematic for African-American communities. Excavation of the realities of disparate impact is critical in assessing the extent to which modern church-state partnerships should be allowed, or even blessed, by the state. To that end, we begin with a quick tour of Establishment Clause cases relevant to the welfare of African-Americans—cases involving schools and cases involving social service delivery.

A. Government Aid to Religious Schools

Everson v. Board of Education is a landmark case not only because it marks the beginning of modern Establishment Clause jurisprudence, but also because it is the first Supreme Court decision regarding public aid to religious schools. At the time of the decision, the vast majority of private religious schools were Catholic.[154] Many scholars have argued that *Everson*, and the school

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153. For examples of this, see generally Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1 (2000); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

154. Jeffries, Jr. & Ryan, *supra* note 152, at 314-18.

aid cases that followed over the next thirty years, were fueled to a
large extent by anti-Catholic sentiment.[155] For the Protestant
majority and a growing number of liberal intellectuals, the Catholic
Church represented "an authoritarian force that threatened
reasoned inquiry, democratic politics, and social unity."[156]

In the African-American community, parochial school aid was
significant not as an issue of church-state relations or anti-Catholic
bigotry, but because of its implications for school desegregation. The
Supreme Court's ruling in *Brown v. Board of Education*[157] met with
massive resistance, and many southern states prepared to avoid
desegregation by closing public schools altogether and using state
vouchers to fund all-white private schools.[158] Although the Court
soon made it clear that closing public schools was not an option, the
number of private, segregationist academies increased dramatically
in the 1960s.[159] In particular, the Court's rejection of freedom-of-
choice and its endorsement of busing[160] "triggered a massive exodus
of whites from public schools and a scramble to find private alterna-
tives."[161] Many of these new schools were Christian academies,
established by white churches.[162] The leaders of these churches were
explicit about their motives. One Baptist pastor stated frankly that
he "would never have dreamed of starting a school, hadn't it been
for busing."[163] Another acknowledged that parents enrolled their
children in Christian schools "because they just don't like blacks."[164]

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155. *See, e.g.*, Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33
LOY. U. CHI. L.J. 121 (2001); Jeffries, Jr. & Ryan, *supra* note 152, at 314-18.

156. Berg, *supra* note 155, at 124.

157. 347 U.S. 483 (1954).

158. Indeed, officials implemented this strategy in Prince Edward County, Virginia. Soon
after, the Supreme Court ruled that the scheme was unconstitutional and ordered the Prince
Edward public schools reopened. *See* Griffin v. County Sch. Bd., 377 U.S. 218, 232-34 (1964);
see also Jeffries, Jr. & Ryan, *supra* note 152, at 330; Jennifer E. Spreng, *Scenes from the
Southside: A Desegregation Drama in Five Acts*, 19 U. ARK. LITTLE ROCK L.J. 327, 340-43
(1997).

159. *See* Jeffries, Jr. & Ryan, *supra* note 152, at 331.

160. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 29-31 (1971); *cf.* Green
v. County Sch. Bd., 391 U.S. 430, 439-42 & n.6 (1968) (holding a freedom-of-choice plan
unconstitutional, but not necessarily endorsing school busing in that instance).

161. Jeffries, Jr. & Ryan, *supra* note 152, at 331.

162. *Id.* at 332.

163. *Id.* at 334.

164. *Id.*

It was thus unsurprising when the NAACP called on the black community to oppose school aid. As one prominent minister observed, religious schools were about to "succeed in carrying out a de facto form of racial segregation with federal funds."[165] Recognizing that threat, the New York NAACP's president announced in 1967, "[w]e are against aid in any way, shape or form, because it only helps those who would skirt legislation on desegregation."[166] In 1970, the Pennsylvania NAACP succeeded in bringing *Lemon v. Kurtzman*[167] before the Supreme Court, a case that would set the standard for impermissible school aid and become one of the most important Establishment Clause rulings in American history.

1. Religious School Aid and the Desegregation Battle: Lemon v. Kurtzman

Alton Lemon was an African-American man whose children attended public school in Pennsylvania.[168] In conjunction with the NAACP, he brought a two-fold challenge against recently enacted legislation that used taxes to subsidize the cost of teacher's salaries, textbooks, and teaching materials in private schools.[169] First, Lemon alleged that the effect of the Nonpublic Schools Act would be "to encourage, promulgate and perpetuate de facto segregation, to the detriment of the education received by his and other black children in the public schools."[170] As a result, Lemon claimed, the funding scheme violated his equal protection rights under the Fourteenth Amendment. Second, Lemon asserted that because ninety-seven percent of the private schools eligible for aid were religiously affiliated, the Act constituted an establishment of religion and was impermissible under the First Amendment.[171]

Lemon's opponents did not challenge his assertion that the Act would perpetuate segregation. Instead, they argued that Lemon lacked standing to bring an equal protection claim because his

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165. Berg, *supra* note 155, at 158-59 (internal quotation marks omitted).
166. *Id.* at 159 (internal quotation marks omitted).
167. 403 U.S. 602 (1971).
168. *See id.* at 611; Brief for Appellants at 48, *Lemon*, 403 U.S. 602 (No. 89).
169. *See Lemon*, 403 U.S. at 611.
170. Brief for Appellants, *supra* note 168, at 14.
171. *Id.* at 10.

children had not been denied admission to any of the nonpublic schools that were positioned to benefit from the Act.[172] In fact, Lemon had not sought to enroll his children in any of these schools. Kurtzman's brief was devoted almost entirely to Lemon's First Amendment challenge.[173]

