

ESSAY

CRIMINAL PROCEDURE AND THE GOOD CITIZEN

*I. Bennett Capers**

There is an aspect of criminal procedure decisions that has for too long gone unnoticed, unrecognized, and unremarked upon. Embedded in the Supreme Court's criminal procedure jurisprudence—at times hidden in plain sight, at other times hidden below the surface—are asides about what it means to be a "good citizen." The good citizen, for example, is willing to aid the police, willingly waives their right to silence, and welcomes police surveillance. And this is just the start. Read between the lines, and the Court's "citizenship talk" also dictates how a good citizen should behave, move, and even speak. Criminal Procedure and the Good Citizen surfaces this aspect of the Court's criminal procedure decisions to explore a series of questions about the nature of power, participation, and citizenship today, especially with respect to the police.

These concerns alone should be reason enough to question the Court's citizenship talk. But there is another concern as well. At this time—when the criminal justice system is the primary civics education for so many individuals, when so many criminal procedure opinions are also on a certain level race opinions—the Court's citizenship talk may very well further inequality. This Essay addresses these concerns. And it takes a first step in imagining a space in which citizens would have the ability, without repercussions or recrimination, to talk back to the police, to ask why and how come, to assert their rights, to question and test the boundaries of the law, and to say "no."

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INTRODUCTION

“[Our decision today sends the message] that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.”

Utah v. Strieff, Justice Sotomayor, dissenting¹

Perhaps the most remarkable aspect of the Court’s recent decision in *Utah v. Strieff*, a case holding that even when a police stop is completely unjustified, evidence discovered during that stop may still be admissible,² is Justice Sotomayor’s dissent. On one level, her dissent is noteworthy for its references to W.E.B. Du Bois, Michelle Alexander, James Baldwin, Ta-Nehisi Coates, Jack Chin, Marie Gottschalk, Lani Guinier, and Gerald Torres; indeed, it is noteworthy, for bringing Critical Race Theory into Supreme Court jurisprudence. It is exceptional, too, for her directness in accusing the majority of further enabling the police to treat certain individuals “as second-class citizens.”³ But there is another reason her dissent is remarkable: It touches on an aspect of criminal procedure decisions that for too long has gone unnoticed, unrecognized, and unremarked upon. Even in criminal procedure decisions—maybe especially in criminal procedure decisions—the Court plays a role in marking who belongs, who does not, who is entitled to be treated as a regular citizen, and who can be treated as second class. Embedded in the Supreme Court’s criminal procedure jurisprudence—at times hidden in plain sight, at other times hidden below the surface—are asides about what it means to be a “good citizen.”

As should already be evident, by “good citizen,” I am not referring directly to the Court’s discussion of citizenship as nationality, as the legal condition of an individual as a member (or not) of a state. Such a topic is certainly a worthy one. For starters, there is our history of racial, xenophobic, and religious exclusions, a history that continues to inform our present. Nor am I referring directly to the legal issue of who, based on their citizenship status, can claim criminal procedure protections under our Bill of Rights. Who are “the people” protected by the Fourth Amendment—for example, does it govern searches of non-American visitors to the country? And, given the reach of American jurisdiction, what process and protections are owed noncitizens on domestic and foreign soil? These issues inform the argument I want to make, but they are not at its core. Nor is my primary interest citizenship as belonging⁴—

1. 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

2. *Id.* at 2059 (majority opinion).

3. *Id.* at 2069–71 (Sotomayor, J., dissenting). I am not the only scholar to laud these aspects of Justice Sotomayor’s dissent. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *Yale L.J.* 2054, 2057–58 (2017).

4. See generally Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 1–14 (1989) (suggesting that American law has both reflected and defined what it means to be an American).

that sense of “genuine participation in the larger political, social, economic, and cultural community”⁵—as conceived by Professor Kenneth Karst, though this too informs my project.

Rather, what interests me—as someone who writes and teaches about equality and criminal justice—is what citizenship means when it comes to every day interactions between the police and the policed. It was this interest that led me to reread the Court’s criminal procedure decisions to uncover what these decisions say about citizenship vis-à-vis the police. What I found surprised me. Citizenship talk was everywhere, from well-known cases like *Miranda v. Arizona*⁶ and *Schneekloth v. Bustamonte*,⁷ to less well-known cases like *McCray v. Illinois*.⁸ These asides about good citizens—though rarely phrased so bluntly—are so pervasive that I wondered how I had not noticed them before. I thought of the novelist and essayist Toni Morrison’s observation about her own astonishment while reading literature:

It is as if I had been looking at a fishbowl—the glide and flick of the golden scales, the green tip, the bolt of white careening back from the gills; the castles at the bottom, surrounded by pebbles and tiny, intricate fronds of green; the barely disturbed water, the flecks of waste and food, the tranquil bubbles traveling to the surface—and suddenly I saw the bowl, the structure that transparently (and invisibly) permits the ordered life it contains to exist in the larger world.⁹

I had seen the holdings and the not-so-subtle curtailment in Fourth Amendment protections. I had seen the chipping away of meaning from the Fifth Amendment. What I had not seen, until now, was the way these decisions were also about citizenship, especially citizenship vis-à-vis the police.

These cases tell us that the good citizen is willing to aid the police and to consent to searches. The good citizen, at times, willingly waives their right to silence, and at other times their right to speak. The good citizen, having nothing to hide, welcomes police surveillance. And this is just the start. Read between the lines, and the Court’s citizenship talk also dictates how a good citizen should behave, move, and even speak. These decisions not only *reflect* ideas about good citizenship. They *produce* good citizenship. These decisions do not simply regulate police behavior. They regulate the behavior of citizens.

One goal of this Essay is to surface this aspect of criminal procedure decisions. But the larger goal is to raise questions. What does it mean for

5. Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *Fordham L. Rev.* 2493, 2494 (2007).

6. 384 U.S. 436, 460, 477–81 (1966).

7. 412 U.S. 218, 229, 232, 243 (1973).

8. 386 U.S. 300, 308 (1967).

9. Toni Morrison, *Playing in the Dark: Whiteness and the Literary Imagination* 17 (1992).

the Court to demarcate good citizenship vis-à-vis police power, particularly a form of citizenship that involves ceding constitutional protections in service of the state? What are we to make of the Court's implied marking of certain citizens as not good, or indeed as insubordinate and unruly? And if part of being a participatory citizen is to test the boundaries of the law—by talking back to law enforcement, by refusing to surrender constitutional protections, and by asserting rights—how does the Court's citizenship talk chill participatory citizenship and frustrate democratic dissent?

These concerns should be reason enough to critically examine the Court's citizenship talk. But there is a second concern as well, at least for me.¹⁰ After all, I am a black man writing in a country where race has always mattered. I am a black man writing in a country where “young plus black plus male” too often “equals probable cause.”¹¹ I am writing against a sharp white background where there exists, forever coupled, both a “racial tax”¹² and a “racial privilege.”¹³ And I am a black man in a country where citizenship, at least for those of us who are black or brown, has always seemed contingent, probationary, and revocable. Indeed, citizenship, much like race itself, has always seemed *policed*. At this time—when Black Lives Matter has become part of the national zeitgeist,¹⁴ when the criminal justice system is the primary civics education for so many individuals,¹⁵ when so many criminal procedure opinions are also on a certain level race opinions,¹⁶ when increasingly there is a feeling of

10. Like Professor Patricia Williams, I subscribe to the notion that my identity matters when it comes to thinking about the law. See Patricia J. Williams, *The Alchemy of Race and Rights* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know it’s a bad morning.”).

11. See generally Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 *Fordham Urb. L.J.* 621 (1993) (explaining how the criminal justice system disproportionately targets African American young men).

12. Randall Kennedy, *Race, Crime, and the Law* 159 (1997).

13. For more on racial privilege, especially in the context of criminal justice, see generally I. Bennett Capers, *The Under-Policed*, 51 *Wake Forest L. Rev.* 589, 593 (2016) (“[I]n this time when we are again discussing white privilege and telling each other, ‘Check your privilege,’ and at this time when the hashtag #Crimingwhilewhite has become a phenomenon, are there advantages to talking about white privilege—or more generally, privilege—and criminal justice?” (footnote omitted)).

14. See John Eligon, *One Slogan, Many Methods: Black Lives Matter Enters Politics*, *N.Y. Times* (Nov. 18, 2015), <http://www.nytimes.com/2015/11/19/us/one-slogan-many-methods-black-lives-matter-enters-politics.html> (on file with the *Columbia Law Review*).

15. Benjamin Justice & Tracey L. Meares, *How the Criminal Justice System Educates Citizens*, 651 *Annals Am. Acad. Pol. & Soc. Sci.* 159, 165–75 (2014). See generally Amy E. Lerman & Vesla Weaver, *Arresting Citizenship: The Democratic Consequence of American Crime Control* (2014) (“[C]riminal justice institutions have come to play a socializing role in a substantial subset of Americans, fundamentally influenc[ing] how they come to conceptualize the democratic state and their place in it.”).

16. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 *Harv. C.R.-C.L. L. Rev.* 1, 12–35 (2011) [hereinafter Capers, *Rethinking the Fourth Amendment*]; cf. Michael J. Klarman, *The Racial Origins of*

legal estrangement,¹⁷ and when retaliations and protests against police spur calls to “take America back”—the Court’s citizenship talk may very well further *inequality*.

This Essay proceeds as follows. Part I surfaces and shines a light on citizenship talk in the Court’s criminal procedure cases—talk that suggests what good citizenship means vis-à-vis interactions with the police. Most troubling, the dominant message in these cases seems to be that the good citizen willingly cedes their constitutional protections to aid the state. Part II turns to the work of French philosopher Michel Foucault to argue that the Court’s decisions have a disciplining effect. In ways large and small, these decisions discipline citizens into performing good citizenship. Part III argues that the Court’s citizenship talk has racial consequences. In part, this is because citizenship and race have always been interconnected in this country. But in part, it is because of the cases themselves. In a sense, every criminal procedure decision is also a race decision. The result is that the Court’s citizenship talk may further racial inequality. Part IV, perhaps the most radical part of this Essay, gestures toward a solution. It imagines an interstitial space, in criminal procedure jurisprudence and in police–citizen interactions, in which citizens would have the ability, without repercussions or recrimination, to talk back to the police, to ask why and how come, to assert their rights, to question and test the boundaries of the law, and to say “no.”

I. THE GOOD CITIZEN

“Is citizenship something susceptible to improvement, so that someone might become good at being an American?”

*The Good Citizen*¹⁸

“It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.”

*Miranda v. Arizona*¹⁹

Modern Criminal Procedure, 99 Mich. L. Rev. 48, 50–77 (2000) (describing four cases sentencing black criminal defendants to death after “egregiously unfair trials”); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 841–44 (1994) (“Racial discrimination in law enforcement has not escaped the Supreme Court’s notice. Indeed, in the last half century or so . . . the Court’s criminal procedure cases have frequently presented some of the most appalling racially discriminatory abuses of police power imaginable.”).

17. See Bell, *supra* note 3, at 2057 (using the term to describe the feeling shared by many African Americans of being “essentially stateless—unprotected by the law and its enforcers and marginal to the project of making American society”).

18. David Batstone & Eduardo Mendieta, What Does it Mean to be an American?, *in* *The Good Citizen* 1, 3 (David Batstone & Eduardo Mendieta eds., 1999).

19. 384 U.S. 436, 477–78 (1966).

A. *Be Good*

By now, Americans are used to exhortations to be good citizens.²⁰ We are told to vote.²¹ To be homeowners. To marry and have children, as long as we are not excessive about it. We are even encouraged, for God and country, to shop.²² These calls to citizenship are all around us and are so ubiquitous that we often absorb these messages without attending to them.

These calls to citizenship become more explicit and urgent at times of crisis. To be sure, different calls were made to different groups. During World War I and World War II, the call was to able-bodied young men—Uncle Sam Needs You!²³ But even those who were not expected to engage in combat were told they had a role to play. Women were told to work in defense plants, to volunteer for war-related organizations, and to serve in the military in noncombat roles.²⁴ Even American citizens who were forcibly interned, merely because they were of Japanese ancestry, were implored to do their duty as citizens and to view internment as a self-sacrifice for country. As the Court glibly put it in *Korematsu v. United States*, the case upholding the constitutionality of the military exclusion order, “Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.”²⁵

20. The term “citizen” in this Essay, especially when I speak of the “good citizen,” is not meant in an exclusionary sense to distinguish between those who are legally recognized as citizens and those who are not. Far from it. Rather, I use the term “citizen” in a far broader sense to refer to being a contributing member of society. In this sense, anyone, regardless of legal status, can be a good citizen. For example, a person who sees a suspicious package and notifies authorities is being a “good citizen” regardless of their legal status.

21. Perhaps most notably, Michael Schudson’s book *The Good Citizen* equates citizenship with “how individuals come to participate in political life, how they arrive at an understanding of political questions, and how they think about what obligations their citizenship entails.” Michael Schudson, *The Good Citizen: A History of American Civic Life* 315 n.2 (1998). As such, the book is largely devoted to political citizenship through voting and how such political citizenship has changed over centuries. See *id.*

22. See Andrew J. Bacevich, *He Told Us to Go Shopping. Now the Bill Is Due.*, *Wash. Post* (Oct. 5, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/03/AR2008100301977.html> [<http://perma.cc/54JV-LURC>] (discussing President George W. Bush’s response after 9/11 urging Americans to “carry on as if there were no war”).

23. See generally Christopher Capozzola, *Uncle Sam Wants You: World War I and the Making of the Modern American Citizen* 5–8 (2008) (explaining the visual metaphor of the Uncle Sam poster and Americans’ sense of obligation during wartime).

24. See generally Emily Yellin, *Our Mothers’ War: American Women at Home and at the Front During World War II*, at xiv (2004) (exploring the experiences of women—“the other American soldiers”—in the war effort).

25. 323 U.S. 214, 219 (1944); see also *Duncan v. Kahanamoku*, 327 U.S. 304, 349 n.4 (1946) (Burton, J., dissenting) (quoting the proclamation issued by Hawaii’s military governor following the attack on Pearl Harbor that “good citizens will cheerfully obey this proclamation and the ordinances to be published”). The Court made a related statement in *Buck v. Bell*, in which it gave its blessing to forced sterilization:

The current war against terror has again brought to the fore calls to be good citizens. These calls to good citizenship are not just evident by the flags people hang in front of their doors and in the bumper stickers telling us to “Support our Troops!” We are also enlisted in more direct ways. Consider the *Citizen’s Preparedness Guide* that the government circulated shortly after the September 11 terrorist attacks:

Be Aware. Get to know your neighbors at home and while traveling. Be on the lookout for suspicious activities such as unusual conduct in your neighborhood, in your workplace, or while traveling. Learn to spot suspicious packages, luggage, or mail abandoned in a crowded place like an office building, an airport, a school, or a shopping center.

Take what you hear seriously. If you hear or know of someone who has bragged or talked about plans to harm citizens in violent attacks or who claims membership in a terrorist organization, take it seriously and report it to law enforcement immediately.²⁶

Consider too the government’s short-lived Terrorist Information and Prevention System (TIPS).²⁷ Although abandoned, the program called upon citizens (including those who routinely entered homes such as delivery men, utility workers, and postal deliverers) to report suspicious activity.²⁸ Even without TIPS, other demands linger. We have all become conscripted as watchers. Who among us hasn’t been told, **IF YOU SEE SOMETHING, SAY SOMETHING**. Or maybe some of us have been conscripted more than others. Consider President Donald Trump’s call to Muslim Americans after the San Bernardino terrorist incident:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

274 U.S. 200, 207 (1927).

26. Nat’l Crime Prevention Council, *United for a Stronger America: Citizens’ Preparedness Guide 2* (2002), <http://dps.sd.gov/application/files/3815/0161/4337/United-For-A-Stronger-America-Citizens-Preparedness-Guide.pdf> [<http://perma.cc/RSS8-XXG2>]; see also Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror (ism)*, 75 U. Colo. L. Rev. 59, 102 (2004).

27. See, e.g., Ritt Goldstein, *U.S. Planning to Recruit One in 24 Americans as Citizen Spies*, *Sydney Morning Herald* (July 15, 2002), <http://www.smh.com.au/articles/2002/07/14/1026185141232.html> [<http://perma.cc/4JDX-FW2G>] (discussing the development and ramifications of the TIPS program); see also Frank James, *Bush Scales Back Terror Tip Program: Postal and Utility Workers Dropped*, *Chi. Trib.* (Aug. 10, 2002), http://articles.chicagotribune.com/2002-08-10/news/0208100203_1_utility-workers-tip-line-tips [<http://perma.cc/6TXW-MLUF>] (detailing the scaling back of the TIPS program in response to controversy).

28. See James, *supra* note 27.

“One thing, I think, that the Muslim population of this country has to do is they have to surveil their own people.”²⁹

Even in the context of domestic crime, these calls to be good citizens are sometimes made explicit, broadcast over public speakers and on our television sets. We are sent AMBER alerts about missing children via texts; recently, following the detonation of an explosive in New York City, we were sent text alerts enlisting us to help locate the alleged perpetrator.³⁰ In Florida, America’s retirement state, billboards announce Silver Alerts, enlisting the public to help find missing senior citizens with Alzheimer’s or dementia.³¹ In the comfort of our homes, we watch *America’s Most Wanted* followed by a toll-free hotline, 1-800-CRIME-TV. Soon, like our cousins in Great Britain, we may be encouraged to tap into public surveillance cameras from our networked devices so that we, too, can keep our streets safe.³² There are also appeals to the more adventurous, athletic, or risk-taking of us. We are urged to volunteer with our local police departments.³³ Even without being asked, many of us understand we have a duty to perform, a role to play.

There is more, of course. We have now seen so many television shows and movies in which someone goes missing and the entire town responds by linking arms in a field to aid the police in search that it now seems like second nature. We wait for the scene, knowing that it is coming, and then it is there. In the old days, before there were police forces, the sheriff

29. Esther Yu Hsi Lee, *Trump Has a Suggestion for What Muslims Should Do About Terrorism*, ThinkProgress (Dec. 18, 2015), <http://thinkprogress.org/trump-has-a-suggestion-for-what-muslims-should-do-about-terrorism-650d35151b0e/> [<http://perma.cc/JGL7-EDDN>]; see also Sahar F. Aziz, *Policing Terrorists in the Community*, 5 *Harv. Nat’l Security J.* 147, 147–55 (2014) (offering critical commentary on the government goal of community policing in counterterrorism); Jessica Glenza, *Donald Trump’s Message to Muslims: ‘We Want You to Turn in the Bad Ones,’* Guardian (Dec. 8, 2015), <http://www.theguardian.com/us-news/2015/dec/08/donald-trump-defends-muslim-ban> [<http://perma.cc/8MA4-R6PQ>] (analyzing Trump’s controversial rhetoric on Muslims and other politicians’ responses).

30. J. David Goodman & David Gelles, *Cellphone Alerts Used in New York to Search for Bombing Suspect*, N.Y. Times (Sept. 19, 2016), <http://www.nytimes.com/2016/09/20/nyregion/cellphone-alerts-used-in-search-of-manhattan-bombing-suspect.html?mcubz=1> (on file with the *Columbia Law Review*).

31. See Silver Alert Program, Fla. Dep’t of Elder Affairs, http://elderaffairs.state.fl.us/doea/silver_alert.html [<http://perma.cc/J3CE-NSCQ>] (last visited Oct. 16, 2017).

32. As Professor Christopher Slobogin has reported, Britain has over 800 local public video surveillance programs involving “between two and three million cameras . . . creating more video images per capita than any other country in the world.” Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 *Miss. L.J.* 213, 222 (2002) (footnote omitted). Britons can “earn cash rewards by watching live-streamed CCTV footage on their home computers and assisting the police in apprehending criminals.” I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 *Fordham Urb. L.J.* 959, 963 (2013) [hereinafter Capers, *Crime, Surveillance, and Communities*].

33. Volunteers in Law Enforcement, DiscoverPolicing, http://www.discoverpolicing.org/find_your_career/?fa=volunteers [<http://perma.cc/XZ6G-LPZK>] (last visited Oct. 16, 2017).

would summon the good citizens to help him, a posse comitatus.³⁴ Things now are not so different.

All of this is known, though often unsaid. All of this has come to be expected, even though rarely examined. We expect the government to speak and, in the First Amendment context, have even carved out an exception by which government speech is both entitled to and must receive First Amendment protections and guarantees.³⁵ In this sense it is unsurprising that the government would use that speech to inculcate good citizenship. For example, it was recently revealed that the Department of Defense paid millions of dollars to “18 NFL teams, 10 MLB teams, eight NBA teams, six NHL teams, eight soccer teams, as well as NASCAR” to make patriotic displays.³⁶ Such inculcation may seem surprising, but in fact it is as American as elementary school students being led in the Pledge of Allegiance, as joining the Boy Scouts and Girl Scouts—who doesn’t want a “Citizenship in the Community” merit badge?³⁷—as the singing of the Star-Spangled Banner at the Super Bowl, and as Veterans Day parades. As a matter of law, we even require educational institutions receiving federal funding to hold programs each September on “Constitution Day” and “Citizenship Day.”³⁸ In short, exhortations to be good citizens are all around us.

34. See Lawrence M. Friedman, *Crime and Punishment in American History* 29 (1993). See generally David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 761 (2015).

35. See David Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637, 1664–76 (2006) (describing three approaches to the First Amendment right for government speech: derivative rights, institutional rights, and public rights).

36. Cindy Boren, *Report: At Least 50 Teams Were Paid by Department of Defense for Patriotic Displays*, Wash. Post (Nov. 4, 2015), http://www.washingtonpost.com/news/early-lead/wp/2015/11/04/report-at-least-50-teams-were-paid-by-department-of-defense-for-patriotic-displays/?utm_term=.5d5b6cde96be (on file with the *Columbia Law Review*).

37. The badge application contains such requirements as: “Discuss with your counselor what citizenship in the community means and what it takes to be a good citizen in your community” and “[d]iscuss the rights, duties, and obligations of citizenship, and explain how you can demonstrate good citizenship in your community, Scouting unit, place of worship, or school.” See U.S. Scouting Serv. Project, Inc., *Citizenship in the Community: Merit Badge Workbook 1–2* (2017), <http://www.uscouts.org/usscouts/mb/worksheets/Citizenship-in-the-Community.pdf> [<http://perma.cc/P24W-Q2T4>].

38. 36 U.S.C. § 106 (2012). For more on Constitution Day and Citizenship Day, see generally Alan E. Garfield, *What Should We Celebrate on Constitution Day?*, 41 Ga. L. Rev. 453, 458 (2007) (describing Constitution Day as an attempt to rectify public ignorance about the Constitution). Indeed, we have long “relied upon government schools as a principal purveyor of deeply cherished democratic values . . . [and] civic assimilation.” Diane Ravitch & Joseph P. Viteritti, Introduction, *in Making Good Citizens: Education and Civil Society* 1, 5 (Dianne Ravitch & Joseph P. Viteritti eds., 2001).

B. *The Criminal Procedure Cases*

For the longest time, I assumed that the messages about good citizenship would come from the executive and legislative branches but not the judicial branch.³⁹ I certainly did not think there would be asides about good citizenship in criminal procedure cases. But then I began to reread opinions that I thought I knew.⁴⁰ What I found surprised me. The more I read, the more I saw asides about citizenship and what constitutes good citizenship.

In fact, what I read prompted me to recall Professor Scott Sundby's influential article, *Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, in which he offered a traveler's guide to the Fourth Amendment:

Travel is a considerable problem. One should be aware that law enforcement officers may stop someone and ask permission to look in his luggage even if the traveler has not acted in a fashion that would provoke articulable suspicion of wrongdoing. This is true whether traveling by land, air, or sea. If approached, the innocent traveler should not be alarmed but should state to the officer that he or she has no desire to converse and has other, more important appointments to keep. Although this might strike the traveler at first as rude and abrupt, and perhaps a bit frightening if the questioner is armed, the Supreme Court has made clear that the Fourth Amendment is not for the timid. Consequently, the wise traveler should carry a copy of the Fourth Amendment and display it to the questioner and thus avoid any unnecessary discourse. It is this writer's fervent hope that travel agents soon shall issue copies of the Fourth Amendment as standard procedure when writing airplane, bus, or train tickets.⁴¹

While much of what Professor Sundby wrote is still doctrinally true, my rereading of the Court's criminal procedure cases also revealed subtle and troubling messages about good citizenship. What emerged suggests another guide may be appropriate. Allow me to add to Professor Sundby's guide my own *Criminal Procedure Guide to Good Citizenship*:

39. Even in the education cases that I knew, like *Brown v. Board of Education*, the message was simply that "[education] is the very foundation of good citizenship." 347 U.S. 483, 493 (1954). The Court did not elaborate on what such good citizenship entailed.

40. Although my focus is on criminal procedure cases relating to police-citizen interactions, "citizenship talk" may also appear in adjudicatory criminal procedure areas, such as plea bargaining, in the notion of "acceptance of responsibility," or in how the Court endorses what Professor Jeff Bellin calls a silence penalty for defendants. See Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. (forthcoming 2017) (manuscript at 16–20) (on file with the *Columbia Law Review*) (exploring empirical results from mock juror experiments that reveal "jurors will penalize defendants who do not testify"). A special thanks to Justin Murray for prompting me to think along these lines for future research.

41. Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 Colum. L. Rev. 1751, 1793–94 (1994).

With citizenship comes not only rights, but obligations. The good citizen is ready and willing to aid law enforcement officers. The good citizen voluntarily answers their questions.⁴² The good citizen has nothing to hide and accordingly is willing to answer questions about his activities. The good citizen is also willing to answer questions about the activities of friends, neighbors, community members, and family, since the good citizen “has an interest in bringing criminal activity to light,”⁴³ and in preventing “a wrong upon the government.”⁴⁴ Indeed, the good citizen finds the presence of armed police officers—whether it be at an airport or a vehicle checkpoint or at his place of employment—a “cause for assurance.”⁴⁵ For this very reason, the good citizen would never run from the police, disobey a police order, or engage in evasive behavior, however wrong or dangerous the order may prove to be.⁴⁶

Also, if asked, the good citizen should not hesitate to open his bag, pocket, or home to the police, or to otherwise consent to a search.⁴⁷ Such consensual searches, after all, will aid the police in doing their work. It will also enhance the citizen’s safety and the safety of those around him.⁴⁸ And of course, while even good citizens have a privilege against self-incrimination, and while of course the burden of proof always remains with the government, good citizens, if wrongly accused of a crime, will immediately present themselves to the authorities to prove their innocence.⁴⁹ And if in the unusual event a good citizen in fact commits a crime—perhaps it was a *malum prohibitum* crime—the good citizen will go a step further and admit his wrongdoing

42. See *Miranda v. Arizona*, 384 U.S. 436, 447–48 (1966) (arguing that police should not resort to physical or psychological compulsion to obtain confessions, and thus, by extension, that citizens should voluntarily submit to police questioning).

43. *Georgia v. Randolph*, 547 U.S. 103, 115–16 (2006) (finding that a warrantless search was unreasonable as to a defendant who was physically present and expressly refused to consent).

44. *Beals v. Cone*, 188 U.S. 184, 187 (1903) (“There is no suggestion in the pleadings that the protestants were in any way interested in the ground applied for, or that they were acting other than as good citizens, seeking to prevent a wrong upon the government.”).

45. See *United States v. Drayton*, 536 U.S. 194, 204 (2002) (claiming that officers in uniform should comfort citizens rather than make them uncomfortable); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (indicating that the presence of officers and their visible signs of authority at checkpoint stops should not engender fear).

46. See *California v. Hodari D.*, 499 U.S. 621, 627 (1991) (encouraging compliance with police orders to “stop,” relying on the assumption that only a few of those orders would be without adequate basis).

47. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (noting that there is nothing “constitutionally suspect” about a citizen voluntarily allowing a search and that “the community has a real interest in encouraging consent”).

48. See *Drayton*, 536 U.S. at 205.

49. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) (holding that “the Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant’s credibility”).

and accept his punishment.⁵⁰ And lastly, should the good citizen for some reason find it absolutely necessary to assert his rights, such as his right to an attorney, he will assert those rights unambiguously to distinguish himself from other citizens who lack “linguistic skills.”⁵¹

To some, this *Criminal Procedure Guide to Good Citizenship* may go too far. The complaint, I imagine, might be that I am reading too much into cases. My response is simple: For the most part, I am simply reading what is there in black and white. Though the language may seem epiphenomenal rather than the focus of the Court’s decisions, the language is there nonetheless. Indeed, one could argue that there is an intentionality in much of the language; the Court wanted to instantiate a particular conception of citizenship.

Consider *Miranda v. Arizona*,⁵² one of the most well-known Court decisions in history.⁵³ In *Miranda*, the Court read the privilege against self-incrimination clause of the Fifth Amendment to require the advisement of rights as a precondition to the admissibility of statements made during custodial interrogation.⁵⁴ On one level, *Miranda* is a rights-enhancing case intended to level the playing field between citizens and the police, and as such it should be celebrated.⁵⁵ But in delineating what police conduct triggers the requirement of warnings—there must be police custody and police interrogation—the Court also made clear that in the normal course of business, it is the mark of good citizenship to voluntarily answer questions and otherwise assist the police. The Court emphasized this point: “General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. *It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.*”⁵⁶

Or consider language from two of the Court’s seminal Fourth Amendment cases. In *Schneckloth v. Bustamonte*, the Court gave its imprimatur to what has been described as the “most significant” exception to the Fourth Amendment’s warrant requirement: the consent exception.⁵⁷ Notwithstanding the Fourth Amendment’s plain language requiring

50. *Minnick v. Mississippi*, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

51. *Davis v. United States*, 512 U.S. 452, 460 (1994).

52. 384 U.S. 436 (1966).

53. See 1 Joshua Dressler & Alan C. Michaels, *Understanding Criminal Procedure* § 24.01 (4th ed. 2006).

54. *Miranda*, 384 U.S. at 437.

55. But see Louis Michael Seidman, *Brown and Miranda*, 80 Calif. L. Rev. 673, 673 (1992) (arguing *Miranda* presents only the illusion of enhancing rights, when in fact it legitimates the status quo).

56. *Miranda*, 384 U.S. at 477–78 (emphasis added).

57. 412 U.S. 218, 219 (1973); see also Megan Anitto, *Consent Searches of Minors*, 38 N.Y.U. Rev. L. & Soc. Change 1, 19 (2014).

probable cause before there may be a search, and the concomitant right to normally have this decided by a neutral, detached magistrate, a person's right to be free from warrantless searches and seizures can be "consented" away.⁵⁸ Nor is there any requirement that the consent be knowing. That the consent is voluntary, even if unknowing, will suffice.⁵⁹ In *United States v. Drayton*, the Court similarly limited Fourth Amendment protections, this time by ruling that a person has not been seized within the meaning of the Fourth Amendment—a search or seizure being the sine qua non to trigger Fourth Amendment protections—if a "reasonable person" would have felt free to leave or "otherwise terminate the encounter."⁶⁰ These two decisions certainly tipped the scales in favor of law enforcement, a point that numerous scholars have noted.⁶¹ But what interests me is the Court's citizenship talk.

In *Schneckloth*, the Court couched its talk in the language of community, but the good citizenship message is clear: "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense."⁶²

In other words, consent should be encouraged; it is the right thing to do. Another message can be found in *Drayton*:

[B]us passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them

. . . .

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.⁶³

The Court, in short, starts from a baseline that the good citizen has an interest in consenting because it reinforces the rule of law. It is a

58. See *Schneckloth*, 412 U.S. at 219.

59. *Id.* at 233–34.

60. 536 U.S. 194, 202 (2002) (internal quotation marks omitted) (quoting *Florida v. Bostick*, 501 U.S. 429, 436 (1991)).

61. See, e.g., Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 *McGeorge L. Rev.* 27, 28 (2008); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 *Sup. Ct. Rev.* 153, 156, 208–09; Stephen A. Saltzburg, *Lecture, The Supreme Court, Criminal Procedure, and Judicial Integrity*, 40 *Am. Crim. L. Rev.* 133, 141 (2003).

62. *Schneckloth*, 412 U.S. at 243.

63. *Drayton*, 536 U.S. at 205–07.

privilege of citizenship—it affords us dignity—to be able to consent away Fourth Amendment protections. And this is only part of what the Court’s citizenship talk does. Rather than the government really needing to prove that consent was given voluntarily—the standard the Court sets forth elsewhere in *Schneckloth*—the Court has in fact already tipped the scales. After all, who except a bad citizen would not be interested in enhancing “their own safety and the safety of those around them?”⁶⁴ In other words, who, but a bad citizen, would refuse consent? Never mind that the government has no reciprocal obligation to advise citizens of their Fourth Amendment right to refuse consent, let alone advise them that any such refusal cannot be held against them.⁶⁵

In *INS v. Delgado*, another criminal procedure case, the Court made clear that good citizens should welcome police inquiries, and view them as consensual, even if a cadre of police have come to their workplace and positioned themselves near the exits.⁶⁶ Then-Justice Rehnquist observed this to be the case even when the law enforcement officers came to the workplace to ask employees *about their citizenship status*. Conflating a normative observation with a descriptive one, the Court stated: “While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.”⁶⁷

Indeed, the normative message from the Court is that the good citizen should feel comforted by the presence of officers. “Officers are often required to wear uniforms and in many circumstances this is cause for assurance, not discomfort.”⁶⁸ The expectation is that good citizens, even good citizens forcibly stopped in their vehicles as part of investigative checkpoints, will react “positively when police simply ask for their

64. *Id.* at 205.

65. *Schneckloth*, 412 U.S. at 232–34. Arguably, even the Court’s ruling that law enforcement officers need not inform citizens of their right to refuse consent is traceable to ideas about citizenship, and to hierarchies of citizenship. Since the Progressive Era, one mark of being a good citizen has been being an “informed citizen.” See Schudson, *supra* note 21, at 294, 298–99. Thus, the good citizen would already be aware of his right to decline consent, making a warning unnecessary. Conversely, the bad citizen would likely be less aware of his right to refuse consent. In this way, the Court’s ruling gave law enforcement an added boon: In theory at least, it allowed the police to take advantage of the lack of knowledge of bad citizens.

66. 466 U.S. 210, 210 (1984).

67. *Id.* at 216.

68. *Drayton*, 536 U.S. at 204; *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (suggesting that when citizens “can see visible signs of the officers’ authority,” they are “much less likely to be frightened or annoyed by the intrusion” (internal quotation marks omitted) (quoting *United States v. Ortiz*, 422 U.S. 891, 894–95 (1975))).

help as ‘responsible citizens.’”⁶⁹ Citizens, assuming they are good citizens, will consider their cooperation “voluntary.”⁷⁰

What else has the Court made explicit? Certainly, that the good citizen does not run from the police, even if there is a history of police violence against citizens. In *Illinois v. Wardlow*, a youth fled when he saw a police vehicle.⁷¹ The officers gave chase, cornered the youth, and apprehended him. The issue before the Court was whether this seizure was justified, since the officers did not have probable cause to believe a crime had been committed to justify an arrest, or even reasonable suspicion of criminal activity to justify a *Terry* stop.⁷² But the Court avoided this problem by holding that the mere fact that the youth fled, coupled with the fact this was a high-crime neighborhood—itsself often a euphemism⁷³—was enough to constitute reasonable suspicion.⁷⁴ The police did not have reasonable suspicion when they approached Wardlow, but they certainly had it when he fled. After all, good citizens do not flee. Indeed, in support of its holding, the Court intimated a far broader standard: Any evasive behavior—looking the other way, changing direction, avoiding the police—is suggestive of bad citizenship and can be used as a factor in assessing reasonable suspicion.⁷⁵ In our high-tech world, the same rule is now applied to those who use encryption tools to keep their online activities private. This, itself, is a mark of bad citizenship and has been enough to raise red flags for the NSA.⁷⁶

69. *Illinois v. Lidster*, 540 U.S. 419, 425 (2004) (quoting *Miranda v. Arizona*, 384 U.S. 436, 477–78 (1966)).