The Supreme Court ruled in favor of Lemon on the basis of his Establishment Clause challenge.[174] In doing so, the Court identified a three-pronged test for permissible statutory law under the Establishment Clause: the statute must have a secular purpose, its primary effect must not be the advancement or inhibition of religion, and it must not foster excessive government entanglement with religion.[175] Pennsylvania's Nonpublic School Act violated the entanglement prong of this test.[176] Although Lemon and the NAACP both dedicated significant portions of their briefs to the issue of segregation, the Court addressed their equal protection challenge only in a footnote, stating that the Establishment Clause ruling in the case "makes it unnecessary for us to reach this issue."[177] Still, it is unlikely that the racial implications of the ruling went unnoticed by the Court.[178]

The interest of the NAACP and African Americans in opposing aid to private schools, which enabled whites to avoid desegregation, is obvious. It is less clear that school aid in itself undermined the black community. Lemon and the NAACP both argued vehemently that the provision of public money to religious schools involved impermissible aid to religion under the First Amendment.[179] Although the non-Catholic, church-related schools at that time were "virtually 100 percent white,"[180] the Catholic parochial school system served ten thousand black students in the city of Philadelphia alone.[181] A significant number of black families thus stood to benefit

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172. *See* Brief for Appellees Kurtzman and Sloan at 10, *Lemon*, 403 U.S. 602 (No. 89).

173. *Id.* at 12-37.

174. *See Lemon*, 403 U.S. at 625.

175. *Id.* at 612-13.

176. *Id.* at 613-14.

177. *Id.* at 611 n.5.

178. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 62 (1997) ("[E]very Justice [in *Lemon*] took note of the issue, and it is hard to believe that no Justice was influenced by it.").

179. Brief for Appellants, *supra* note 168, at 10.

180. *Id.* at 49.

181. *See id.* at 50.

from the Nonpublic School Act. As Lemon emphasized, however, the vast majority of black children in the parochial school system attended schools that were over eighty-five percent black.[182] The overarching issue for Lemon and the NAACP was racial segregation. Lemon observed that, "[t]o its great credit the Philadelphia Archdiocese supports and maintains fifteen black ghetto schools for black children ... but this is not integration."[183] There is no evidence that Lemon or the NAACP had any vested interest in the Establishment Clause challenge other than its potential usefulness in obtaining the desired outcome in the case.

2. *Shifting Tides in the Black Community:* Aguilar v. Felton

The tension between racial segregation and public funding of religious schools has continued since *Lemon*. As the battle for school desegregation wore on during the 1970s, so did the Supreme Court's attack on religious school aid. By 1980, the Court had struck down tuition reimbursement for low-income children,[184] maintenance and repair assistance for schools serving low-income families,[185] reimbursement for standardized testing expenses,[186] provision of school services and education equipment,[187] and funding for instructional materials and field trips.[188] In 1985, the Court hit the high water mark of its "No Aid" position[189] with back-to-back rulings in *School District of Grand Rapids v. Ball*[190] and *Aguilar v. Felton*.[191] We focus on *Aquilar* here.

Aguilar involved a challenge to a publicly funded program that provided remedial assistance to low-income children with educational need, regardless of whether they attended public or private school.[192] One result of this program was that public school teachers

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182. *Id.*

183. *Id.* at 50 (ellipsis in original).

184. Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).

185. *Id.* at 774-80.

186. Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479-82 (1973).

187. Meek v. Pittenger, 421 U.S. 349, 367-72 (1975).

188. Wolman v. Walter, 433 U.S. 229, 248-55 (1977); *see* Jeffries, Jr. & Ryan, *supra* note 152, at 288-89 (summarizing the Court's school aid decisions between 1947 and 1996).

189. *See* MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION 495 (2002).

190. 473 U.S. 373 (1985).

191. 473 U.S. 402 (1985).

192. *Id.* at 406.

were providing services to children on the premises of religiously affiliated schools.[193] Although neither the parties' briefs nor the Court's opinion reference the issue of segregation,[194] *Aguilar* marks an important turning point in Establishment Clause jurisprudence for African Americans: it is the first time that a significant contingent of the black community had reason to *support* public aid to religious schools. This schism continued to grow in the late 1980s and 1990s, as black families grew frustrated with the dismal quality of urban public schools and wanted other options for their children.[195] Indeed, there is solid evidence that black students at parochial schools perform significantly better than their public school counterparts and are much more likely to graduate from high school and attend college.[196] Programs that provide publicly funded vouchers for religious schools began to receive substantial support from the black community; in a 1997 poll, seventy-two percent of black parents favored voucher programs.[197]

3. Shifting Tides in the Supreme Court: Agostini v. Felton

As the landscape of religious school aid and its implications for African Americans changed, so did the Supreme Court's Establishment Clause jurisprudence. Beginning in the mid-1980s, the Court shifted its position on public aid to religious institutions, requiring only that the government "be neutral in its allocation of funds" rather than "support only secular activities."[198] After five Justices suggested in a 1994 opinion that it might be time to overrule *Aguilar*,[199] fifteen parochial school parents, mostly single

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193. *Id.*

194. The appellant's brief repeatedly emphasizes that the remedial assistance program was designed to "bring better education to millions of disadvantaged youth who need it most," Brief for Appellants at 3, *Aguilar*, 473 U.S. 402 (No. 84-237) (quoting S. REP. NO. 89-146, at 5 (1965)), and that many of the parochial schools served by the program were "located in inner-city neighborhoods with large minority populations." *Id.* at 11 n.16.

195. *See* Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 303-10 (2000).