70. *Id.* at 426.

71. 528 U.S. 119, 121 (2000).

72. *Id.* at 123–25 (explaining that under *Terry*, “an officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulate suspicion that criminal activity is afoot”).

73. *Id.* For example, in *Floyd v. City of New York*, the court found that when the police used the term “High Crime Area” as a factor to justify a stop based on reasonable suspicion, the term often had little correlation with actual statistics of crime. 959 F. Supp. 2d 540, 581 (S.D.N.Y. 2013); see also Andrew Guthrie Ferguson & Damien Bernache, The “High-Crime Area” Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis, 57 *Am. U. L. Rev.* 1587, 1609 (2008); Hannah Rose Wisniewski, Note, It’s Time to Define High-Crime: Using Statistics in Court to Support an Officer’s Subjective “High-Crime Area” Designation, 38 *New Eng. J. on Crim. & Civ. Confinement* 101, 105–06 (2012) (discussing the standards courts use to determine which areas are “high crime,” which often do not require statistical evidence).

74. Never mind that in the proverbial “high-crime neighborhood,” the nature of police–citizen interactions there furnishes “a reason for flight totally unrelated to consciousness of guilt.” See *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (recognizing the understandable “desire to avoid the recurring indignity of being racially profiled”).

75. *Wardlow*, 528 U.S. at 124 (“Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”).

76. See Elizabeth E. Joh, Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion, 55 *Ariz. L. Rev.* 997, 1020 & n.144 (2013).

Nor is *Illinois v. Wardlow* the only flight case in which the Court engaged in citizenship talk. Consider *California v. Hodari D.*⁷⁷ The Court admonished citizens, even when confronted with police orders that lack legal basis, to obey:

[C]ompliance with police orders to stop should . . . be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply.⁷⁸

The Court's Fifth Amendment and Sixth Amendment cases also contain citizenship talk. A good citizen, should they be wrongfully accused of a crime, does not keep silent, notwithstanding any Fifth Amendment privilege against self-incrimination they may have. The good citizen should "cast aside [their] cloak of silence" and come forward to proclaim their innocence.⁷⁹ Certainly this explains the Court's decision in *Jenkins v. Anderson*, allowing the government to impeach a testifying defendant with his prearrest silence.⁸⁰ The citizen who has strayed from the straight and narrow and has in fact committed a crime is also encouraged to do their duty. As Justice Scalia put it in his dissent in *Minnick v. Mississippi*, "While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves."⁸¹ In *Davis v. United States*, the Court even weighed in on how articulate a citizen is expected to be.⁸² The good citizen enunciates and speaks forcefully. "Maybe I should talk to a lawyer," the language at issue in *Davis*, will not do to invoke the right to counsel.⁸³ The Court conceded that this might disadvantage citizens who lack "linguistic skills" to "clearly articulate their right to counsel,"⁸⁴ and sociolinguistic research

77. 499 U.S. 621, 626 (1991) (holding that a command to stop, without voluntary submission or a physical apprehension, does not constitute a seizure).

78. *Id.* at 627.

79. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

80. *Id.*

81. 498 U.S. 146, 167 (1990) (Scalia, J., dissenting).

82. See 512 U.S. 452, 459 (1994) (holding that a suspect "must articulate [their] desire to have counsel present sufficiently clearly" to trigger a requirement that the police cease questioning).

83. *Id.* at 462.

84. *Id.* at 460.

confirms as much.⁸⁵ But maybe this was precisely the point.⁸⁶ The good citizen is an educated citizen, after all.⁸⁷

And these are just some of the cases in which the Court explicitly engages in citizenship talk. There is also *McCray v. Illinois*, in which the Court links informing the police of the criminality of others with “good citizenship,”⁸⁸ a sentiment the Court endorsed again in *Georgia v. Randolph*.⁸⁹ In *Burt v. Union Centennial Life Insurance Co.*, the Court notes that “good citizens” have a “duty to furnish [evidence that would] prevent a miscarriage of justice.”⁹⁰ In *Brown v. Walker*, the Court states that “[e]very good citizen is bound to aid in the enforcement of the law.”⁹¹ And in *Grin v. Shine*, the Court observes that the good citizen “ought to be willing” to “submit themselves to the laws of their country.”⁹²

Again, these are cases in which the Court’s citizenship talk is explicit. In other cases, the Court is more indirect, handing down what I have elsewhere termed a type of “white-letter law”⁹³—those “societal and normative laws that stand side-by-side and often undergird black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.”⁹⁴ Read between the lines and one can glean a clear delineation in the Court’s criminal procedure opinions about what it means to be a good citizen—being willing to help the authorities and to cede constitutional protections—versus what it means to be a bad citizen.

85. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *Tulsa L.J.* 1, 18 (1995) (citing studies that find women and minorities use “indirect and hedged speech patterns”).

86. For illustrations of how lower courts have applied *Davis*, see Charles D. Weisselberg, *Mourning Miranda*, 96 *Calif. L. Rev.* 1519, 1579–81 (2008) (noting lower courts “tend to construe strictly the requirement of an unequivocal assertion of rights, thus narrowing the duty of officers to cease or refrain from questioning”).

87. See Schudson, *supra* note 21, at 182–85, 294, 298–99 (noting citizenship became equated with intelligence during the Progressive Era). Arguably, the *Davis* ruling also reflects a ranking of citizenship insofar as it favors and benefits those with “linguistic skills.” Indeed, the Court’s language is, on a certain level, reminiscent of the literacy tests that were used to limit the voting rights of southern blacks and many poor whites, as well as many recent immigrants, before passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. See *id.* at 182–85; see also 42 U.S.C. § 1973b (2012). Those groups could access their rights only by meeting someone else’s standard of knowledge or eloquence.

88. 386 U.S. 300, 308 (1967) (internal quotations omitted) (quoting 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2374, at 762 (John T. McNaughton ed., 1961)).

89. 547 U.S. 103, 115–16 (2006) (noting the interest an individual has “as a citizen in bringing criminal activity to light”).

90. 187 U.S. 362, 369 (1902).

91. 161 U.S. 591, 600 (1896).

92. 187 U.S. 181, 184–85 (1902).

93. I. Bennett Capers, *Reading Back, Reading Black*, 35 *Hofstra L. Rev.* 9, 19 n.42 (2006) [hereinafter *Capers, Reading Back, Reading Black*].

94. *Id.*

And again, it is not just that the Court is describing good citizenship. In a very real sense, these cases reflect a desire to *produce* good citizenship.

I can imagine that to some, the fact that the Court, however indirectly, encourages citizens to cooperate with the police is something that should be applauded rather than critiqued. For these individuals, the Court, by pressing good citizenship, is performing *its* role as a good citizen. My point is not that encouraging good citizenship is an inherent wrong. Rather, my point is that there is something deeply problematic about citizenship talk that encourages citizens to surrender constitutional protections⁹⁵ and to serve as willing posse comitatus to a criminal justice system known for overcriminalization, overincarceration, and unequal policing.⁹⁶ Likewise, there is something deeply problematic about citizenship talk that chills democratic dissent. My point too is this: Whatever one thinks of the substance of the Court's citizenship talk, certainly there is merit, for the sake of transparency and legitimacy, to bringing that citizenship talk out into the open.

There are two more points to be made about the citizenship talk that emerges from the Court's criminal procedure cases. One is that citizenship talk is racially inflected. As I have written previously, the story of the development of our criminal procedure jurisprudence is largely a story about race.⁹⁷ Much the same can be said about the Court's citizenship talk. Almost all of the Court's citizenship talk cases—*Miranda*, *Schneckloth*, *Drayton*, *Delgado*, *Wardlow*, *Hodari D.*—involve black or brown criminal defendants, though the Court often elides this fact. More to the point, how the Court's "citizenship talk" is heard and interpreted is anything but race neutral. The result is that racial minorities, especially those who are black or brown, often find themselves having to "work" their citizenship in ways that are citizenship-diminishing.⁹⁸

However, before turning to race, it makes sense to begin with an exploration of the role the Court's citizenship talk plays in disciplining *everyone* to be good citizens. This is the issue Part II takes up below.

95. There may be exceptions at the extreme. For example, although individuals may have the right to burn crosses on their own front lawns under the First Amendment, we may want the Court to discourage such behavior, and to do so strongly. Even here, though, we can imagine the Court framing such cross burning as bad behavior, but not necessarily bad citizenship. This is a distinction with a difference. A hat tip to Michael Dorf for raising this possibility.

96. See *infra* note 236.

97. Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 1. Indeed, Professor Charles Ogletree suggests that much criminal procedure should be considered a branch of American race law. See Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 *Tul. L. Rev.* 2231, 2245 (1993) (citing Charles Ogletree, *Lecture at the Association of American Law Schools Annual Meeting* (Jan. 1990)).

98. See *infra* section III.D.

II. DISCIPLINED

“When they have established government[,] [the people] should think of nothing but obedience, leaving the care of their liberties to their wiser rulers.”

James Madison⁹⁹

“[Citizens stopped at checkpoints should react] positively when police simply ask for their help as ‘responsible citizens.’”

*Illinois v. Lidster*¹⁰⁰

Borrowing from the work of Michel Foucault, this Part argues that the Court’s citizenship talk plays a role in disciplining citizens into being obedient subjects, or good citizens. To begin, this Part will discuss how the Court’s citizenship talk reaches citizens.

Thus far, I have spoken of the Court’s citizenship talk as communicating ideas about good citizenship. But the question that lurks below this assertion is one of mechanics and distribution. Concededly, there are few citizens who read Supreme Court opinions. The audience for Court opinions is select and small. Nonetheless, sometimes their messages are disseminated far and wide. As Professor Lauren Ouziel has remarked, the Warren Court’s “criminal procedure cases generated intense public interest; the cases were publicized, debated, and commented upon widely in the media and the political sphere.”¹⁰¹ Even today, the Court’s opinions are condensed for the news. Couple this fact with the observation that the Court’s opinions contain expressive messages regarding how citizens should behave.¹⁰² As Professor Lawrence Lessig observed

99. James Madison, Who Are the Best Keepers of the People’s Liberties?, *Nat’l Gazette*, Dec. 20, 1792, reprinted in 6 *The Writings of James Madison, 1790–1802*, at 120 (Gaillard Hunt ed., 1906) (imagining a dialogue between republican and anti-republican responses to the title question).

100. 540 U.S. 419, 425 (2004) (quoting *Miranda v. Arizona*, 384 U.S. 436, 477–78 (1966)).

101. Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 *Notre Dame L. Rev.* 691, 721 (2016).

102. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 *U. Pa. L. Rev.* 1503, 1571 (2000) (“Legal communications of state attitudes typically *impose* social relationships on people . . .”); I. Bennett Capers, *Policing, Race, and Place*, 44 *Harv. C.R.-C.L. L. Rev.* 43, 46 (2009) [hereinafter *Capers, Policing, Race, and Place*] (arguing that the number of minority professors who have been stopped by police in predominately white neighborhoods “sends the expressive message . . . about who belongs and who does not”); Lawrence Lessig, *The Regulation of Social Meaning*, 62 *U. Chi. L. Rev.* 943, 947 (1995) (arguing that “social meanings . . . constitute what is authority for a particular society, or a particular culture”); Richard H. McAdams & Janice Nadler, *Coordinating in the Shadow of the Law: Two Contextualized Tests of the Focal Point Theory of Legal Compliance*, 42 *Law & Soc’y Rev.* 865, 868–75 (2008) (considering expressive theories of legal compliance); Cass R. Sunstein, *On the Expressive Function of the Law*, 144 *U. Pa. L. Rev.* 2021, 2022 (1996) (“Many people support law

more than a decade ago, laws indirectly communicate what behavior is inappropriate, which behavior is orthodox, and what behavior should be rewarded.¹⁰³ More importantly, they do so in ways that are often subtle and work below the surface.¹⁰⁴ The same is true of the Court's opinions.¹⁰⁵

Even when not filtered through the media, the Court's citizenship talk is still heard and absorbed by many. It is internalized by lower courts and state courts, by district attorneys and public defenders. And the public digests this citizenship talk in repackaged form in television shows from *Dragnet* to *Law and Order*, from *Colombo* to *The Wire*, from *S.W.A.T.* to *The Night Of*. Such cultural markers are, after all, part and parcel of how many citizens become legally fluent;¹⁰⁶ they exist not independent from the law but in the law's carefully cast shadow.

And of course, the Court's citizenship talk is filtered to police departments via police manuals and training.¹⁰⁷ Indeed, this filtering is bidirectional and dynamic. Police beliefs about how citizens should behave in their interactions with police are communicated to the Court in briefs from the solicitor general and in amicus briefs from law enforcement.¹⁰⁸ The Court in turn incorporates these beliefs as part of its Fourth Amendment balancing of the rights of the individual against the need to

because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.”).

103. Lessig, *supra* note 102, at 947.

104. See, e.g., I. Bennett Capers, *Real Women, Real Rape*, 60 *UCLA L. Rev.* 826, 854–56 (2013) (describing the subtly, and sometimes contradictory, expressive messages communicated by rape shield laws).

105. Numerous Supreme Court opinions have contributed to changing social meaning in ways that are readily discernible. The school desegregation case *Brown v. Board of Education*, 347 U.S. 483 (1954), and the gay rights case *Lawrence v. Texas*, 539 U.S. 558 (2003), are but two examples. More often, however, such change occurs in ways that are less noticeable, though no less potent.

106. See, e.g., David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 *Ind. L.J.* 1225, 1231–33 (2007) (describing the impact of court-related popular culture on lay Americans' "perception and understanding" of the legal system); June Louin Tapp & Felice J. Levine, *Legal Socialization*, in *The Sociology of Law: A Social-Structural Perspective* 121, 129 (William M. Evan ed., 1980).

107. One has only to think of the successive editions of the police manual *Criminal Interrogations and Confessions*. Each edition digests case law so that the authors can opine on what interrogation techniques are permissible. See, e.g., Fred E. Inbau et al., *Criminal Interrogations and Confessions* (5th ed. 2013). For a discussion of how the authors of the manual parse the language of Supreme Court cases to read between the lines and see what the decisions portend, see generally Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 *Mich. L. Rev.* 662, 662–65 (1986).

108. Consider for example the amicus brief jointly filed by the International Association of Chiefs of Police, the National Sheriffs Association, and Americans for Effective Law Enforcement in the case *United States v. Drayton*, 536 U.S. 194 (2002). In their amicus brief, they pressed for a decision that would facilitate compliance with officers' requests for consent in order "to combat the flow of illegal narcotics and weapons." Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. et al. at 9, *Drayton*, 536 U.S. 194 (2002) (No. 01-631), 2002 WL 316503.

“promot[e] . . . legitimate governmental interests.”¹⁰⁹ Indeed, these messages are likely dynamic in yet another way. The Court’s language about who is a good citizen and who is not very likely informs and shapes constitutional doctrine.¹¹⁰ After all, decisions regulating what the police *can* do are necessarily informed by beliefs about what citizens *should* do. While much could be unpacked here, the central point is that, in a host of ways, the Court’s language incorporates police beliefs. More importantly, in incorporating these beliefs, the Court legitimates and reinforces them.

There is one final thing to say about the Court’s criminal procedure decisions and their dissemination: Those citizens who are most policed—because of the rates of crime in the communities where they live, or because of the color of their skin—are particularly likely to be familiar with the messages in these decisions.¹¹¹ After all, these decisions are communicated in “Know Your Rights” pamphlets and teach-ins, and even in campaigns that Professor Devon Carbado describes as “*know-your-rightlessness* campaigns.”¹¹² They are communicated in driver’s education classes and in public schools, where minority youth in particular are increasingly being taught how to interact with the police,¹¹³ becoming part

109. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

110. For example, the ruling in *Illinois v. Wardlow*—that flight from the police in a high crime neighborhood is enough to justify reasonable suspicion to forcibly detain the person—is only fully legible against the Court’s assumption that Wardlow was a bad citizen. 528 U.S. 119, 123–25 (2000). Similarly, the Court’s many rulings that deny Fourth Amendment protection to individuals when only contraband can be discovered—see, e.g., *United States v. Place*, 462 U.S. 696 (1983)—is legible only against the backdrop that only good citizens are worthy of Fourth Amendment protection. For similar observations, see generally Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 Colum. L. Rev. 1456, 1459 (1996) (“People feel differently about guilty versus innocent holders of Fourth Amendment privacy rights.”); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 766, 780–82 (1989) (arguing that embedded in the Supreme Court’s Fourth Amendment jurisprudence is a desire to protect only “law-abiding privacy”).

111. At present, “the scale of citizen contact with the American criminal justice system is unmatched in the nation’s history.” Lerman & Weaver, *supra* note 15, at 8. Justice and Meares add, “Because interactions with police officers are among the most common sites of official action that people have with the state they obviously play a key role in shaping an individual’s civic identity.” Justice & Meares, *supra* note 15, at 172. As in a game of telephone, this citizenship talk likely gets distorted along the way, though one senses the distortion is unidirectional. Consider the Court’s many statements that it is a mark of good citizenship to voluntarily assist the police and answer questions. One can imagine that by the time this talk reaches line officers, it has morphed into a different message: Citizens who decline to answer questions or grant consent are bad citizens and have something to hide. In short, the Court has indicated that uncooperative behavior can contribute to the officer’s reasonable suspicion or probable cause, notwithstanding case law to the contrary.

112. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 131 (2017).