196. *Id.*

197. Jeffries, Jr. & Ryan, *supra* note 152, at 361.

198. MCCONNELL ET AL., *supra* note 189, at 503.

199. *See* Bd. of Educ. v. Grumet, 512 U.S. 687, 717-18 (1994) (O'Connor, J., concurring); *id.* at 731-32 (Kennedy, J., concurring); *id.* at 750 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.).

working mothers, brought New York's remedial education program before the Court in *Agostini v. Felton*.[200] Only one of the briefs in the case mentioned the issue of racial segregation and, interestingly, it did so in *support* of the school aid program. The amicus brief argued that publicly funded remedial education in religious schools increased the choices open to low-income parents, and cited evidence that school choice was "being used to combat racial segregation" and had "become the preferred approach to desegregation in districts throughout the country."[201] The parochial school parents did not make race an issue in their argument, but did emphasize that all the children who benefited from the program were "economically and educationally disadvantaged" and that the government's intent was only to "improve the lot" of such children.[202] For many people, the litigation symbolized a battle between poor, working parents who merely wanted quality education for their children, and white elites whose opposition to school aid was purely philosophical. To no one's surprise, the Court sided with the parents, overruling both its assumption in *Aguilar* that teachers on religious school premises were likely to teach religion and its conclusion in *Grand Rapids* that any educational aid to religious schools necessarily creates an impermissible "symbolic union" between church and state.[203]

Not all African Americans agreed with the parents in *Agostini*. As the Supreme Court continued to relax its stand on religious aid in the 1990s and early 2000s, the issue of religious school vouchers became increasingly controversial in the black community. Black school-choice proponents formed an unlikely alliance with conservative white evangelicals, arguing that publicly funded tuition assistance for religious schools would provide low-income families with a desperately needed alternative to failing urban public schools.[204] Other African Americans argued that religious school aid would only benefit a small minority of poor black students and

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200. 521 U.S. 203 (1997); *see* Martin Kasindorf, *Aid to Parochial Pupils: Court To Review 1985 Ruling that Led to Complex Situation*, SEATTLE TIMES, Apr. 14, 1997, at A3.

201. Brief of Institute for Justice et al. as Amici Curiae in Support of Neither Party at 12 n.4, *Agostini*, 521 U.S. 203 (Nos. 96-552, 96-553).

202. Brief for Petitioners Rachel Agostini, et al. at 26, *Agostini*, 521 U.S. 203 (1997) (Nos. 96-552, 96-553).

203. *See Agostini*, 521 U.S. at 220, 235.

204. *See* Jodi Wilgoren, *Young Blacks Turn to School Vouchers as Civil Rights Issue*, N.Y. TIMES, Oct. 9, 2000, at A1.

that the majority would be left behind in rapidly deteriorating public schools that lacked the money necessary to improve their performance.[205] In 2002, this tension surfaced with force in *Zelman v. Simmons-Harris*.[206]

4. *The Voucher Battle:* Zelman v. Simmons-Harris

Zelman involved a taxpayer challenge to the Ohio Pilot Scholarship Program, which provided private school tuition aid for certain low-income children in the Cleveland City School District.[207] The taxpayers argued that because ninety-six percent of the participating students attended religiously affiliated schools, the program had the impermissible effect of advancing religion.[208]

The respondents, not surprisingly, denied the First Amendment charge, but they also introduced a novel argument into the school aid debate: even if the voucher program did advance religion, it should be upheld on the ground that "the improvement it will bring to the education of African-American students now attending Cleveland's public schools outweighs Establishment Clause concerns."[209] This claim was supported in an amicus brief by a newly formed provoucher organization entitled the Black Alliance for Educational Options (BAEO). In its brief, BAEO described itself as a nonprofit, intergenerational organization "committed to improving the educational opportunities available to minority and low-income children."[210] Although the summary of argument stated that the "case [was] not about religion, but about educational policy,"[211] most of the brief addressed the Establishment Clause issue. BAEO argued that the voucher program did not have the primary effect of advancing religion and that it was administered in

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205. *Id.*

206. 536 U.S. 639 (2002).

207. *See id.* at 643-47 (describing the Ohio program).

208. Brief for Respondents Doris Simmons-Harris, et al. at 2, 6-7, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779).

209. Brief of the NAACP Legal Defense & Educational Fund, Inc. and the NAACP as Amici Curiae in Support of Respondents at 3, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779) [hereinafter NAACP Brief].

210. Brief of Black Alliance for Educational Options as Amicus Curiae in Support of Petitioners at 2, *Zelman*, 536 U.S. 639 (Nos. 00-1751, 00-1777, 00-1779).

211. *Id.*

a religiously neutral fashion.[212] Only at the end of the brief did BAEO return to the issue of educational opportunity, citing numerous studies about the success of vouchers in failing school systems. They concluded that invalidating the Cleveland program "would force thousands of economically disadvantaged children to return to the substandard conditions of Cleveland's inner-city public schools."[213]

The NAACP disagreed. In an amicus brief supporting the taxpayers, the NAACP argued that the tuition assistance program raised "grave dangers of ... fostering the resegregation of schooling in Cleveland."[214] As evidence, they pointed out that whites were participating in the voucher program at a disproportionate rate compared to the number of white students in the school district.[215] The brief made no argument with regard to the Establishment Clause challenge, concluding only that the "Court should act to prevent the establishment of separate private, predominantly white educational systems and public, predominantly minority educational systems ... by rejecting" the petitioner's argument.[216]

Zelman sparked intense conflict in the black community about the desirability of school choice. Although the Establishment Clause was the legal basis for the litigation, the surrounding debate had nothing to do with religion or church-state relations. Nonetheless, as in *Lemon*,[217] the Supreme Court completely ignored the race- and class-based implications of Cleveland's tuition assistance program, and instead grounded its decision exclusively on the First Amendment. In a 5-4 ruling, the Justices held that the program was "entirely neutral with respect to religion" and did not offend the Establishment Clause.[218]

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212. *Id.* at 3-4.
213. *Id.* at 29.
214. NAACP Brief, *supra* note 209, at 2.
215. *Id.* at 13.
216. *Id.* at 17.
217. *See supra* note 177 and accompanying text.
218. Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002).