113. See Editorial, *Lifesaving Lessons for Driving While Black*, N.Y. Times (May 12, 2017), <http://www.nytimes.com/2017/05/12/opinion/driving-while-black.html> (on file with the *Columbia Law Review*) (observing that a newly enacted Virginia law requires

of the “pools of knowledge”¹¹⁴ common to black and brown Americans. And most importantly, these messages—which include messages about who belongs and who does not—are being communicated to black and brown citizens by the police themselves. In fact, it is in police interactions that many Americans, especially black and brown Americans, become legally socialized into a sense of “who is a citizen[] and who is a problem.”¹¹⁵ As some scholars have argued, such encounters and other aspects of the criminal justice system function as a *negative* civic education.¹¹⁶ Political scientists Charles R. Epp, Steven Maynard-Moody, and Donald Haider-Markel make a similar point about police stops: “Police stops convey powerful messages about citizenship and equality.”¹¹⁷ In short, the Court’s citizenship talk may not reach citizens directly, but it does reach citizens.

Now the cart: The Court’s citizenship talk plays a role in disciplining citizens. The work of Foucault is instructive. In *Discipline and Punish*, Foucault expanded upon English philosopher Jeremy Bentham’s imaginary panopticon, an ideal prison where prisoners are housed in cells in a circular building, at the center of which is an observation tower.¹¹⁸ The observation tower, along with the architectural contrivances of lighting and strategically placed mirrors, places prisoners under constant perceptual surveillance—perceptual, because the prisoners themselves are unable to tell when they are actually being watched and when they are not.¹¹⁹ As Foucault remarked, this hypothetical panopticon in effect induces “in the inmate a state of conscious and permanent visibility.”¹²⁰ In this way, prisoners internalize a state of surveillance and a state of

driver’s education courses to teach students how to interact with police officers during traffic stops to minimize the risk of police escalation); see also Mary Emily O’Hara, NJ Assembly Passes Bill Requiring Kids Be Taught to Interact with Police, NBC News (June 22, 2017), <http://www.nbcnews.com/news/us-news/nj-assembly-passes-bill-requiring-kids-be-taught-interact-police-n775516> [<http://perma.cc/26D5-QWUJ>] (discussing a New Jersey bill that would mandate K-12 instruction in how to talk to police officers).

114. See Russell K. Robinson, Perceptual Segregation, 108 Colum. L. Rev. 1093, 1120 (2008) (“In general, black and white people obtain information through different informational networks, which results in racialized pools of knowledge.”); see also David R. Maines, Information Pools and Racialized Narrative Structures, 40 Soc. Q. 317, 319–20 (1999) (noting that information is often race-based, with blacks being privy to certain information that is largely unknown by whites, and vice versa).

115. Justice & Meares, *supra* note 15, at 162.

116. See Lerman & Weaver, *supra* note 15, at 10 (arguing that citizens “learn to stay quiet, make no demands, and be wary and distrustful of political authorities”); Justice & Meares, *supra* note 15, at 161.

117. Charles R. Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* 2 (2014).

118. See Jeremy Bentham, *Panopticon; or, The Inspection House* (1787), reprinted in 4 *The Works of Jeremy Bentham* 37, 40–41 (John Bowring ed., 1843).

119. *Id.* at 40.

120. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 201 (Alan Sheridan trans., Vintage Books 1979) (1977) [hereinafter Foucault, *Discipline and Punish*].

discipline; they behave as if they are being watched at all times. Actual continuous state surveillance is “unnecessary.”¹²¹ Perceptual surveillance renders the prisoners compliant, subservient, docile, and good.¹²² Observation, even when invisible or imagined, becomes power.

Foucault recognized the disciplinary power of Bentham’s panopticon, but he also believed that the modern era had rendered the physical edifice itself and its centralized surveillance superfluous, at least for disciplining individuals in the broader sense. For Foucault, Bentham’s model prison merely reproduced, “with a little more emphasis, all the mechanisms that are to be found in the social body[.] The prison is like a rather disciplined barracks, a strict school, a dark workshop, but not qualitatively different.”¹²³ Put differently, the modern prison is just one institution in a network of institutions forming a “great carceral continuum” in which “frontiers between confinement, judicial punishment and institutions of discipline” disappear.¹²⁴

Foucault also observed that the state’s interest in discipline extends well beyond what one normally thinks of as the police state. The state is also interested in disciplining bodies as “obedient subjects” in support of the state.¹²⁵ This discipline, Foucault argued, is diffuse and “cannot be localized in a particular type of institution or state apparatus.”¹²⁶ Rather, it is “a type of power, a modality for its exercise, comprising a whole set of instruments, techniques, procedures, levels of application, [and] targets.”¹²⁷ For Foucault, the success of this disciplinary power is traceable to its reliance on “simple instruments”: “hierarchical observation,” “normalizing judgement[s],”¹²⁸ and a “network of writing,”¹²⁹ such as birth certificates, marriage licenses, and property deeds that document and track individuals.¹³⁰ These simple instruments operate in tandem to encourage and normalize what the state views as acceptable behavior. The effect is to render the acceptable behavior and trajectories as natural, or at least as occurring independent of the state, when in fact the state is entangled in much of our behavior, from when and how we are

121. *Id.*

122. See Bentham, *supra* note 118, at 40 (concluding that “the more constantly the persons to be inspected are under the eyes of the persons who should inspect them, the more perfectly will the purpose of the establishment have been attained”).

123. Foucault, *Discipline and Punish*, *supra* note 120, at 233.

124. *Id.* at 297.

125. Michel Foucault, *The History of Sexuality: An Introduction* 144 (Robert Hurley trans., Pantheon Books 1990) (1978).

126. Foucault, *Discipline and Punish*, *supra* note 120, at 26.

127. *Id.* at 215.

128. *Id.* at 170.

129. *Id.* at 189.

130. See *id.* at 189–90 (noting “the formation of a whole series of codes of disciplinary individuality that made it possible to transcribe . . . individual features”).

educated, to when and who we marry, and to our very existence as productive citizens.

Certainly, the Court's criminal procedure jurisprudence plays a role in "hierarchical observation."¹³¹ One has only to think of the Court's decisions permitting the state to engage in almost unlimited surveillance;¹³² permitting the state access to third-party records¹³³—such as bank records,¹³⁴ telephone records,¹³⁵ and web-browsing records—and even allowing the state to monitor and record our speech,¹³⁶ our handwriting,¹³⁷ our fingerprints, and even our DNA.¹³⁸

The Court's criminal procedure decisions also contribute to the state's "network of writing."¹³⁹ We are no longer simply catalogued by our birth and death certificates. Now, we are knowable via Big Data, captured by our financial transactions and omnipresent surveillance, by Metrocards and E-Z passes, by our Facebook and Snapchat and Instagram use, and, generally, by the "way we live now."¹⁴⁰ Even our interactions with the police are tracked. In New York City, for example, it is not only the fact that in just eight years the police forcibly stopped people over 4.4 million times—the vast majority of whom were innocent

131. That the Court plays such a role, however unremarked upon, should not surprise us. Recall that disciplinary power is not confined to a particular institution or state apparatus. As another scholar has written, "[I]t is the policing power that never passes for such." D.A. Miller, *The Novel and the Police* 17 (1988).

132. Capers, *Crime, Surveillance, and Communities*, supra note 32, at 965–69 (describing the conventional reading that the Fourth Amendment provides no protection for activities conducted in public); see also Capers, *Policing, Race, and Place*, supra note 102, at 69–70 (explaining how the enforcement of order-maintenance offenses and traffic laws are used to target minorities and others deemed out of place).

133. See generally Jane Bambauer, *Other People's Papers*, 94 *Tex. L. Rev.* 205 (2015) (critiquing the third-party doctrine of the Fourth Amendment, which permits the government to collect consumer records).

134. *United States v. Miller*, 425 U.S. 435, 437 (1976) (holding that the Fourth Amendment did not prohibit the government from obtaining checks and other records conveyed to a third-party bank).

135. *Smith v. Maryland*, 442 U.S. 735, 735 (1979) (holding that a phone company's creation of a registry of dialed numbers at police request did not constitute a search for purposes of the Fourth Amendment).

136. *United States v. Wade*, 388 U.S. 218, 222–23 (1967) (holding that requiring a suspect to speak and thus "use his voice as an identifying physical characteristic" does not violate the Fifth Amendment privilege against self-incrimination).

137. *United States v. Dionisio*, 410 U.S. 1, 6–7 (1973) (concluding that the privilege against compulsory self-incrimination did not protect handwriting exemplars).

138. *Maryland v. King*, 569 U.S. 435, 437–50 (2013) (permitting warrantless and suspicionless DNA collection).

139. Foucault, *Discipline and Punish*, supra note 120, at 189.

140. See generally Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 *U. Pa. L. Rev.* 327, 365–69 (2015) (describing how law enforcement personnel identify and link individuals to accumulated data).

of wrongdoing—that should give us pause.¹⁴¹ What should also give us pause is the fact that for each of these 4.4 million stops, police filled out a UF-250 form marking the name of the individual stopped; their date of birth and address; their race, height, and sex; and even whether or not they have tattoos.¹⁴² In short, the police “marked” individuals—again, the vast majority of whom were innocent—for future records. They do so still.

However, it is the role the Court plays in providing “normalizing judgments” that interests me most. This, after all, is what the Court is doing when it engages in citizenship talk. The Court, in these cases, does more than simply decide the legal issue of whether a particular state action infringed upon a defendant’s right to be free from unreasonable searches or seizures, or their privilege against self-incrimination, or their right to counsel. The Court’s decisions also operate on a different register, creating a “penalty of the norm”¹⁴³ by marking out which citizens have engaged in behavior warranting punishment, and which have not; which citizens warrant “heightened scrutiny,”¹⁴⁴ to repurpose an equal protection term, and which citizens do not.

Consider again the “citizenship talk” decisions discussed in Part I. These decisions mark which citizens are properly deferential to authorities¹⁴⁵ and which are not—which citizens are “responsible citizens” and the type to “give whatever information they may have to aid in law enforcement,”¹⁴⁶ and which are not; which citizens appropriately view the police in a positive light and as a “cause for assurance,”¹⁴⁷ and which do not; which citizens willingly cooperate with the authorities and voluntarily bring criminal activity to light¹⁴⁸ and which do not; and which citizens are obedient and conforming, and which are disobedient and

141. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556, 584, 588 (S.D.N.Y. 2013); see also Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 *Ann. Rev. L. & Soc. Sci.* 335, 336 (2014).

142. See Greg Ridgeway, RAND Corp., *Analysis of Racial Disparities in the New York Police Department’s Stop, Question, and Frisk Practices 54–55* (2007), http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf [<http://perma.cc/U67E-PZ5P>].

143. Foucault, *Discipline and Punish*, *supra* note 120, at 183.

144. I. Bennett Capers, *Race, Policing, and Technology*, 95 *N.C. L. Rev.* 1241, 1290 (2017) [hereinafter *Capers, Race, Policing, and Technology*].

145. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (holding that a juvenile running from police was not “seized” until he was tackled, even if police officer’s pursuit constituted a “show of authority”).

146. *Miranda v. Arizona*, 384 U.S. 436, 477–78 (1966).

147. *United States v. Drayton*, 536 U.S. 194, 204 (2002); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

148. *Georgia v. Randolph*, 547 U.S. 103, 115–16 (2006); *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (holding that consent to search a car generally implies consent to search closed containers within a car); *McCray v. Illinois*, 386 U.S. 300, 308 (1967) (supporting privilege of identities of informants who may be motivated by “good citizenship” to cooperate with law enforcement).

non-conforming. In short, the decisions mark which citizens are good citizens, and which are bad.

There is one other aspect of how the Court's language is disciplinary in a Foucauldian sense. The consequence of being a bad citizen is often punishment. The citizen may not face incarceration for failing to be "good," but other, subtler forms of punishment often ensue. In extreme cases, there may be an arrest for failing to obey a police order. This recently happened when a hospital nurse refused a detective's order to draw blood from a patient since the detective lacked a warrant; the detective forcibly arrested the nurse for her refusal.¹⁴⁹ More often, the punishment takes the form of a raised voice, or incredulity and exasperation, or a further delay, or disrespect, or a public dressing down.¹⁵⁰

Before turning to race in Part III, allow me to give one example of how we have internalized discipline: our response to the judicially created consent exception to the Fourth Amendment. Scholars have been almost unanimous in noting that the consent exception disregards evidence that psychological pressures often induce individuals to consent.¹⁵¹ Scholars also point out that police are trained in how to induce drivers to give consent. For example, one well-known training manual, *Tactics of Criminal Patrol*, advises officers how to "position" the driver "emotionally to grant you [their] permission."¹⁵² The manual even suggests how requests for consent should be phrased, suggesting phrasing that "employs psychology in your favor. The implication is that the subject will look guilty if he *does* mind. . . . It's psychologically harder to decline."¹⁵³ But what scholars miss in focusing on psychological pressures is this: While such pressures play a role in why so many people consent, that role likely pales compared to the role state discipline has played. We have been told, indirectly and directly, again and again, that assisting the police is what we are supposed to do. Good, responsible citizens, after all, have nothing to hide and want to aid law enforcement. We have internalized the Court's citizenship talk such that even when we do not want to—we have someplace to be, we are already late, we want to maintain our privacy, we *think* we have rights—we surrender. We consent.

149. See Derek Hawkins, 'This is Crazy,' Sobs Utah Hospital Nurse as Cop Roughs Her Up, Arrests Her for Doing Her Job, Wash. Post (Sept. 2, 2017), http://www.washingtonpost.com/news/morning-mix/wp/2017/09/01/this-is-crazy-sobs-utah-hospital-nurse-as-cop-roughs-her-up-arrests-her-for-doing-her-job/?utm_term=.752a28fffe15 (on file with the *Columbia Law Review*).

150. Capers, Policing, Race, and Place, *supra* note 102, at 68–69; Capers, Rethinking the Fourth Amendment, *supra* note 16, at 24–25.

151. See, e.g., Alafair S. Burke, Consent Searches and Fourth Amendment Reasonableness, 67 Fla. L. Rev. 509, 511–16 (2015); Brian R. Gallini, *Schneekloth v. Bustamonte*: History's Unspoken Fourth Amendment, 79 Tenn. L. Rev. 233, 278 (2012); Nadler, *supra* note 61, at 211.

152. Charles Remsberg, *Tactics for Criminal Patrol: Vehicle Stops, Drug Discovery and Officer Survival* 217–31 (1995).

153. *Id.* at 216.

We cede what rights we have. We become compliant, good citizens. And when we do resist, we are met by incredulity and suspicion, badgered for being noncompliant, and marked as not good.

III. RACING CITIZENSHIP

“And you are not the guy and still you fit the description because there is only one guy who is always the guy fitting the description.”

Claudia Rankine, *Citizen*¹⁵⁴

“Your country? How came it yours?”

W.E.B. Du Bois¹⁵⁵

It is impossible for me to think of the Court’s citizenship talk in criminal procedure cases without also thinking about race. After all, I am a black man living in a country where “race matters,”¹⁵⁶ though as Ta-Nehisi Coates reminds us, “[R]ace is the child of racism, not the father.”¹⁵⁷ I carry myself knowing that I will be watched by the police, scrutinized by the police, and, at any point, potentially stopped by the police.¹⁵⁸ As much as I might hope that my status as an academic might insulate me from racialized policing, my own experience and the experience of numerous black professors suggest otherwise.¹⁵⁹ So for me, when I think about the Court’s citizenship talk, the sticky tar-baby of race¹⁶⁰ is inevitable.¹⁶¹ Add to this the fact that just as there seems to be

154. Claudia Rankine, *Citizen: An American Lyric* 105 (2014).

155. W.E.B. DuBois, *Souls of Black Folk* 392 (1903).

156. See generally Cornel West, *Race Matters* (2001).

157. Ta-Nehisi Coates, *Between the World and Me* 7 (2015).

158. See *infra* notes 228–230 and accompanying text.

159. As I have detailed elsewhere, a number of law-abiding minority professors—Cornel West, William Julius Wilson, Paul Butler, and Devon Carbado, to name just a few—have been subjected to police stops. Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 18.

160. See generally Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 *Calif. L. Rev.* 1585 (1997) (illustrating the proposition that race in the United States is a “Tar-Baby,” in that scholars get stuck “in the messiness of their own critique”).

161. To be sure, notions of citizenship are connected to other identities as well, particularly class. The poor have always been cast as undeserving and bad citizens. See generally William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *Mich. L. Rev.* 1 (1999) (explaining the links between the social citizenship tradition and the court-centered ideal of the Constitution as a safeguard of discrete and insular minorities). For the purposes of this Essay, I focus on race. I am reminded of Paul Butler’s recent discussion of race and class. Butler writes:

I want to note that it is impossible to disaggregate the effects of race and class. The answer to the questions, “Are poor defendants treated unfairly because many of them are black, are black defendants treated unfairly

no exit from race, there seems to be no exit from history. The simple fact is that race and citizenship in this country have always been intertwined, from the first marking of blacks with the badge of slavery, to the ratification of the Fourteenth Amendment extending legal citizenship to blacks, to continued angst over who is a “real” American. Understanding race and citizenship is thus a necessary predicate to understanding race and policing. Understanding race and policing, in turn, becomes clearer against the backdrop of the Court’s criminal procedure cases, which, even when race is unsaid, are on a certain level race cases. It is with these three points in mind—each of which I explore more fully below—that the question must be asked: What citizenship is expected of those who, by virtue of skin color, are often viewed as second class and as “always already suspect”?¹⁶²

A. *Race and Citizenship*

Race and citizenship in this country have always been interconnected. Concerns about the former have always pervaded discussions of the latter. This goes beyond the country’s original sin, slavery, and the enshrinement of that sin in the Constitution through its Great Compromise. Rather than address slavery directly, the Founders struck compromises that they revealed only through circumlocution and evasion.¹⁶³ This also goes beyond the fact that from the beginning, the “most radical claims for freedom and political equality were played out in counterpoint to chattel slavery, the most extreme form of servitude,” and that the “equality of political rights, which is the first mark of American citizenship, was proclaimed in the accepted presence of its absolute denial.”¹⁶⁴ This inability to see blacks as citizens was reflected in Chief

because many of them are poor, or is there some other dynamic at work?”
is “yes.”

Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *Yale L.J.* 2176, 2180 (2013).

162. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 *N.C. L. Rev.* 1339, 1363 (2015); see also Frank Rudy Cooper, *We Are Always Already Imprisoned: Hyper-Incarceration and Black Male Identity Performance*, 93 *B.U. L. Rev.* 1185, 1203 (2013). Professor Cooper in turn borrows this concept from the Marxist philosopher Louis Althusser. For a discussion of what it means to be “always-already” constituted, see generally Louis Althusser, *Ideology and Ideological State Apparatuses, in Lenin and Philosophy* 127, 175–76 (1971) (“Ideology has always-already interpellated individuals as subjects Hence individuals are ‘abstract’ with respect to the subjects which they always already are.”).

163. See U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2 (apportioning representatives to the states based on “the whole Number of free Persons” and “three fifths of all other Persons”); U.S. Const. art. I, § 9, cl. 1 (setting out the states’ ability to import “such Persons as any of the States now existing shall think proper to admit”); U.S. Const. art. IV, § 2, cl. 3 (obligating all states to return fugitives if they were “Person[s] held to Service or Labour in one State” who escaped); U.S. Const. art. V (protecting until 1808 the “first . . . Clause[] in the Ninth Section of the First Article”).

164. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 387 (1991).

Justice Taney's decision in *Dred Scott v. Sandford*, which should have involved the question of whether Scott's residence in a free state was enough to make him free.¹⁶⁵ Instead, the Court held that Dred Scott was not a "citizen," but a being "of an inferior order . . . unfit to associate with the white race," and as such could not even invoke diversity jurisdiction to have the issue addressed.¹⁶⁶ For American courts, blacks, whether free or not, might be citizen *subjects*, but they were not *real* citizens to be admitted into "political partnership."¹⁶⁷ Or as Professors Jack Balkin and Sandy Levinson put it, *Dred Scott* made clear that "the members of one race 'owned' the United States; it was 'their' community and 'their' country, and all other races were permitted to remain only on its terms."¹⁶⁸

Even after the Great Emancipation and ratification of the Fourteenth Amendment, which nominally granted citizenship rights to former slaves and their descendants,¹⁶⁹ the contours of that citizenship remained contested. As Professor Khalil Gibran Muhammad observes:

In a moment equivalent to a historical blink of the eye, four million people were transformed from property to human beings to would-be citizens of the nation.

. . . .

[Against this backdrop,] [t]he post-emancipation period demanded a fresh and immediate inquiry into the new reality of black freedom in America. What grade of humankind were these Africans in America? What quality of citizenship did they truly deserve? What manner of coexistence should be tolerated?¹⁷⁰

In short, for many white Americans, the "slavery Problem [was now] the Negro problem."¹⁷¹ Integral to that problem were notions of citizenship, so much so that one can glean this problem from the titles of books during the period, from *Following the Color Line: American Negro*

165. 60 U.S. 393 (1856).

166. *Id.* at 407.

167. See James H. Kettner, *The Development of American Citizenship, 1608–1870*, at 316–17 (1978) (discussing the Pennsylvania Supreme Court, which in 1853 held "'the black population' . . . had [not] yet been admitted 'into political partnership' . . . [and] could not yet aspire to 'the exercise of the elective franchise, or to the right to become our legislators, judges, and governors'" (quoting *Foreman v. Tamm*, 1 Grant 23, 23 (Pa. 1853))).

168. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 *Chi. Kent L. Rev.* 49, 54 (2007).

169. The Fourteenth Amendment accomplished this by extending citizenship to all "persons born or naturalized in the United States." U.S. Const. amend. XIV, § 1, cl. 1.

170. Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* 16, 19 (2010).

171. *Id.* at 20. See generally N. S. Shaler, *The Negro Problem*, *Atlantic* (Nov. 1884), <http://www.theatlantic.com/magazine/archive/1884/11/the-negro-problem/531366/> [<http://perma.cc/6KV3-T9X3>] (detailing the societal tensions that resulted from the "experiment of making a citizen of the negro").

*Citizenship in the Progressive Era*¹⁷² to *The Colored American: From Slavery to Honorable Citizenship*¹⁷³ to, somewhat later, *An American Dilemma: The Negro Problem and Modern Democracy*.¹⁷⁴ One can also glean this concern about citizenship from thinkers like President Woodrow Wilson, who insisted that any attempt to extend voting rights to blacks was an imposition on Southern whites, the region's "real citizens."¹⁷⁵

For its part, the Supreme Court played a constitutive role in erecting roadblocks to the exercise of full citizenship rights by black Americans. This was true in cases like the *Civil Rights Cases*, in which the Court held that the Civil Rights Act of 1875, enacted to bar racial discrimination in public accommodations, exceeded Congress's authority under the Reconstruction Amendments¹⁷⁶ and *Plessy v. Ferguson*, in which the Supreme Court blessed racial segregation in public accommodations and enshrined the doctrine of "separate but equal."¹⁷⁷ It was also true in *United States v. Reese*, which invalidated federal voting protections designed to extend voting rights to newly freed African Americans,¹⁷⁸ *Williams v. Mississippi*, which upheld Mississippi's voting laws that operated to deprive blacks of the right to vote;¹⁷⁹ and *Giles v. Harris*, which again upheld racially discriminatory voter registration laws.¹⁸⁰ And it was true in cases like *Berea College v. Kentucky*, which upheld a law barring integrated schools in Kentucky,¹⁸¹ and *Franklin v. South Carolina*, which upheld the right of states to, in effect, exclude black jurors.¹⁸² These cases stood for the implicit proposition that although blacks were technically "citizens," albeit "hyphenated Americans,"¹⁸³ that alone meant

172. Ray Stannard Baker, *Following the Color Line: American Negro Citizenship in the Progressive Era* (1907).

173. J.W. Gibson & W.H. Croghan, *The Colored American: From Slavery to Honorable Citizenship* (1903).

174. Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944).

175. Woodrow Wilson, *Reconstruction of the Southern States*, Atlantic (Jan. 1901), <http://www.theatlantic.com/magazine/archive/1901/01/the-reconstruction-of-the-southern-states/520035/> [<http://perma.cc/DT2U-JY7T>].

176. 109 U.S. 3, 3 (1883).

177. 163 U.S. 537, 537–38 (1896); *id.* at 552 (Harlan, J., dissenting).

178. 92 U.S. 214, 214–15 (1875).

179. 170 U.S. 213, 213 (1898).

180. 189 U.S. 475, 475 (1903).

181. 211 U.S. 45, 45–46 (1908).

182. 218 U.S. 161, 161–62 (1910) (finding no violation of the Equal Protection Clause when a state jury commissioner used a "good moral character" test as a proxy to exclude black jurors).

183. Lolita K. Buckner Inniss, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 DePaul L. Rev. 85, 85–88 (1999) (discussing "the image of blacks as foreigners and the phenomenon of blacks as hyphenated Americans" as a result of being "a de facto permanent immigrant class").

little—or even sometimes nothing at all.¹⁸⁴ Perhaps unsurprisingly, historian Carter G. Woodson remarked in 1921, “[C]itizenship of the Negro in this country is a fiction.”¹⁸⁵

The link between race and citizenship in legal status can also be seen in another set of laws and cases. Beginning with the Naturalization Act of 1790, naturalized citizenship was limited to “free white person[s].”¹⁸⁶ According to historian George Frederickson, the target of this restriction was likely free blacks, since at the time there was little prospect of Asian immigration and Native Americans were ineligible.¹⁸⁷ The original restriction, however, proved useful once Asians began to immigrate in substantial numbers as part of the California gold rush. Indeed, race-based exclusions for naturalized citizenship continued until 1952.¹⁸⁸ As Professor Ian Haney-López has documented, over one-million whites gained citizenship through these naturalization laws.¹⁸⁹ At the same time, other immigrants—from Hawaii, China, Japan, Burma, and the Philippines—were deemed nonwhite and rejected.¹⁹⁰

Finally, even immigrant groups that were considered “white” and therefore gained the legal status of naturalized citizens nevertheless often found themselves racially excluded from social citizenship.¹⁹¹ They were white, but not white enough. This was especially true during the early-twentieth century, when many Anglo-Saxons embraced what political scientist Rogers M. Smith terms “ascriptive Americanism”: the

184. As historian Carter G. Woodson noted, in the immediate years following emancipation, blacks enjoyed rights guaranteed by the Constitution. The Reconstruction period, however, was followed by “the undoing of the Negro as a citizen.” Carter G. Woodson, *Fifty Years of Negro Citizenship as Qualified by the United States Supreme Court*, 6 *J. Negro Hist.* 1, 6 (1921). In short, blacks were reduced “to the position of the free people of color, who before the Civil War had no rights but that of exemption from involuntary servitude.” *Id.*

185. *Id.* at 1.

186. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

187. See George M. Frederickson, *The Historical Construction of Race and Citizenship in the United States I* (2003), [http://www.unrisd.org/80256B3C005BCCF9/\(httpAuxPages\)/8A0AE7EACD11F278C1256DD6004860EA/\\$file/Fredrick.pdf](http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/8A0AE7EACD11F278C1256DD6004860EA/$file/Fredrick.pdf) [<http://perma.cc/YMG6-XAX9>].

188. See Ian F. Haney López, *White by Law: The Legal Construction of Race I*, 183 *n.2* (2006) (citing the Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 311, 66 Stat. 163, 239 (codified as amended at 8 U.S.C. § 1422 (1988))).

189. *Id.* at 1 (noting “countless people found themselves arguing their racial identity in order to naturalize” under Congress’s “‘white person’ prerequisite”).

190. *Id.* Such exclusions were rarely contested, though a couple did make it to the Supreme Court. See *Ozawa v. United States*, 260 U.S. 178, 197 (1922) (rejecting Japanese-born Takao Ozawa’s petition for citizenship notwithstanding his “white” skin, because “white” under the Nationalization Act meant “a person of what is popularly known as the Caucasian race,” not merely someone with seemingly white skin); see also *United States v. Thind*, 261 U.S. 204, 210, 213 (1923) (reaching the same conclusion as to the petition for citizenship by a “high caste Hindu”).

191. The same was sometimes true of native born poor whites, as Nancy Isenberg recently documented. See generally Nancy Isenberg, *White Trash: The 400-Year Untold History of Class in America* 105–32, 207 (2016).

belief that what qualified one for “true” citizenship was a bloodline that could be traced to Northern Europe.¹⁹² Southern and Eastern European immigrants—including Italians, Greeks, and Slavs—were deemed not quite ready for full citizenship on par with “old stock” white Americans.¹⁹³ Indeed, the fear that these new immigrants were having large families, while the birthrate was declining among Anglo-Saxons, prompted President Theodore Roosevelt, in one of his famous letters on race, to warn of “race suicide.”¹⁹⁴ Roosevelt urged Anglo-Saxons to counteract the immigrant birthrate by producing big families of their own with children who would have “strong racial qualities” and who too would become good citizens.¹⁹⁵

All of this adds context to W.E.B. Du Bois’s observation:

[The] widening of the idea of common Humanity is of slow growth and to-day but dimly realized. We grant full citizenship in the World-Commonwealth to the “Anglo-Saxon” (whatever that may mean), the Teuton and the Latin; then with just a shade of reluctance we extend it to the Celt and Slav. We half deny it to the yellow races of Asia, admit the brown Indians to an ante-room only on the strength of an undeniable past; but with the Negroes of Africa we come to a full stop, and in its heart the civilized world with one accord denies that these come within the pale of nineteenth century Humanity.¹⁹⁶

This context also points to the incontrovertible fact that it is those who are most phenotypically different who experience contested citizenship. Consider the increasingly vociferous calls to “build a wall” between America and Mexico.¹⁹⁷ Pat Buchanan’s recent book *State of Emergency: The Third World Invasion and Conquest of America* makes the

192. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 507–08 n.5 (1997).

193. See Frederickson, *supra* note 187, at 4–5 (discussing the “racialization of immigrants from Southern and Eastern Europe” based on the latter of “two distinct systems of hierarchical racial classification”—one that focused on skin color, and one that focused on “the cultural characteristics of certain European nationalities”).

194. Letter from Theodore Roosevelt to Bessie Van Vorst (Oct. 18, 1902), *in* Mrs. John Van Vorst & Marie Van Vorst, *The Woman Who Toils Being the Experiences of Two Gentlewomen as Factory Girls*, at vii–ix (1903) [hereinafter Letter from Roosevelt to Van Vorst]; see also Theodore Roosevelt, *A Letter from President Roosevelt on Race Suicide*, 35 *Am. Monthly Rev. Revs.* 550 (1907) (asserting that “[t]he greatest problem of civilization is to be found in the fact that the well-to-do families tend to die out,” and worrying about the low birth rates of “the average native American family of native American descent”).

195. Letter from Roosevelt to Van Vorst, *supra* note 194, at vii–viii.

196. W.E. Burghardt Du Bois, *The Philadelphia Negro: A Social Study* 386–87 (Boston, Ginn & Co. 1899).

197. See, e.g., Julie Hirschfield Davis, David E. Sanger & Maggie Haberman, *Trump to Order Mexican Border Wall and Curtail Immigration*, *N.Y. Times* (Jan. 24, 2017), <http://www.nytimes.com/2017/01/24/us/politics/wall-border-trump.html> (on file with the *Columbia Law Review*) (noting the “raucous [Trump] campaign rallies [that] frequently featured chants of ‘build the wall’”).

claim explicit: “America faces an existential crisis. If we do not get control of our borders, by 2050 Americans of European descent will be a minority in the nation their ancestors created and built. No nation has ever undergone so radical a demographic transformation and survived.”¹⁹⁸

As Professor Peter Halewood has argued, even today, “the citizen is implicitly white.”¹⁹⁹ Asian Americans are still often perceived to be “foreign.”²⁰⁰ The same is true of those who appear Muslim or South Asian and who, in the aftermath of 9/11, often had to display American flags outside their homes and stick American flag bumper stickers on their cars to demonstrate their citizenship.²⁰¹ It is often true of Latinos, so much so that the Court permits border officers to consider “apparent Mexican ancestry” to determine who to stop.²⁰² And to a certain extent, it is true, though we rarely acknowledge this fact, of blacks. It is their contingent citizenship, after all, that explains why black victims of Hurricane Katrina were often described in the media as “refugees,” a

198. Patrick J. Buchanan, *State of Emergency: The Third World Invasion and Conquest of America* 11–12 (2006).

199. See Peter Halewood, *Citizenship as Accumulated Capital*, 1 *Colum. J. Race & L.* 313, 322 (2012) (contesting the claim that the United States has become a postracial society and instead highlighting underlying themes of racism and xenophobia in U.S. law and culture).

200. See Ronald Takaki, *Race at the End of History*, in *The Good Citizen*, *supra* note 18, at 81–82 (explaining that Asian Americans are widely viewed as foreigners and not American); see also Ronald Takaki, *Strangers from a Different Shore* 6–7 (1989) (explaining that Asian Americans are often excluded from American history); Frank H. Wu, *Yellow: Race in America Beyond Black and White* 80–81 (2002) (explaining that Asian Americans often encounter a presumption of not being American); Leti Volpp, *The Excesses of Culture: On Asian American Citizenship and Identity*, 17 *Asian Am. L.J.* 63, 63–64 (2010) (explaining that the perception that Asian Americans are especially attached to their culture renders Asian Americans “foreign”); Arvin Lugay, *Book Note*, “In Defense of Internment”: Why Some Americans Are More “Equal” than Others, 12 *Asian L.J.* 209, 209–12 (2005) (reviewing Michelle Malkin, *In Defense of Internment* (2004)).

201. I. Bennett Capers, *Flags*, 48 *How. L.J.* 121, 149 (2004) (noting how Muslim Americans “cloak[ed] themselves in the American flag to ward against everything from job discrimination, to racial profiling, to harassment, to violence” (footnotes omitted)).

202. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976) (allowing race as a permissible factor in conducting border stops); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87 (1975) (rejecting the notion that race can by itself justify a border stop but affirming that race is a relevant factor); see also Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 *Geo. L.J.* 1005, 1007–09 (2010) (explaining that the Supreme Court has allowed racial profiling in federal immigration enforcement under *Brignoni-Ponce* and *Whren*); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *Yale L.J.* 214, 230–33 (1983) (discussing the use of race at border stops). It is similarly telling that many Americans do not consider Puerto Ricans to be American citizens. See Nick Visser, *Most Americans Don’t Know Puerto Ricans Are American*, *Huffington Post* (Nov. 22, 2016), http://www.huffingtonpost.com/entry/americans-puerto-rico_us_573d4900e4b0aee7b8e90e32 [<http://perma.cc/G2L7-UHQJ>] (discussing a survey of 2,000 U.S. citizens, which found that “just 43 percent of Americans knew the citizenship status of Puerto Ricans”).

term normally associated with noncitizens.²⁰³ It also explains why so many Americans had no trouble questioning President Obama's "citizenship," with its race-based undercurrents.²⁰⁴

B. *Race and Policing*

Understanding how citizenship has been racialized seems indispensable to getting to the "answer" of what citizenship is expected of those of us who are black and brown. And getting to this answer is impossible without thinking about Eric Garner, the six-foot-tall "gentle giant" who died after being placed in a prohibited chokehold by Officer Daniel Pantaleo in Staten Island, New York, on July 17, 2014.²⁰⁵ Garner's "crime": thinking it was "criminal" that police should be able to arrest him again for simply selling loose cigarettes on the street, and resisting their attempts to do so.²⁰⁶ Another unarmed black man, this one just a teenager, Michael Brown, is also part of the answer. Darren Wilson, a white police officer, shot and killed Brown in Ferguson, Missouri, on August 9, 2014.²⁰⁷ Brown's crime: stealing cigarillos from a liquor store and running.²⁰⁸ The answer involves Dajerria Becton, the fifteen-year-old black teenage girl who was body slammed to the ground by a Texas police officer at a graduation pool party.²⁰⁹ Becton's crime: crashing the pool party with other teenagers.²¹⁰ And it also involves Shakara, the sixteen-year-old foster student who was flipped out of her desk and

203. For a discussion of the use of the term "refugees" for those displaced by Hurricane Katrina and what it implied about the full citizenship of those individuals, see Gordon & Lenhardt, *supra* note 5, at 2495–97; see also Jocelyn Noveck, Use of the Word 'Refugee' Stirs Newsroom Debate, Editor & Publisher (Sept. 6, 2005), <http://www.editorandpublisher.com/news/use-of-the-word-refugee-stirs-newsroom-debate/> [<http://perma.cc/TLR7-MQEN>]; Robert E. Pierre & Paul Farhi, 'Refugee': A Word of Trouble, Wash. Post (Sept. 7, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/06/AR2005090601896_pf.html (on file with the *Columbia Law Review*).