5. The Continuing School Aid Debate in the Black Community

As one writer observed, "[s]trange days indeed, when the NAACP's ... *opponents* are black school children singing 'We Shall Overcome' on the courthouse steps."[219] Tuition assistance for nonpublic schools has become increasingly popular in cities throughout the country, and the black community remains divided about the impact of such programs. In reflecting on the history of religious school aid rulings in the context of the African-American community, the most interesting observation is that the actual issue of religious establishment has been entirely ancillary to that of racial segregation and educational opportunity. Although shifts in Establishment Clause jurisprudence have, for the most part, paralleled shifts in the impact of religious school aid on black schoolchildren, the Supreme Court has never acknowledged the racial consequences of its school aid rulings. As a result, a severe disconnect exists between the internal logic of the Court's opinions and external influences and implications of the litigation leading to those opinions. *Zelman* raised an important question: can benefits for a historically disadvantaged population outweigh religious establishment concerns in determining the constitutional validity of a school aid program? By focusing the *Zelman* opinion exclusively on the Establishment Clause challenge, the Court left this question unanswered.

B. Faith-based Social Services

The use of public money to fund private social services has a long history in the United States; as early as 1898, New York City distributed fifty-seven percent of its money for relief of the poor to private agencies.[220] Throughout this history, churches and religious organizations have been at the forefront in providing social services, with "religiously motivated persons [typically] ... the first into areas of societal need."[221] As government contracting with nonprofit agencies increased dramatically over the past forty years, so did the

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219. Garnett & Garnett, *supra* note 195, at 305-06.
220. STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 6 (1996).
221. *Id.* at 8.

amount of public money going to churches and religious organiza-
tions. Each year, billions of tax dollars are funneled through
religiously affiliated programs for the provision of health care, foster
care, drug and mental health treatment, job training, child care, and
a host of other social services.[222] The New York Roman Catholic
archdiocese alone receives $1.75 billion annually in government
funds.[223] Although some of these services are provided in a secular
manner, many of the churches and religious nonprofits that receive
public funds continue to incorporate religious doctrine and faith-
based practices into their services. A recent study by Stephen
Monsma found that among religiously based child service agencies,
seventy-one percent have religious symbols or pictures in their
facilities; sixty-four percent have spoken prayers at meals; seventy
percent have "informal references to religious ideas by staff
with clients"; thirty-five percent have required religious activities;
and thirty-three percent "encourage religious commitments" by
clients.[224] As Monsma observes, "[o]ne of the best kept-secrets in the
United States is that when it comes to public money and religious
nonprofit organizations, sacred and secular mix."[225]

1. The Constitutionality of Faith-based Social Services: Bowen
v. Kendrick

Modern Establishment Clause jurisprudence includes only one
Supreme Court ruling on the constitutionality of providing public
funds for social services by religious entities. Decided in 1988,
Bowen v. Kendrick[226] involved a challenge to the Adolescent Family
Life Act, which bestowed federal grants to public and private
organizations for the purpose of providing services related to
teenage sexual activity and pregnancy.[227] Because religious
organizations were included among grantees, the plaintiffs argued
that the Act constituted an impermissible establishment of

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222. *See id.* at 1, 7.
223. *Id.* at 10.
224. *Id.* at 75 tbl.7.
225. *Id.* at 1.
226. 487 U.S. 589 (1988).
227. *Id.* at 593.

religion.[228] The Supreme Court rejected this challenge, holding that "direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion."[229] Although the plaintiffs also argued that the program created "an unacceptable risk" that the grant money would be used to promote religion, the majority disagreed, stating "we refus[e] to presume that [the grant] would be used in a way that would have the primary effect of advancing religion."[230]

Although *Bowen* specifically stated that social service providers may only use public money for secular purposes, its rejection of the plaintiffs' "unacceptable risk" argument had the practical effect of making it extremely difficult to win broad-based Establishment Clause challenges to government grant programs. Instead, a plaintiff must litigate on a grant-by-grant basis and show that specific grant recipients are using public money to promote religion.[231] This aspect of *Bowen* explains why there has been so little litigation regarding religious activity by government-funded social service providers: it is simply not worth the effort for the ACLU or other separation watchdogs to litigate against specific grants to specific religious organizations. The most important exception to this nonlitigation pattern is *Wilder v. Bernstein*,[232] a faith-based social service case decided by the Second Circuit in 1988.

2. Faith-based Social Services and Disparate Racial Impact: Wilder v. Bernstein

Wilder was the culmination of a series of lawsuits challenging the New York City Department of Social Service's pervasive use of sectarian foster care agencies and its practice of placing children in agencies affiliated with the same religious denomination as the child's legal parent(s).[233] Represented by the New York Civil Liberties Union, Shirley Wilder, a black, Protestant foster child, complained that the provision of state funds to sectarian agencies

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228. *Id.* at 597.
229. *Id.* at 609.
230. *Id.* at 612 (citing Roemer v. Bd. of Pub. Works, 426 U.S. 736, 760 (1976)).
231. *See* MCCONNELL ET AL., *supra* note 189, at 600.
232. 848 F.2d 1338 (2d Cir. 1988).
233. *Id.* at 1341.

and the department's religious-matching scheme violated the Establishment, Free Exercise, and Equal Protection Clauses of the Constitution.[234]

With regard to the establishment claim, Wilder argued that the Department's practice of providing public funds to sectarian agencies impermissibly advanced religion and favored some religions over others and over nonreligion.[235] Although the free exercise claim is outside the scope of this article, the equal protection claim is interesting because, like Lemon in his challenge to parochial school aid, Wilder argued that the church-state partnership at issue resulted in discrimination against blacks and other minorities.[236] In New York City, the best foster care facilities were overwhelmingly Jewish and Catholic-run. Because the statutory scheme gave Jewish and Catholic children first rights to placement with these agencies, Protestant children were, on the basis of their religion, sent to inferior Protestant, secular, or public facilities. Wilder asserted that these placements were racially discriminatory because white children were more likely to be Catholic and Jewish, and black children were more likely to be Protestant.[237] As a result, "black children waited longer than white children for placement; and black children were more often and in numbers disproportionate to white children placed with agencies of inferior quality."[238]

The first district court to consider Wilder's claims conceded that the department's practices did violate "the literal language of the Establishment Clause," but held that this infringement was justified by two legitimate state interests: the right of legal parents to determine the religious upbringing of their children, and the right of foster children to free exercise of religion.[239] The three-judge court concluded that the statutes and practices at issue represented "a fair and reasonable accommodation between the Establishment and

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234. *See id.* at 1338, 1341.

235. *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1303 (S.D.N.Y. 1986).

236. *See id.* at 1301-02.

237. *Id.* at 1302.

238. Martin Guggenheim, *State-supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bernstein, 56 BROOK. L. REV. 603, 621 (1990).

239. Wilder v. Sugarman, 385 F. Supp. 1013, 1024-26 (S.D.N.Y. 1974); *see* Guggenheim, *supra* note 238, at 615-16.

Free Exercise Clauses" of the First Amendment.[240] When a new complaint was filed five years later, essentially continuing the original lawsuit,[241] the new district court judge came to the same conclusion, balancing Establishment Clause concerns with "other equally important provisions of the Constitution."[242]

As in the school-aid cases, the racial discrimination charges fell by the wayside. In the first round of litigation, the district court explicitly limited its inquiry to the Establishment Clause challenge, declining to consider Wilder's equal protection claim.[243] Eventually, the parties entered into a settlement agreement that required the Department of Human Services to ensure that black Protestant children had equal access to the best facilities by implementing a "first-come, first-served" policy when demand for a particular placement exceeded availability.[244] The last round of Wilder litigation was instigated by sectarian agencies that objected to the settlement and argued, among other things, that the "first-come, first-served" policy was a race-conscious remedy without empirical justification.[245] The district court and Second Circuit both rejected this argument, not because they found sufficient evidence to justify a race-conscious remedy, but because they concluded that the "first-come, first-served" policy was not race conscious.[246] Thus, at no point in the entire litigation did any of the courts consider whether New York City's practice of matching religion in foster care placements actually violated the equal protection rights of black children. The cases were decided entirely on the basis of the Establishment and Free Exercise Clauses. As in the school-aid cases, the judiciary acted as if the only issue presented was one of church and state and ignored the racial undertones and implications of the litigation.

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240. *Wilder*, 385 F. Supp. at 1029.
241. *See* Guggenheim, *supra* note 238, at 621.
242. *See Wilder*, 385 F. Supp. at 1024.
243. *Id.* at 1017-18.
244. Wilder v. Bernstein, 848 F.2d 1338, 1343-45 (2d Cir. 1988).
245. *Id.* at 1340-41.
246. *Id.* at 1345; Wilder v. Bernstein, 645 F. Supp. 1292, 1320-21 (S.D.N.Y. 1986).

IV. CONCLUSION: THE PRAYER VIGIL AND THE CONSTITUTION

The preceding review of Establishment Clause jurisprudence makes clear that the African-American struggle for civil rights has intersected in important ways with the Court's development of ideas regarding the separation of church and state. The review also highlights the extent to which African Americans, or at least key African-American political institutions, have conceptualized the community's interests in the Establishment Clause. For the most part, the litigation pattern suggests that the African-American community's interest in the Establishment Clause has been instrumental—a legal vehicle used to achieve a higher end such as desegregation. And desegregation, while clearly pursued for its own moral value, also had instrumental value to those litigating cases like *Lemon*. African Americans hoped that their children would have access to high quality education through desegregation. One can easily see this last point by looking to more recent cases such as *Zelman*: there, Establishment Clause concerns, at least for some African-American litigants, took a back seat to an interest in educational quality, which the litigants hoped to achieve through a more liberal voucher policy. Note that even the NAACP, which supported the claim that Ohio's program violated the Establishment Clause, did not press a First Amendment argument. The NAACP opposed the voucher plan out of concern that the program would reestablish segregated public schools.[247]

There is little concern about, or even attention to, the potential dangers that outsiders see regarding close church-state relationships exhibited by representative African-American institutions; perhaps this is not surprising, particularly in light of the centrality of church-like norms, religious language, and other social practices readily flowing from the towering institutions of African-American cultural life. Indeed the central role of churches in African-American communities helps explain not only Commander Ervin's success in facilitating the WSC prayer vigils, but also the seemingly inconsistent litigation positions of the NAACP in *Lemon* on the one hand, and the BAEO and NAACP in *Zelman* on the other. In no case did the kinds of "traditional" Establishment Clause concerns identified

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247. NAACP Brief, *supra* note 209, at 2.

by the *Everson* Court ever loom larger for these groups. Given that one might argue that the groups of people most affected by a particular policy—African-American public school students in Ohio, residents of high crime neighborhoods in Chicago—are less troubled by potential constitutional problems than less impacted outsiders, should one conclude that certain collaborations between the state and the church, like the WSC prayer vigil, should be sanctioned?[248]

It would be ironic, to say the least, to conclude that activities such as the WSC prayer vigil should be *prohibited* given that the community-based problems to be remedied on Chicago's West Side have a particular history. That history is one of political exclusion and marginalization—marginalization that made it difficult for community members of the past to acquire the resources necessary to avert the kinds of processes that Shaw and McKay argued led to crime.[249] In that atmosphere, African-American residents of urban disadvantaged neighborhoods created their own civil institutions—the church being one—to deal with community-based problems. It is natural, then, that residents would turn to this venerable institution when taking the beginning steps to reestablish, or establish for the first time, working relationships with political and government actors. And it would be sad—perhaps even an outrage—to use the Constitution to prevent residents of impoverished communities from drawing on this longstanding source of civic strength and power.