204. See Janie Velencia, Republicans Still Don't Think Obama Is American, But Don't Care Ted Cruz Was Born in Canada, Huffington Post (Jan. 12, 2016), http://www.huffingtonpost.com/entry/republicans-trump-cruz-canadian-birth-eligibility_us_56940e76e4b0c8beacf7fe2d [<http://perma.cc/85MN-9UUR>].

205. Al Baker, J. David Goodman & Benjamin Mueller, Beyond the Chokehold: The Path to Eric Garner's Death, N.Y. Times (June 13, 2015), <http://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> (on file with the *Columbia Law Review*).

206. *Id.*

207. See Jake Halpern, The Cop, New Yorker (Aug. 10 & 17, 2015), <http://www.newyorker.com/magazine/2015/08/10/the-cop> (on file with the *Columbia Law Review*).

208. *Id.*

209. Carol Cole-Frowe & Richard Fausset, Jarring Image of Police's Use of Force at Texas Pool Party, N.Y. Times (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/mckinney-tex-pool-party-dispute-leads-to-police-officer-suspension.html> (on file with the *Columbia Law Review*).

210. *Id.*

dragged across a room by Senior Deputy Ben Fields, a school resource officer.²¹¹ Her crime: not putting away her cell phone in class quickly enough.²¹² I also cannot imagine reaching the right answer without thinking of Tamir Rice, the twelve-year-old black boy who was shot by a Cleveland police officer.²¹³ His crime: playing with a toy BB gun in the park.²¹⁴ There is Sandra Bland, who committed suicide after being taken into custody following a traffic dispute.²¹⁵ Her crime: talking back to the traffic officer and not exiting her vehicle fast enough.²¹⁶ And Freddie Gray, who suffered a spine injury and lapsed into a coma when officers, figuring they'd teach him a lesson, failed to strap him down as they transported him to a precinct.²¹⁷ His crime: fleeing when he saw the police.²¹⁸ And Philando Castile, who was shot in his car as he reached into his pocket for his license.²¹⁹ His crime: notifying the police officer he was in possession of a licensed firearm.²²⁰ What kind of citizenship was expected of them?

These are just some of the names from the past few years. Some of the names we know. The ones many of us scratch our heads at as we wonder how this happened. The ones that result in scathing reports from the Department of Justice²²¹ or studies on how housing discrimination

211. Alan Blinder, Ben Fields, South Carolina Deputy, Fired over Student Arrest, N.Y. Times (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/us/south-carolina-deputy-ben-fields-fired.html?_r=0 (on file with the *Columbia Law Review*); Robert Parmer, The Spring Valley High School Incident: How Cell Phones Helped Uncover Police Brutality, Thought Catalog (Nov. 10, 2015), <http://thoughtcatalog.com/robert-parmer/2015/11/the-spring-valley-high-school-incident-how-cell-phones-helped-uncover-police-brutality/> [<http://perma.cc/N3FV-RNVY>].

212. Blinder, *supra* note 211.

213. See Sean Flynn, The Tamir Rice Story: How to Make a Police Shooting Disappear, GQ (July 14, 2016), <http://www.gq.com/story/tamir-rice-story> [<http://perma.cc/286U-GAXB>].

214. *Id.*

215. James Queally, What Happened to Sandra Bland Before She Died in a Texas Jail?, L.A. Times (July 28, 2015), <http://www.latimes.com/nation/nationnow/la-na-nn-sandra-bland-20150728-htmlstory.html> (on file with the *Columbia Law Review*).

216. *Id.*

217. Lindsey Bever & Abby Ohlheiser, Baltimore Police: Freddie Gray Died from a 'Tragic Injury to His Spinal Cord,' Wash. Post (Apr. 20, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/04/20/baltimore-police-freddie-gray-arrested-without-force-or-incident-before-fatal-injury/> (on file with the *Columbia Law Review*).

218. *Id.*

219. Mitch Smith, Minnesota Officer Acquitted in Killing of Philando Castile, N.Y. Times (June 26, 2017), <http://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> (on file with the *Columbia Law Review*).

220. *Id.*

221. See, e.g., Civil Rights Div., U.S. Dep't of Justice, Investigation of the Baltimore Police Department 21 (2016) (finding that the Baltimore Police Department engaged in a practice of unlawful conduct); Civil Rights Div., U.S. Dep't of Justice, Investigation of the Ferguson Police Department 1 (2015) (finding a pattern and practice of unlawful conduct by the Ferguson Police Department).

made Ferguson, Missouri, a hot point for unrest.²²² The ones that prompt debate about whether police officers belong in schools, and then talk about the school-to-prison pipeline, and then talk about why in a city like New York a black student has about a one-in-two chance of being in a school with metal detectors while a white student has only about a one-in-seven chance.²²³ The ones that renew debates about whether broken windows policing contributed to the death of Eric Garner while protesters march and hold signs saying, “I Can’t Breathe” or “Don’t Shoot.”

What may be less obvious is that these names are part of a larger citizenship problem. They are eruptions here and there, but they also prompt the larger question: Why are some treated like second-class citizens? There is a reason why Claudia Rankine’s heralded book of poetry, which includes poems called “In Memory of Trayvon Martin” and “Stop-and-Frisk,” is titled *Citizen*.²²⁴ Consider, as an exhibit, data from New York’s aggressive stop-and-frisk policing. In New York City alone, police executed over 4.4 million forcible stops between January 2004 and June 2012, with eighty-four percent of those stopped individuals being black or brown.²²⁵ In raw numbers, this means that black or brown people were stopped approximately 3.7 million times.²²⁶ Although these stops were allegedly based on reasonable suspicion of crime, in fact around nineteen of twenty of these individuals were found *not* to be engaged in criminal behavior warranting arrest, resulting in an error rate of approximately ninety-four percent.²²⁷ And even this understates the

222. See Editorial, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. Times (Aug. 12, 2014), <http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html> (on file with the *Columbia Law Review*) (describing Professor Colin Gordon’s study on the housing discrimination that preceded Ferguson).

223. Kat Aaron et al., *More than 90,000 New York City Students Are Searched Before School*, WNYC (Sept. 15, 2015), <http://www.wnyc.org/story/school-metal-detectors/> [<http://perma.cc/X8RL-6KRY>] (“Citywide, almost half of black high school students are scanned every day — compared to about 14 percent of white students.”).

224. Rankine, *supra* note 154.

225. *Floyd v. City of New York*, 959 F. Supp. 2d 554, 558–59 (S.D.N.Y. 2013).

226. *Id.*

227. *Id.* at 558. This error rate is staggering on its own, but it is even worse when one remembers that the Fourth Amendment offers no help in these situations. An innocent person gets no benefit from the exclusionary rule, and the injury from a single unjustified stop-and-frisk is far too small to warrant a civil rights suit. The primary beneficiaries of the exclusionary rule are, by definition, those individuals who have something to exclude. By contrast, the citizen who is wrongfully stopped or searched is essentially left without recourse. Perhaps this is simply a collateral cost of good citizenship, at least what the Court delineates as good citizenship. Implicit in the Court’s criminal procedure jurisprudence is that the good citizen willingly accepts the error rate that comes with legally justified stops. The Court tells the good citizen that such error is acceptable and necessary. Because acceptance of such risk is in service of the state, the good citizen does not seek a remedy nor is one really available.

true error rate, since of the individuals who were arrested, nearly half of their arrests were eventually dismissed.²²⁸

Now carry this over to other cities: Atlanta, Washington, Baltimore, Detroit, and Los Angeles. What citizenship is expected of racial minorities there?²²⁹ And it is not just large cities. One only has to say Ferguson to be reminded of that. Nor is it just areas where there are significant minority populations. Consider Oneonta, New York, a town of approximately 10,000. After a white woman claimed a black *man* broke into her home, the police conducted a round-up of nearly 200 of the town's 300 black residents, including at least one black *woman*.²³⁰ This was just a couple of decades ago. In fact, it is often in places that have the smallest percentage of African Americans—such as South Dakota, Vermont, and Wisconsin—that the largest disparities in incarceration rates exist.²³¹

Earlier, I mentioned the known error rate in stop-and-frisk policing in New York. We see similar error rates in another policing tool: pretextual traffic stops, or what blacks have long come to know as Driving While Black.²³² Interestingly, studies show little disparity in unambiguous traffic safety stops such as running a stop sign.²³³ Rather, the disparity is

228. Eric T. Schneiderman, N.Y. State Office of the Attorney Gen., A Report on Arrests Arising from the New York City Police Department's Stop-and-Frisk Practices 3, 10 fig.7 (2013), http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf [<http://perma.cc/X2ES-K9HY>] (analyzing the efficacy of stop-and-frisk by looking at the dispositions of the arrests made under the program).

229. Throughout this Essay, I struggled with when to say “them” and when to say “us,” especially when referring to people of color. By settling on “them,” the last thing I mean to suggest is a “politics of distinction,” such as that embraced by Professor Randall Kennedy. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 Harv. L. Rev. 1255, 1260 n.20 (1994) (describing his decision to use a politics of distinction, which distinguishes between different parts of the African American community). Far from it. Like Professor Regina Austin, I recognize the importance of a politics of identification. See Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, 65 S. Cal. L. Rev. 1769, 1779 (1992) (invoking a feeling of kinship between all members of the black community based on the understanding that the current American legal framework was set up in an oppressive fashion).

230. *Brown v. City of Oneonta*, 221 F.3d 329, 334, 338 (2d Cir. 2000).

231. Marc Mauer & Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity* 6 tbl.2 (2007), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf> [<http://perma.cc/C4BF-LZMJ>].

232. For recent statistics, see Capers, *Race, Policing, and Technology*, *supra* note 144, at 1255–57; David A. Harris, *The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters*, 84 Minn. L. Rev. 265, 275–88 (1999) (giving statistical analysis for excessive traffic stops against black drivers in cities across the United States); Christopher Ingraham, *You Really Can Get Pulled over for Driving While Black*, *Federal Statistics Show*, Wash. Post (Sept. 9, 2014), <http://www.washingtonpost.com/news/wonk/wp/2014/09/09/you-really-can-get-pulled-over-for-driving-while-black-federal-statistics-show/> [<http://perma.cc/W6GB-MUZ5>] (reporting that black drivers are around thirty-one percent more likely to be pulled over than white drivers).

233. See Epp et al., *supra* note 117, at 72 (noting that “[w]hen police are engaged” in pure traffic-safety enforcement, “they make stops without regard to the driver’s race”).

in investigatory stops, those stops when police exercise discretion to conduct a traffic stop for a minor violation, such as changing lanes without signaling, as a pretext to look for more criminal behavior. For these investigatory stops, black drivers are nearly three times more likely than white drivers to be stopped and over five times more likely to have their cars searched.²³⁴ And yet studies show that the hit rate—the rate at which officers discover contraband following a search—is not greater for African Americans.²³⁵ Add to this that racial minorities are more likely to be subjected to pointless indignities, such as being ordered out of a vehicle, or told to keep their hands visible, or asked where they are going.²³⁶ All of this suggests “error,” as a descriptive term, is incomplete. Error implies that the stops are solely designed to apprehend criminals. What I am suggesting is that the stops also exercise a type of control: to show whose country this is, and whose it is not.

So again, the question must be asked: What citizenship is expected of those who, by virtue of skin color, exist in what philosopher Judith Butler terms a “racially saturated field of visibility”²³⁷ that frames blacks as second class? How do racial minorities prove they are good citizens when driving with the same care as their white counterparts still subjects them to racialized policing?²³⁸ When they, and they alone, experience the brunt of an officer’s court-sanctioned discretion to order a driver out of a car,²³⁹ a passenger out of a car,²⁴⁰ or a family out of a car?²⁴¹ When

234. *Id.* at 64, 105–06 (finding that blacks are 2.7 times more likely than whites to be pulled over for investigatory stops and 5.19 times more likely to be subjected to vehicle searches).

235. See David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* 80 (2002) (collecting studies indicating the hit rate for African Americans is not greater than that of white drivers).

236. See Epp et al., *supra* note 117, at 74–92 (describing racial disparities in the nature and frequency of police stops of drivers); see also Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *Fordham L. Rev.* 2257, 2272–74 (2002) (discussing the “black perspective” in interactions with law enforcement); Camelia Simoiu et al., *The Problem of Infra-Marginality in Outcome Tests for Discrimination* 17 (July 18, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811449 (on file with the *Columbia Law Review*) (finding a substantively lower standard for searching black and Hispanic drivers compared to white drivers in a dataset of 4.5 million police stops).

237. Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in *Reading Rodney King/Reading Urban Uprisings* 15, 15 (Robert Gooding-Williams ed., 1993).

238. See Epp et al., *supra* note 117, at 64, 105–06; Capers, *Race, Policing, and Technology*, *supra* note 144, at 1255–57; Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 *Fordham Urb. L.J.* 539, 611–14 (2016).

239. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (holding that police officers may order drivers out of a vehicle after making traffic stops).

240. See *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (extending the Court’s holding in *Mimms* to passengers).

241. In a well-known case, a Maryland state trooper stopped Harvard Law School graduate Robert Wilkins—now a judge on the D.C. Circuit Court of Appeals—as he was

joining the middle class and the upper-middle class, and moving to a predominantly white neighborhood, still subjects them to targeted policing for being “out of place”?²⁴² When they, and they alone, are “uppity” if they talk back and ask why,²⁴³ ask for a warrant,²⁴⁴ and ask under what authority? When they, simply by virtue of skin color, are often already marked as a probable threat, a “symbolic assailant,”²⁴⁵ as a “custodial citizen,”²⁴⁶ as an “anti-citizen”?²⁴⁷

Of course, racialized policing—again inextricable with how we conceive our equal citizenship—is not an isolated phenomenon. As discussed above, it is tied up with history. As Professor Carol Steiker has persuasively argued, even our modern police force is traceable in part to the “slave patrols,” which developed many of the trademarks—uniforms, arms, military drilling—that we associate with police forces.²⁴⁸ Racialized

driving with his family and ordered them out of the vehicle, requiring them to stand in the rain, while the officer arranged for a canine sniff. See Robert L. Wilkins, U.S. Court of Appeals, D.C. Circuit, <http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+RLW> [<http://perma.cc/XN8K-T24A>] (last visited Nov. 1, 2017); see also Complaint at 7–8, *Wilkins v. Md. State Police*, No. MJG-93-468 (D. Md. filed Feb. 12, 1993). Failing to find contraband, the trooper eventually permitted Wilkins and his family to leave. *Id.* at 8–9. Wilkins sued the Maryland State Police in federal court, and discovery revealed a state police memo instructing troopers to target black males and black females. See David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 *J. Crim. L. & Criminology* 544, 551 n.44 (1997). Shortly afterwards, the State settled with Wilkins. See Settlement Agreement, *Wilkins*, No. MJG-93-468 (D. Md. Jan. 5, 1995). For more on this case, see generally Harris, *supra*, at 563–66.

242. Capers, Policing, Race, and Place, *supra* note 102, at 66.

243. Consider the trooper’s response to Sandra Bland, the African American driver who asked why she needed to put out her cigarette since she was sitting in her car. See Abby Ohlheiser & Abby Phillip, “I Will Light You Up!”: Texas Officer Threatened Sandra Bland with Taser During Traffic Stop, *Wash. Post* (July 22, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/07/21/much-too-early-to-call-jail-cell-hanging-death-of-sandra-bland-suicide-da-says/> [<http://perma.cc/27TU-F2MW>]. Trooper Encina responded by immediately ordering Bland out of the car and eventually yelling, “I’m going to yank you out of here. I’m going to drag you out of here.” *Id.* (internal quotations marks omitted) (citing Police Center, Sandra Bland Dashcam Video Release, YouTube (July 21, 2015), <http://www.youtube.com/watch?v=jpSEmvwOn4>). Pointing his Taser at her he added, “I will light you up!” *Id.*

244. *Mapp v. Ohio*, 367 U.S. 643 (1961). The case that made the exclusionary rule binding on the states began when Dollree Mapp, a black woman, demanded to see a warrant when officers showed up to search her house. *Id.* at 644.

245. Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* 44–47, 212–13 (1994).

246. Lerman & Weaver, *supra* note 15, at 7–8, 30 (using the term “custodial citizens” to refer to individuals, mostly minority men, who are likely to come into contact with the criminal justice system, whether as offenders or suspects).

247. D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 *Geo. L.J.* 437, 493 (1993) (noting the “idea of the black man as anticitizen, as the archetypal threat to law and order”).

248. Steiker, *supra* note 16, at 839; see also Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* 72–73 (2001) (noting that, in the eighteenth and

policing is tied up too with choices the Court has made—both in its holdings and in its citizenship talk—again and again. The connection between the Court’s criminal procedure jurisprudence and the race-ing of citizenship I take up in the section below.

C. *Race and Criminal Procedure Cases*

Thus far, I have attempted to demonstrate that the question of race and citizenship in this country has always been fraught, that race has determined who is allowed to become a citizen, and that race has determined which rights a citizen is permitted to exercise. But what is equally important is this: Citizenship has always been connected to crime. This is not only in the sense that those who have been convicted of felonies can be stripped of rights we normally associate with citizenship, or as Michelle Alexander argued in *The New Jim Crow*, that we seem to deliberately use crime as a way to relegate blacks to second-class status.²⁴⁹ Nor is it only in the sense Professor Muhammad has articulated: Historically, we “wrote crime into race” and then used black criminality as an argument against full citizenship.²⁵⁰ Rather, citizenship has also been connected to crime in the Court’s criminal procedure opinions that delineate what rights citizens are entitled to and what rights they are expected to exercise.

This is because criminal procedure cases, even when race is unsaid, are on a certain level about race. Indeed, as I and several other scholars have observed, the story of how our criminal procedure protections developed becomes completely intelligible only through the lens of race.²⁵¹ The right to counsel for indigent felony defendants,²⁵² the right

nineteenth centuries, “slave patrols” were combined with legitimate law enforcement duties); Andrew E. Taslitz, *Reconstructing the Fourth Amendment: A History of Search and Seizures, 1789–1868*, at 109 (2006) (“For all practical purposes, patrols had nearly unlimited authority to search, seize, and exercise violence.”); Kristian Williams, *Our Enemies in Blue: Police and Power in America 40–43* (2004) (describing the various state slave-patrol systems).

249. See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010) (discussing the way in which American law has been created and enforced so as to confine and criminalize black people).

250. Muhammad, *supra* note 170, at 51–60.

251. See, e.g., Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 5–9; see also Klarman, *supra* note 16, at 48–50 (contending “that the linkage between the birth of modern criminal procedure and southern black defendants is no fortuity”); Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. Chi. L. Rev. 215, 230–31 (2003) (“[I]t is simply impossible to understand the foundation of constitutional criminal procedure without understanding that racial inequality played a key role in the Court’s decision to intervene in the administration of southern justice.”); Steiker, *supra* note 16, at 841–44 (noting that the Court “constru[ed] the Fourth Amendment’s prohibition of ‘unreasonable’ government action in light of” persistent racism).

252. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Powell v. Alabama*, 287 U.S. 45, 73 (1932).

to be free from coercion during interrogation,²⁵³ the right to *Miranda* warnings,²⁵⁴ the right to trial by jury,²⁵⁵ and indeed, the entire process by which the Fourth, Fifth, and Sixth Amendments were incorporated and made applicable to the states,²⁵⁶ owe much to the Court's concern between the 1920s and 1960s about police treatment of minorities, especially in the South.²⁵⁷ Even now, in part due to racialized policing, criminal procedure cases remain race cases. Even in criminal procedure cases involving white defendants, race is often in the background.

Mark Weiner has coined the term “black trials” to apply to seminal civil rights cases like *Dred Scott*, *Plessy*, and *Brown*.²⁵⁸ Weiner writes:

[B]lack trials are legal events that figure symbolically and dramatically in American culture by making public certain basic ideological conflicts about race and civic life. They are legal dramas of citizenship, civic rituals through which we have come to know ourselves as a people.²⁵⁹

But Weiner's coinage does not go far enough. Allow me to take Weiner's term a step further and say that seminal criminal procedure cases—think *Terry v. Ohio*, another case in which race was both absent and present²⁶⁰—also function as “black trials,”²⁶¹ or even “master texts that contribute to an ideology of race and racial hierarchy.”²⁶² These cases, for the most part involving black and brown defendants on one side and the state on the other, are also “legal dramas of citizenship, civic rituals through which we have come to know ourselves as people.”²⁶³

253. *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

254. *Miranda v. Arizona*, 384 U.S. 436, 467–72 (1966).

255. *Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968).

256. Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 *Geo. L.J.* 1153, 1155–59 (1998) (arguing that the extent to which the “modern regime of criminal procedure” eliminates local discretion, though created to protect minorities, now restricts helpful community-policing tactics).

257. Capers, Rethinking the Fourth Amendment, *supra* note 16, at 4–12.

258. Mark S. Weiner, *Black Trials: Citizenship from the Beginnings of Slavery to the End of Caste*, at xi–xii (2004).

259. *Id.* at xi.

260. See Anthony C. Thompson, Stopping the Usual Suspects: Race and the Fourth Amendment, 74 *N.Y.U. L. Rev.* 956, 962 (1999) (contending “*Terry* . . . contributed to the Court's conception of a raceless world of Fourth Amendment jurisprudence: a constructed reality in which most police officers do not act on the basis of considerations of race”). Even in *Miranda v. Arizona*, the Court downplayed race. See Seidman, *supra* note 55, at 751 n.254 (describing Chief Justice Warren's omission from *Miranda* of a passage that “expressly acknowledged the connection between police interrogation techniques and racial subjugation” (citing Bernard Schwartz, *Superchief: Earl Warren and His Supreme Court—A Judicial Biography* 591 (1983))).

261. Weiner, *supra* note 258, at xi–xii.

262. Capers, Reading Back, Reading Black, *supra* note 93, at 11.

263. Weiner, *supra* note 258, at xi (characterizing more explicitly racial civil rights cases).

Recognizing criminal procedure cases as “black trials” adds another layer to how we should think about the Court’s decision, time and time again, to use criminal procedure cases to mark out what constitutes good citizenship vis-à-vis the police. Good citizens should willingly surrender their right to require a warrant for a search. Good citizens should willingly waive their right to silence, or its opposite, their right to speak. Good citizens should voluntarily obey police orders, even patently unlawful ones. Good citizens should willingly and happily aid the police, even a police system that exacerbates inequality and incarceration. I argued before that these are messages about good citizenship, and by implication, bad citizenship as well. I have now added that these cases are, on a certain level, also “black trials.”²⁶⁴ What I did not say is this: Those messages are anything but race-neutral. Even if racialized messages are not intended, that is how they are heard.

We know from the literary theorist and legal scholar Stanley Fish that how texts are understood depends on the interpretive communities to which readers belong.²⁶⁵ Other literary scholars, such as Professor Michael Awkward, have made similar observations with respect to race. Professor Awkward asks, “[H]ow does blackness direct, influence, or dictate the process of interpretation? Is there a politics of interpretation that is determined or controlled by race in ways that can be compared to the ideologically informed readings of, for example, feminist critics?”²⁶⁶ For my part, I have posited that there is something called “reading black.”²⁶⁷

All of this has implications for how citizenship talk—even if unintended, even assuming a game of telephone²⁶⁸—is understood along lines of race. Allow me to offer myself as an exhibit. Again, I am a black man living in a country where “young plus black plus male” too often “equals probable cause.”²⁶⁹ When I read *United States v. Drayton*, am I the suspect on the bus being asked if I would mind consenting to a search, or am I one of the “good citizens” around him—“traveling on a Greyhound

264. As noted earlier, the bulk of the citizenship cases involves black and brown defendants. This is true of *Miranda*, *Miranda v. Arizona*, 384 U.S. 436 (1966), *Schneckloth*, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), *Hodari D.*, *California v. Hodari D.*, 499 U.S. 621 (1991), *Drayton*, *United States v. Drayton*, 536 U.S. 194 (2002), *Wardlow*, *Illinois v. Wardlow*, 528 U.S. 119 (2000), *Delgado*, *INS v. Delgado*, 466 U.S. 210 (1984), and a host of others.

265. Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* 14 (1980) (exploring how the communities to which one belongs and with which one interacts can affect how one interprets a text).

266. Michael Awkward, *Race, Gender, and the Politics of Reading*, 22 *Black Am. Literature* F. 5, 5–6 (1988).

267. Capers, *Reading Back, Reading Black*, *supra* note 93, at 10–11.

268. That is, assuming things are added or lost as the messages pass indirectly from the Court to citizens.

269. Gaynes, *supra* note 11, at 621.

bus en route from Ft. Lauderdale, Florida to Detroit, Michigan”²⁷⁰—who were disciplined into opening their bags by example and who deployed the Court-endorsed psychology of group pressure,²⁷¹ “encouraging consent”²⁷² In *Illinois v. Wardlow*, am I the youth running when I see the police because I know, from my race-based “pools of knowledge,”²⁷³ all about police violence? Or am I part of the “good citizens” who are told that running from the police in their community *is* reasonable suspicion, and that if anything, they should help the police grab the youth. And why do I have the impression that the citizens that the Court has in mind in these and other cases—the citizens who should have an interest in “encouraging consent,”²⁷⁴ the citizens who are told that “compliance with police orders to stop” should be “encouraged,”²⁷⁵ no matter how invalid the orders—are the poor, the black and brown, the disenfranchised? Is it because this is who I imagine, in *United States v. Drayton*, traveling the thirty-two-hour trip by Greyhound from Florida to Michigan?²⁷⁶ Is it because the community the Court mentions in *Illinois v. Wardlow* is so “known for heavy narcotics trafficking” that the Court says it twice in the first six sentences of the opinion?²⁷⁷

D. *Citizenship Work*

Conceptualizing these criminal procedure cases as “black trials” and “master texts” helps explain and contextualize the extra work racial minorities in particular must do in order to enjoy a simulacrum of full citizenship status in their interactions with the police. The extra work stems from the long association of American-ness with whiteness²⁷⁸—picture in your mind the All-American girl, or the All-American boy—

270. 536 U.S. 194, 197 (2002).

271. For a discussion about how social influence can play a role in affecting an individual’s behavior, and the role law can play in shaping that social influence, see generally Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 Va. L. Rev. 349, 350–52 (1997).

272. *Schneckloth v. Bustamonte*, 412 U.S. 218, 243 (1973) (“[T]he community has a real interest in encouraging consent.”).

273. *Robinson*, supra note 114, at 1120; see also *Maines*, supra note 114, at 318–19 (1999) (noting that information is often race-based, with blacks being privy to certain information that is largely unknown by whites, and vice versa).

274. *Schneckloth*, 412 U.S. at 243.

275. *California v. Hodari D.*, 499 U.S. 621, 627 (1991).

276. For the Greyhound travel time between Ft. Lauderdale and Detroit, see Bus Trips from Ft. Lauderdale, FL, to Detroit, MI, Greyhound, <http://www.greyhound.com/en/ecommerce/schedule> [<http://perma.cc/B4ZP-GE95>] (lasted visited Oct. 16, 2017) (displaying search starting point field for “Ft. Lauderdale, FL” and search destination field for “Detroit, MI”).

277. 528 U.S. 119, 121 (2000).

278. Whiteness, in turn, is often associated with innocence. See, e.g., Thomas Ross, The Rhetorical Tapestry of Race: White Innocence and Black Abstraction, 32 Wm. & Mary L. Rev. 1, 3–6 (1990).

and an interconnected problem: the association of black and brown minorities with criminality.²⁷⁹

Building on sociologist Erving Goffman's work on identity performance,²⁸⁰ Professors Devon Carbado and Mitu Gulati have noted that members of minority groups, in response to negative stereotypes, often "do significant amounts of 'extra' identity work to counter those stereotypes."²⁸¹ Though Carbado and Gulati's initial observations were in the context of employment discrimination, the same is true in the context of police–citizen interactions.²⁸² Partially as a result of the Court's jurisprudence, racial minorities in particular find themselves facing a double-bind: To be regarded as "good citizens" deserving of the treatment routinely accorded to privileged whites, these minority citizens have to first abjure or at least downplay their actual citizenship rights. And if they do this, they never get to fully enjoy them.

They must perform what I will term "citizenship work"—being extra deferential, acquiescing to demands, relinquishing citizenship rights.²⁸³ Perhaps nothing better illustrates this extra "citizenship work" than "the talk" that so many black and brown parents find themselves having to give their children, a talk so well-known that Justice Sotomayor

279. See Adam Benforado, *Unfair: The New Science of Criminal Injustice* 197–99 (2015) (explaining the historical relationship between racial bias and the overcriminalization of minority communities in the United States); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psychol.* 876, 876 (2004) ("The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years."); Jerry Kang, *Trojan Horses of Race*, 118 *Harv. L. Rev.* 1489, 1491–528 (2005) (discussing several studies examining implicit racial bias); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 *Minn. L. Rev.* 2035, 2039–40 (2011) (describing stereotyping of young black men "as violent, hostile, aggressive, and dangerous" and exploring the effects of those stereotypes on policing).

280. See generally Erving Goffman, *The Presentation of Self in Everyday Life* 15 (1959) (setting out the book's methodology of studying identity performance with the ultimate goal of discerning "some of the common techniques that persons employ to sustain [their] impressions" in social situations).

281. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *Cornell L. Rev.* 1259, 1262 (2000).

282. Professor Carbado later extended this analysis to police encounters. See Devon W. Carbado, (E)Racing the Fourth Amendment, 100 *Mich. L. Rev.* 946, 966–67 (2002). Indeed, Carbado argued that it is through these encounters that black Americans learn they are black Americans, and hence second-class citizens. *Id.* at 952–64; see also David Alan Sklansky, *Democracy and the Police* 136–37 (2008) (noting that racialized policing results in some minorities feeling "the need to adopt roles of exaggerated deference and subservience").

283. Other scholars have also begun discussing the racial distributional costs associated with the Court's cultivation of compliance. Particularly noteworthy are Professors Alice Ristroph, *The Constitution of Police Violence*, 64 *UCLA L. Rev.* 1182, 1188 (2017) and Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 *U. Chi. Legal F.* 295, 296.

referenced it in her dissent in *Utah v. Strieff*.²⁸⁴ What my own parents told me is not atypical. When you see the police:

Don't run. Say, "yes, sir," or "no, sir." Don't talk back. Keep your head down, don't look them in the eye. That's disrespectful. Say, "yes, sir," or "no, sir." "Yes, ma'am," or "no, ma'am" if it's a lady cop. Don't act smart. Don't get smart. Just keep your head down and be deferential. Don't ask how come or why. Don't run. If they let you go, say "thank you." Don't show your color. Don't act black. A cop will kick your ass in a second, you hear? Don't talk back. Do whatever they say, you hear? Unless he asks you something, shut your mouth and keep it shut. Don't start talking about rights. Definitely don't start talking about black power. What were you doing wearing baggy pants and a hoodie in the first place? What were you doing walking/driving on that side of town any old way? What were you doing looking at his badge number and name? You don't have rights, you hear? Don't run. And you best say, "yes, sir," or "no, sir."²⁸⁵

Black and brown Americans in particular are told that we must stoically endure state-sanctioned microaggressions.²⁸⁶ We must de-race ourselves and "appear racially non-threatening."²⁸⁷ We are told we must answer question after question unrelated to the stated grounds for the stop, especially in the case of investigatory traffic stops.²⁸⁸ *Where are you going? What brings you to this neighborhood? Do you mind if I look in your car? Just routine—you understand?* We must, quite literally, "assume the position," except the position is that of an at-will citizen, or a second-class citizen. Even in the face of official politeness, we must suffer what

284. 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) ("For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; . . . keep your hands where they can be seen; do not even think of talking back . . . all out of fear of how an officer with a gun will react . . .").

285. This is essentially what my parents told me. For other examples of "the talk," see Coates, *supra* note 157, at 9; Miller, *supra* note 283, at 342; Geeta Gandbhir & Blair Foster, Opinion, A Conversation with My Black Son, N.Y. Times (Mar. 17, 2015), http://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html?_r=0 (on file with the *Columbia Law Review*); Touré, How to Talk to Young Black Boys About Trayvon Martin, Time (Mar. 21, 2012), <http://ideas.time.com/2012/03/21/how-to-talk-to-young-black-boys-about-trayvon-martin/> [<http://perma.cc/XH8A-2A55>].

286. See Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1559, 1565–68 (1989) (describing the "[v]igilance and psychic energy" required to withstand these recurring "assaults").

287. Randolph Hohle, Black Citizenship and Authenticity in the Civil Rights Movement 3 (2013).

288. See Wayne L. LaFave, The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1885–91 (2004) (discussing investigatory stops case law); see also Epp et al., *supra* note 117, at 74–92 ("To show how investigatory stops are the source of these racial disparities, we need to take into account a key alternative explanation: the possibility that they grow instead from unintended tit-for-tat interactions between officers and black drivers.").

Professor Sherry Colb terms “targeting harm.”²⁸⁹ Professor Frank Rudy Cooper adds that black men in particular must emasculate themselves.²⁹⁰ Male or female, we certainly should not ask, as Sandra Bland famously did, “Why?”²⁹¹ Through all of this, we are expected to cede any Fourth Amendment right we may have to walk away (in the case of a so-called “casual encounter”), as well as any Fourth Amendment right that the length of detention be no longer than necessary (in the case of a stop).²⁹² We are expected to forego our Fourth Amendment right to decline requests to have our persons and belongings searched. We are expected to waive any common law and Fifth Amendment right to decline to answer questions that have nothing to do with the stated basis for the stop.²⁹³ The double-bind is not just that to warrant the treatment normally accorded white citizens, we must “work” our citizenship. The double-bind is that the citizenship we must perform is that of the obedient citizen. The docile citizen. The nonproblem citizen. And yes, the second-class citizen.

So, allow me to return to the question that motivated this section. What performance is expected of Eric Garner, Sandra Bland, and the rest of us?

289. Colb, *supra* note 110, at 1486 (noting that stopped individuals are “left wondering, ‘Why me? Why have the police singled me out What gave them the gut feeling that I am a criminal?’” (footnote omitted)).

290. Frank Rudy Cooper, “Who’s the Man?”: Masculinities Studies, *Terry* Stops, and Police Training, 18 *Colum. J. Gender & L.* 671, 700, 725 (2009) (observing that officers “often use stops and frisks as a means of staging, and winning, masculinity contests”); cf. Paul Butler, Stop and Frisk: Sex, Torture, Control, *in* *Law as Punishment/Law as Regulation* 155, 166 (Austin Sarat et al. eds., 2011) (“African American men . . . have . . . observed the sexual nature of frisks.”).