In their brief, the *Zelman* litigants offered a framework for situating the WSC prayer vigil in its proper historical context. They proposed a balancing test, arguing that even if Cleveland's voucher program violated the Establishment Clause on its face, it should be upheld on the ground that "the improvement it will bring to the education of African-American students ... outweighs Establishment Clause concerns."[250] This approach is attractive because it breaks down the, somewhat artificial, lack of balancing in the First Amendment religion cases. The most problematic element of the

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248. *See* Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 830-32 (1998) (arguing that it is important that courts, when considering the constitutionality of crime policy, consider the views of those most affected by the policy and accord this group more weight than the views of outsiders).

249. *See supra* notes 3-6 and accompanying text.

250. NAACP Brief, *supra* note 209, at 3.

current *Lemon* test is that, at least facially, it is a purely formal inquiry: whether or not a state action constitutes religious establishment has nothing to do with the context in which the action takes place. Although the historical development of Establishment Clause jurisprudence strongly suggests that the Justices are swayed by the circumstances surrounding the challenged activity, the Court's reasoning is always expressed as if it takes place in a vacuum, inconsiderate of the extrareligious impact of its decisions. This tendency could be precisely why it is so difficult to identify an internal logic in the Court's opinions; the Justices fail to articulate the true scope of the *Lemon* inquiry, which necessarily involves some balancing of competing state interests. Constitutional balancing outside of the Establishment Clause context is widespread. The Court has acknowledged the role of interest-weighing in almost every other area of constitutional law, including freedom of speech,[251] substantive due process,[252] procedural due process,[253] equal protection,[254] separation of powers,[255] privileges and immunities,[256] dormant federal commerce power,[257] and even free religious exercise.[258] Why not here? The balancing approach to religious establishment eliminates the need for artificial formalistic debate over church-state interactions and provides a platform for examining the empirical questions that currently divide the black community: Does parochial school aid hurt disadvantaged students? Is the provision of federally funded social services by black churches good for black communities? Can church-police partnerships improve the safety of poverty-stricken neighborhoods? Under current Establishment Clause jurisprudence, these inquiries appear irrelevant. In reality, they are often the heart of the matter.

In fact, one way to look at the litigation path described above is to say that African-American litigants in establishment cases have implicitly made a balancing argument since *Lemon*. While it could

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251. *See, e.g.*, Schneider v. State, 308 U.S. 147, 160-61 (1939).
252. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846, 853 (1992).
253. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).
254. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 766 (1977); Craig v. Boren, 429 U.S. 190, 197-98 (1976).
255. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853-54 (1986).
256. *See, e.g.*, Supreme Court v. Piper, 470 U.S. 274, 284 (1985).
257. *See, e.g.*, Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 320-21 (1851).
258. *See, e.g.*, United States v. Lee, 455 U.S. 252, 257-58 (1982).

be coincidental that establishment jurisprudence has, in so many ways, paralleled the interests of African Americans, it appears that the Supreme Court has not been immune to the racial implications of its establishment decisions. The problem here is that the explicit identification of race as a factor under the *Lemon* test could constitute impermissible racial discrimination under the Equal Protection Clause. This might explain the Court's reluctance to recognize the racial implications of its decisions—allowing Cleveland's voucher program to continue solely on the basis of its benefit to black children would put the Court on very dangerous ground.[259] It is certainly permissible, however, for the state to undertake efforts to improve the quality of life in poverty-stricken neighborhoods; as the Court held in *San Antonio Independent School District v. Rodriguez*, wealth is not a suspect classification.[260] A church-state partnership in a poor, black neighborhood might be justified not because the community is black, but because the centrality of the church in that community creates a situation in which the most efficient and effective way for the government to serve that community is through its religious institutions. The Equal Protection Clause impacts the ways in which black litigants can frame their contextual arguments, but it does not prevent courts from considering the unique role of faith-based institutions in black communities. Moreover, even in cases bringing race-based Equal Protection challenges, courts have been willing to give special leeway to police and public safety arguments.[261]

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259. If it is true that the Court has not been immune to the racial implications of its decisions in the Establishment Clause cases, even without mentioning race, then it would not be the first time in the Court's history. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1156-58 (1998) (noting that nearly all the landmark criminal procedure cases arose in a context in which the Supreme Court fashioned its decisions in response to institutionalized racism without being very forthcoming about this fact, and drawing a comparison to modern free speech jurisprudence).

260. 411 U.S. 1, 18 (1973).

261. *See, e.g.*, Petit v. City of Chicago, 352 F.3d 1111, 1115 (7th Cir. 2003) (upholding the City's testing program allowing African-American police officers to be promoted before whites with better raw test scores because the city had a "compelling state interest" in a racially balanced police force and because the program was "narrowly tailored" to the problem). The Court went on to explain that it has left open small windows for discrimination when the discrimination is supported by compelling public safety issues, such as police department effectiveness. *Id.* at 1114 (citing Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002)); *see* Talbert v. City of Richmond, 648 F.2d 925, 926 (4th Cir. 1981) (allowing race-based promotion of police officers).

EPILOGUE: THE CAUTIONARY TALE OF KIRYAS JOEL

While the doctrine erected around the First Amendment's religion clauses is the antithesis of clarity, the basic purposes of those clauses are fairly straightforward. Thus, courts have worried about government's excessive interference with or promotion of religion to ensure that no individual is forced by the State to undertake a religious practice that he or she does not want to, or forced to believe in a deity at all, thereby assuring the "fullest possible scope of religious liberty and tolerance."[262] This idea has led to judicial tests to seek out coercion and endorsement.[263] In the context of the WSC prayer vigils, the concerns of those tests may be at worst misplaced or, at best, unhelpful, because of the cultural norms and practices of the relevant neighborhood residents. But the First Amendment religion clauses have an additional goal that is relevant to the events in WSC, and, indeed relevant to the social process promoted here. Specifically, another goal of the religion clauses is to "avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike."[264] Social processes in WSC were not activated in ways that brought the greatest potential for crime reduction and prevention; in part, this was due to conflict among the community's important institutions that was based, at least in part, on religion. Justice Breyer's presumed strategy of greater secularization to quiet the conflict is unlikely to succeed in WSC, however, where church culture is so prominent. Instead, a different route, one that simultaneously promotes a religious approach to interaction with community leaders and an approach of official state-based neutrality, appears to be the correct prescription—a prescription in many ways in accord with the goal underlying the religion clauses themselves.

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262. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

263. *See* Lee v. Weisman, 505 U.S. 577, 592-93 (1992) (advocating a coercion test); Lynch v. Donnelly, 465 U.S. 668, 688 n.1 (1984) (O'Connor, J., concurring) (advocating an endorsement test).

264. Van Orden v. Perry, 125 S. Ct. 2854, 2868 (2005) (Breyer, J., concurring) (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting)).

Vigilance is still in order, however. The very success of the prayer vigils and the ensuing accretion of the WSC ministers in municipal government may lead to concern for the relative power of other religious groups in WSC. As long as all religious groups have equal access to municipal resources, there is little reason to worry; but to the extent of evidence that one sect is favored over another, or even shut out altogether—is the Nation of Islam at the table?—one might rightly wonder whether endorsement and coercion ought to play a larger role in regulating the local activities in WSC. Where would that regulation come from? This Article ends with a cautionary tale: the story of Kiryas Joel.[265]

Kiryas Joel Village is a community of ultraorthodox Hasidic Jews located fifty miles northwest of New York City. Following the Holocaust, surviving members of the Satmar Hasidic sect relocated from Europe to the Williamsburg section of Brooklyn, New York.[266] By 1975, the Satmar community had grown too large for its forty-square-block enclave in Brooklyn, and decided to purchase 320 acres of land in Monroe, New York.[267] A zoning dispute soon arose with the township, leading the Satmars to incorporate their land as the Village of Kiryas Joel in 1977.[268] As of 1995 the village had over twelve thousand residents, all of whom were members of the Satmar Hasidic sect. Children made up about half the population.[269]

The Kiryas Joel community is devoutly religious and maintains a lifestyle that bears little resemblance to that of mainstream society. They interpret the Torah strictly and speak Yiddish as their primary language. Men and women are segregated outside the home and wear unconventional clothes that include head coverings and special garments for boys and modest dresses for girls. Television, radio, and English-language publications are prohibited. Children are educated at private, sex-segregated religious schools, where boys

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265. The details of the following story can be found in *Board of Education v. Grumet,* *(Kiryas Joel)* 512 U.S. 687 (1994).

266. *Id.* at 690-91.

267. *Id.*

268. *Id.*

269. *See* Deidre M. Glasser, Case Note, *The Curious Case of* Kiryas Joel: Board of Education v. Grumet (Kiryas Joel), *114 S. Ct. 2481 (1994),* 63 U. CIN. L. REV. 1947, 1948 n.5 (1995); *see also* Lisa W. Foderaro, *Hasidic Public School Loses Again Before U.S. Supreme Court, but Supporters Persist,* N.Y. TIMES, Oct. 13, 1999, at B5 (stating that the village population was fifteen thousand in 1999).

receive extensive training in the Talmud and girls are prepared for their roles as wives and mothers.[270]

While the two parochial schools in Kiryas Joel were intended to serve the entire community, they did not have the resources necessary to provide special education services to children with disabilities. Under the Individuals with Disabilities Education Act, these children were entitled to adequate special education even though they were enrolled in private schools. Thus, the challenge facing New York State and the Monroe-Woodbury Central School District, in which the village was located, was how to provide special education services to the handicapped children of Kiryas Joel.[271]

The New York legislature determined that this situation constituted an educational crisis, and decided that special education services should be offered within the community of Kiryas Joel.[272] With the support of the Monroe-Woodbury school district and the village, the state legislature enacted a special statute that established Kiryas Joel as "a separate school district" that would "have and enjoy all the powers and duties of a union free school district under the provisions of the education law."[273] The statute empowered a locally elected school board to open and close schools, hire teachers, prescribe textbooks, and establish disciplinary rules. Governor Cuomo called the new law "a good faith effort to solve the[] unique problem" of educating the handicapped children of Kiryas Joel.[274]

Only one public school was opened by the new district, a special education school that served about forty full-time students and 160 part-time students.[275] Nonhandicapped children in Kiryas Joel continued to attend parochial school and used the new school district only for transportation, remedial education, and health and welfare services.[276] If a nonhandicapped child had requested public education, the district would have paid tuition to send the child to another school district nearby.[277] Neighboring school districts made

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270. *Kiryas Joel*, 512 U.S. at 691.
271. *Id.* at 692.
272. *See id.* at 693.
273. *Id.* at 693 n.1 (quoting 1989 N.Y. Laws, ch. 748).
274. *Id.* at 693 (alteration in original).
275. *See id.* at 694.
276. *Id.*
277. *Id.*

arrangements to send their handicapped Hasidic children to the Kiryas Joel public school; two-thirds of the full-time students were from outside the village.[278] Despite the religious nature of the village, the Kiryas Joel public school was wholly secular, with non-Satmar teachers and staff, coeducation of boys and girls, and a secular curriculum.[279] The superintendent hired to manage the district, Dr. Steven Bernardo, was not a member of the Satmar community.[280] Although some members of an ultraconservative wing of the community felt the presence of the secular school violated the Torah, most residents of the village were pleased with the new arrangement, as were neighboring school districts and state officials.[281]

Despite the satisfaction of the involved parties with the statute, a number of taxpayers opposed the new school district. A lawsuit was filed challenging the constitutionality of the statute that created the Kiryas Joel Village School District.[282] In 1994, the U.S. Supreme Court held that the statute did indeed involve impermissible entanglement of church and state and thus violated the Establishment Clause of the First Amendment.[283] In response, only days later, the New York legislature passed a new statute, Chapter 241, that was intended to provide a religion-neutral mechanism for reestablishing the Kiryas Joel school district.[284] The new law allowed all qualifying municipalities to "organize a new union free school district consisting of the entire territory of such municipality whenever the educational interests of the community require it."[285] A seceding district was required to have at least two thousand children and surpass the state average in wealth, although its secession could not adversely affect the larger district. In addition, Chapter 241 only applied to cities, towns, and villages in existence on an effective date.[286] Kiryas Joel quickly applied to re-establish its

278. *Id.*

279. *Id.* at 733 (Scalia, J., dissenting).

280. *See id.*; Haran C. Rashes, *Try, Try, Try Again: The Kiryas Joel Village School District and the Separation of Shul, School, and State*, 29 U. TOL. L. REV. 485, 494 (1998).

281. *See* Foderaro, *supra* note 269.

282. *See Kiryas Joel*, 512 U.S. at 694 & n.2.

283. *Id.* at 709-10.

284. Grumet v. Cuomo, 625 N.Y.S.2d 1000, 1003 (N.Y. Sup. Ct. 1995).

285. *Id.*

286. Grumet v. Cuomo, 681 N.E.2d 340, 344 (N.Y. 1997).

school district, and the Monroe-Woodbury Board of Education voted unanimously to approve the secession.[287] Thus, the Kiryas Joel Village School District was reestablished within weeks of the Supreme Court decision. But Chapter 241 was also challenged by taxpayers, on the grounds that it singled out Kiryas Joel for special treatment and thereby involved impermissible governmental endorsement of the Satmar religious community. Indeed, Kiryas Joel was the only municipality in New York that qualified for secession under the new law. In 1997, the New York Court of Appeals struck down Chapter 241 as unconstitutional.[288]

A few months later, the New York legislature tried again, enacting Chapter 390, which still allowed Kiryas Joel Village to create its own school district but under broader guidelines.[289] Governor Pataki estimated that ten municipalities qualified under the new law.[290] Opponents claimed the law applied to only two towns and filed suit challenging its constitutionality.[291] Although the school district won the first round of litigation, the New York Court of Appeals reversed in 1999, concluding again that the law violated the Establishment Clause because it involved special treatment of a religious community.[292]

This time, the New York legislature was prepared: two months earlier, they had passed a fourth law that allowed the re-establishment of the Kiryas Joel school district but expanded the criteria for secession even further. The new statute was broad enough to cover twenty-nine municipalities in New York.[293] Kiryas Joel Village was again approved as a separate school district, and although opponents threatened to sue for a fourth time, it does not appear that a lawsuit was ever filed.

The Kiryas Joel Village School District exists today, operating one special education school that employs twenty-four teachers and serves 179 students. In 1999-2000, per pupil expenditure was $74,048, almost seven times the average expenditure per pupil in

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287. *Id.*
288. *Id.* at 342.
289. Grumet v. Pataki, 720 N.E.2d 66, 70 (N.Y. 1999).
290. *Id.* at 83 (Bellacosa, J., dissenting).
291. *Id.*
292. *Id.* at 67 (majority opinion).
293. Foderaro, *supra* note 269.

New York state public schools.[294] Dr. Bernardo still serves as superintendent and the school continues to be wholly secular in its management and curriculum. Thus, despite fifteen years of litigation and four different formal policies, special education services are now provided to Kiryas Joel children in the same way originally envisioned by the state legislature when it first undertook the issue in 1985.

On the one hand, the story of Kiryas Joel can be seen as a success story. The Kiryas Joel "problem" arose because a Supreme Court ruling forced Monroe-Woodbury to close its special education site at the parochial school in Kiryas Joel. Underlying these rulings was a fundamental value judgment by the Supreme Court about what the relationship between church and state *should* look like in a good society. In this context, the Kiryas Joel statute can be seen as the New York legislature's response; that is, the statute represents the legislature's judgment about what constitutes an appropriate relationship between a state government and a religious community such as Kiryas Joel. While the legislature could not challenge the decisions already made by the Court, it did have the ability to enter uncharted legal territory in an attempt to preserve whatever flexibility it could in its dealings with religious groups. This volleying is partly a struggle over power, but it is also driven by judgments about the value of church-state relationships. The taxpayers' decision to challenge the statute also represented a judgment about the value of state cooperation and accommodation of religious groups, namely a belief that the Kiryas Joel statute represented an undesirable endorsement of a particular religion by the government. The story has a successful ending because the children received the services that they needed, and the challengers, presumably, decided that the legislature's design providing for those services met their requirements, or at least was not worth complaining about.

The story of Kiryas Joel suggests that a successful outcome could be reached should the events in WSC be subject to challenge; and such a challenge might generate a productive volleying that could

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294. *See* UNIV. OF THE STATE OF N.Y., STATE EDUC. DEP'T, THE NEW YORK STATE SCHOOL REPORT CARD FOR KIRYAS JOEL VILLAGE SCHOOL IN KIRYAS JOEL VILLAGE UNION FREE SCHOOL DISTRICT 1 (2002), *available at* http://www.emsc.nysed.gov/repcrd2002/overview/441202020001.pdf.

check some of the possible negative outcomes. But suppose there is no litigation. No one has ever discussed bringing the City of Chicago into court over the WSC prayer vigils. Is this a good thing? Perhaps it is not. Without litigation, it is not clear what check exists to ensure that unconstitutional excesses do not take place. The state legislature of New York was tenacious in the face of multiple taxpayer challenges, but there is no guarantee that Chicago's municipal officials would exert such energy. Without legislative or executive pushback against challengers, the volleying displayed in Kiryas Joel is not generated, and there is no guarantee of a positive outcome. In such a world, perhaps the absence of litigation is a good thing for the West Side of Chicago.