291. Specifically, after Trooper Encinia pulled over Sandra Bland for failing to use a turn signal, he “asked” her to put out her cigarette. Sandra Bland responded, “I’m in my car, why do I have to put out my cigarette?” prompting the trooper to forcibly remove her from the car. Ohlheiser & Phillip, *supra* note 243. Certainly, there is evidence to suggest that a similarly situated white woman would have been treated differently. See M.K.B. Darmer, Teaching *Whren* to White Kids, 15 *Mich. J. Race & L.* 109, 113 (2009) (noting that her interactions with the police during a traffic stop were informed by her status as a white woman); see also Epp et al., *supra* note 117, at 47–48 (observing that whites “begin their encounters with police assuming that they have full citizenship rights and leave these experiences with their status undiminished”). In this sense, Bland refused to do the “extra” work for performing citizenship.

292. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614–16 (2015) (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (explaining that, like *Terry* stops, traffic stops must be of limited duration, and a stop that exceeds the time necessary to address the reason for the stop violates the Fourth Amendment); *United States v. Sharpe*, 470 U.S. 675, 685 (1985)).

293. As Justice White noted in his concurrence in *Terry v. Ohio*, normally a stopped person “is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.” 392 U.S. 1, 34 (1968) (White, J., concurring).

IV. TALKING BACK

“[H]ere is the bottom line: if you don’t want to get shot, tased, pepper-sprayed, struck with a baton or thrown to the ground, just do what I tell you. Don’t argue with me, don’t call me names, don’t tell me that I can’t stop you”

A seventeen-year police veteran²⁹⁴

“[T]he most important office in a democracy is the office of the citizen. Change happens because of you. Don’t forget that.”

President Barack Obama²⁹⁵

Thus far, I have argued that embedded in the Court’s criminal procedure jurisprudence—at times hidden in plain sight, at other times hidden below the surface—are asides about what it means to be a good citizen vis-à-vis policing power. This citizenship talk insists that good citizens should welcome the presence of police officers and consider it their duty to assist them, even if it means informing on neighbors, family, and friends. Equally troubling, this talk calls on citizens to consent to searches and seizures and waive their right to silence, or to speak. Throughout, this citizenship talk functions as a type of normalizing judgment, an integral part of state discipline in the Foucauldian sense. Moreover, this citizenship talk is almost always racially inflected.²⁹⁶

294. Sunil Dutta, *I’m a Cop. If You Don’t Want to Get Hurt, Don’t Challenge Me.*, Wash. Post (Aug. 19, 2014), http://www.washingtonpost.com/posteverything/wp/2014/08/19/im-a-cop-if-you-dont-want-to-get-hurt-dont-challenge-me/?utm_term=.2419d1cbdf9b [<http://perma.cc/5V5K-CRRS>].

295. President Barack Obama, *Remarks at the 20th Annual Lake Tahoe Summit* (Aug. 31, 2016), <http://obamawhitehouse.archives.gov/the-press-office/2016/08/31/remarks-president-20th-annual-lake-tahoe-summit> [<http://perma.cc/U6DD-7JZK>]. President Obama made similar remarks in his farewell address from Chicago. See George Packer, *President Obama’s Memorable Words*, *New Yorker* (Jan. 23, 2017), <http://www.newyorker.com/magazine/2017/01/23/president-obamas-memorable-parting-words> [<http://perma.cc/22QK-39DH>] (“Obama called [‘citizen’] ‘the most important office in a democracy,’ one that he’ll embrace in his post-Presidency.”).

296. Given our history of associating crime with race, of giving crime a dark face, it should not surprise that even in cases in which race is ostensibly absent, race is still present. This is true of cases like *Terry*, which gave its imprimatur to stop-and-frisks based on reasonable suspicion, and which never mentioned the race of the defendants, both black. But as I have argued previously, it is also true of cases involving white defendants when it is clear that the impact of the Court’s decision will have a disproportionate effect on racial minorities. A prime example is *Gideon v. Wainwright*, 372 U.S. 335 (1963), establishing the state’s obligation to appoint counsel for defendants who cannot afford counsel. See Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 8–9 (discussing *Gideon* as a race case); Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 Sup. Ct. Rev. 59, 86 (“[T]he right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.”); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, *Law & Contemp. Probs.*,

Whether intentional or not, this citizenship talk results in the chilling of democratic dissent and the frustration of rights. The result too is further inequality.

Still, one can imagine the hesitation and resistance to this argument. For some readers the response is a straightforward one: So what if the Court encourages good citizenship? My reply is similarly straightforward. My concern is not the promulgation of good citizenship *per se*, or even its inculcation. That said, there is something deeply problematic about a model of good citizenship that relies on citizens *foregoing* their citizenship rights. Just as there is something problematic with a model of good citizenship that, in effect if not by design, chills democratic dissent. Professor Eric Miller makes a related point: “The public should not face the cruel dilemma of forgoing their rights or facing harsh treatment from the police.”²⁹⁷ Going a step further: There is something deeply problematic, even ironic, that in the very cases defining constitutional protections, the Court’s citizenship talk encourages the surrendering of such protections. This is the first problem. But there is also a second problem that has to do with the unequal distribution of citizenship talk. We should be troubled by citizenship talk that implicitly requires minorities to prove or “work” their citizenship, and to perform as passive, nonquestioning, and, indeed, as second-class citizens. While citizenship talk may not seem like a problem, it is.

However, citizenship talk, as promulgated by the Court and as experienced every day by thousands of individuals during citizen–police interactions, does not have to be a problem. This final part of the Essay gestures towards a jurisprudential intervention that would reduce both problems, that is, the problem of suppressing rights and chilling dissent, and the problem of racial distribution. Specifically, this Part imagines an interstitial space in which it would be a mark of a healthy democracy that *all* citizens have the ability, without repercussions or recrimination, to talk back to the police, to ask why and how come, to assert their rights, to

Winter 1995, at 81, 83 (“When discussing the inadequacies of the current system of providing counsel for the accused poor, one cannot ignore the correlation between race and poverty.”). Another example is *Coker v. Georgia*, 433 U.S. 584 (1977), which abolished the death penalty as punishment for rape. Though involving a white defendant, the Court was well aware of the impact the case would have given racial disparities in the imposition of the death penalty. There is *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), a case involving the constitutionality of arresting someone for a traffic violation; although *Atwater* was a white “soccer mom,” the implication for minorities was evident. A more recent example is *Utah v. Strieff*, 136 S. Ct. 2056 (2016), in which the Court held that in certain circumstances evidence discovered during a stop can be used against a suspect at trial, even though the stop itself was unconstitutional. As Justice Sotomayor observed, although the case involved a white defendant, “it is no secret that people of color are disproportionate victims of this type of scrutiny.” *Id.* at 2070 (Sotomayor, J., dissenting). For a more general discussion of how race is revealed and concealed in decisions, see generally Justin Driver, *Recognizing Race*, 112 *Colum. L. Rev.* 404 (2012).

297. Miller, *supra* note 283, at 296.

question and test the boundaries of the law, and to say “no.” In this space, dissenting voices, or what political theorist Chantal Mouffe might call agonistic voices,²⁹⁸ would be heard rather than silenced, and democracy would be fostered rather than frustrated.

Allow me to return and expand upon just one incident that became a flashpoint in the national conversation about policing in this country. In July 2015, in Waller County, Texas, State Trooper Brian Encinia pulled over Sandra Bland for failing to use a turn signal.²⁹⁹ Prior to this event, the most well-known case of a woman being pulled over was probably that of Gail Atwater, a white woman who was arrested and hauled to jail for essentially failing to secure her children in seatbelts,³⁰⁰ an arrest that the Supreme Court gave its blessing to in *Atwater v. City of Lago Vista*.³⁰¹ Like Atwater, Sandra Bland was pulled over for a routine traffic violation, a traffic stop that could have disappeared into the thousands of stops that happen each day. Instead, her traffic stop spawned a growing “SayHerName” movement.³⁰² As captured on the state trooper’s dashboard video camera, Trooper Encinia quickly says to Bland, “You mind putting out your cigarette, please? If you don’t mind?” Sandra Bland, a Black Lives Matter activist, responds with a question of

298. Chantal Mouffe, *Agonistics: Thinking the World Politically* (2013). Mouffe writes:

Conflict in liberal democratic societies cannot and should not be eradicated, since the specificity of pluralistic democracy is precisely the recognition and legitimation of conflict. What liberal democratic politics requires is that the others are not seen as enemies to be destroyed, but as adversaries whose ideas might be fought, even fiercely, but whose right to defend those ideas is not to be questioned. To put it another way, what is important is that conflict does not take the form of an ‘antagonism’ (struggle between enemies) but the form of ‘agonism’ (struggle between adversaries).

Id. at 7. Mouffe adds, “This confrontation between adversaries is what constitutes the ‘agonistic struggle’ that is the very condition of a vibrant democracy.” Id.

299. Queally, *supra* note 215; see also Tex. Dep’t of Pub. Safety, *Police Video Shows Sandra Bland’s Arrest*, N.Y. Times (July 22, 2015), <http://www.nytimes.com/video/us/100000003813646/police-video-shows-sandra-blans-arrest.html> (on file with the *Columbia Law Review*).

300. Ross E. Milloy, *PUBLIC LIVES; For Seat-Belt Violator, a Jam, a Jail and Unmoved Justices*, N.Y. Times (Apr. 28, 2001), <http://www.nytimes.com/2001/04/28/us/public-lives-for-seat-belt-violator-a-jam-a-jail-and-unmoved-justices.html?mcubz=3> (on file with the *Columbia Law Review*).

301. 532 U.S. 318, 326 (2001) (allowing warrantless arrests for “minor criminal offenses” and misdemeanors, such as failing to secure one’s child in a seat belt). I raise *Atwater* here in part to remind the reader that the current citizenship talk that emerges from the Court harms everyone regardless of race. The intensity of those harms, however, is experienced by those who are black and brown.

302. For a discussion of the movement and how police violence has been gendered against black women, see generally Kimberlé Williams Crenshaw & Andrea J. Ritchie, *African Am. Policy Forum*, *Columbia Law Sch. Ctr. for Intersectionality & Soc. Policy Studies*, *Say Her Name: Resisting Police Violence Against Black Women* (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741d/f/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [<http://perma.cc/F5YY-8B65>].

her own: “I’m in my car, why do I have to put out my cigarette?” Rather than answering, Trooper Encinia orders Bland out of her car, and when she refuses, Trooper Encinia uses force to drag her from her car. The trooper’s dashboard camera captured this exchange, as well as Trooper Encinia dragging Bland along the ground.³⁰³

Professor Rachel Harmon, in her examination of the legal authority of police commands, suggests that Bland responded the way she did in order to question the trooper’s authority.³⁰⁴ Professor Harmon’s reading of the incident is certainly right. But to my mind, Professor Harmon’s reading captures only part of what Bland was likely thinking.³⁰⁵ Bland, in asking why she had to put out her cigarette, was not only questioning the officer’s authority. She was also contesting that authority, and positing a counterfactual; she was interrogating the trooper, asking whether he would have pulled her over had she been white, and whether he would have asked her to put out her cigarette if she had been white. More than this, one senses that Bland was calling into question the law itself. Without ever mentioning the names of cases—think *Pennsylvania v. Mimms*,³⁰⁶ *Maryland v. Wilson*,³⁰⁷ *Whren v. United States*,³⁰⁸ *United States v. Armstrong*,³⁰⁹ and yes, *Atwater v. City of Lago Vista*³¹⁰—she was asking how it can possibly be legitimate in a country that espouses equality before the law and equal justice—at both “the gatehouse[s] and the mansion[s]”³¹¹—that the law gives an officer almost unfettered discretion to decide which citizen he will stop; which citizen he will order to step out of her vehicle; which citizen he will order to place her hands “where

303. Tex. Dep’t of Pub. Safety, *supra* note 299.

304. Rachel Harmon, Lawful Orders and Police Uses of Force 1 (unpublished manuscript) (on file with the *Columbia Law Review*).

305. Even here, in interpreting Bland’s encounter with Trooper Encinia, I am relying on my own “information pools.” See Maines, *supra* note 114, at 317–18 (noting that information pools “might contribute to the understanding of . . . racial gulfs”). I am also reading back, reading black. See Capers, Reading Back, Reading Black, *supra* note 93, at 9–10 (suggesting “a way of reading [the law] . . . that attends to the way judicial opinions function as cultural productions that create and recreate race” (footnote omitted)).

306. 434 U.S. 106, 111 (1977) (granting officers unfettered discretion, under the Fourth Amendment, to order drivers out of the vehicle following a legitimate traffic stop).

307. 519 U.S. 408, 414–15 (1997) (extending this discretion to permit police to order passengers out of the vehicle).

308. 517 U.S. 806, 809–13 (1996) (holding that pretextual stops are permissible under the Fourth Amendment so long as the stop itself is based on an actual traffic violation).

309. 517 U.S. 456, 465 (1996) (requiring plaintiffs alleging discriminatory enforcement to meet the exacting burden of establishing that similarly situated individuals of a different race were treated differently, and that such different treatment was motivated by a discriminatory purpose).

310. 532 U.S. 318, 354–55 (2001) (upholding the constitutionality of a discretionary arrest for a traffic violation).

311. Yale Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From *Powell* to *Gideon*, from *Escobedo* to . . . , in *Criminal Justice in Our Time* 1, 19–20 (A.E. Dick Howard ed., 1965).

I can see them”; which citizen he will let go with a warning, or punish with a summons, an arrest, or worse still, physical violence; which citizen he will treat as an equal, as “presumed innocent”; and which he will not. One senses that in asking, “I’m in my car, why do I have to put out my cigarette?” Bland was essentially asking whether this is a country of equal citizenship,³¹² a country without ceremonies of degradation directed toward racial minorities.³¹³ She was asking, when we say “law and order,” why does it seem that we have a particular “order,” a particular hierarchy of bodies, in mind. She was asking, when we say, “serve and protect,” who exactly are the police serving and what are they protecting? Recalling the words of civil rights activist Fannie Lou Hamer in describing the effects of the inequality she saw, Bland was saying “I’m sick and tired of being sick and tired.”³¹⁴ Bland was asking, “Is there a reason I have to prove my good citizenship, and others don’t?” She was both talking back, and talking black.³¹⁵

As a society, many of us have been taught to categorize the actions of Bland as disobedient. As insufficiently deferential. As insubordinate. Indeed, a frequent occurrence after similar highly publicized police–citizen encounters, especially those involving racial minorities as victims, is to blame said victim with comments like “people need to obey orders.”³¹⁶ We have been taught to think of Bland and other black and brown people like her as unruly, as confrontational, as “uppity,” and ultimately as bad citizens. After all, per the Court, Bland should have cooperated with the police. Bland should have obeyed all police orders without question.

But what happens if we bracket what we have been taught and look at Bland’s actions—her talking back—as part of a continuum of citizens

312. Charles Epp et al., in the recent book *Pulled Over*, make a similar point: Knowing that they and their group have long been viewed as second-class citizens (or worse), members of traditionally stigmatized groups are attentive to whether *this* official in *this* instance is treating them with the respect due a full and equal member of the community.

Epp et al., *supra* note 117, at 15.

313. See generally Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low-Income Women, 3 U.C. Irvine L. Rev. 297 (2013) (borrowing the term from sociologist Harold Garfinkel and offering examples of ceremonial degradation of low-income women of color); see also Harold Garfinkel, Conditions of Successful Degradation Ceremonies, 61 Am. J. Soc. 420, 420 (1956) (“Any communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types, will be called a ‘status degradation ceremony.’”).

314. Jerry DeMuth, Fannie Lou Hamer: Tired of Being Sick and Tired, Nation (Apr. 2, 2009), <http://www.thenation.com/article/fannie-lou-hamer-tired-being-sick-and-tired/> [<http://perma.cc/HHH5-3JAB>] (“All my life I’ve been sick and tired . . . Now I’m sick and tired of being sick and tired.”).

315. See Capers, Reading Back, Reading Black, *supra* note 93, at 10–11.

316. See, e.g., Ibram X. Kendi, Opinion, Sacrificing Black Lives for the American Lie, N.Y. Times (June 24, 2017), <http://www.nytimes.com/2017/06/24/opinion/sunday/philando-castile-police-shootings.html> (on file with the *Columbia Law Review*).

engaged in resistance, in voicing dissent and dissatisfaction, in engaging in agonistic democracy? Viewed through this lens, Bland responded to the trooper's microaggression by engaging in microresistance, knowing that such microresistance has the possibility of igniting more microresistance, and ultimately change. So, what happens when we place Bland—and the hundreds of citizens like Bland—in the same sentence as the dozens of women who, in the late nineteenth century, were arrested when they went to polling places to vote, knowing that women were barred from voting? What happens when we place Bland in the same sentence as Homer Plessy, who deliberately sat in a white car during a time of racial segregation; or Rosa Parks, arrested for refusing to give up her seat to a white person in the segregated South; or Fred Korematsu, who deliberately violated an exclusion order; or to the hundreds of drag queens and gay men and women, who refused police orders to disperse at the Stonewall Inn; or to the DREAMers, who en masse came out as “undocumented and unafraid”³¹⁷ to challenge immigration policies? What happens when we acknowledge that, as a society, we celebrate certain individuals—those privileged by whiteness and class and gender—precisely because they assert their rights, because they engage in agonistic citizenship? We even call them exemplars of rugged individualism, of that American fighting spirit. *Take that job and shove it. Don't touch my junk. I'll give you my gun when you pry it from my cold, dead hands.* What happens when we acknowledge that we deny these approbations to those who, by virtue of race and class, are often deemed contingent citizens?

For that matter, what happens when we assume that Bland, by talking back and refusing to voluntarily exit her car until the officer provided her a valid reason, was calling into question the government's “eternal temptation . . . to arrest the speaker rather than to correct the conditions about which he complains?”³¹⁸ Do we recall that the birth of this republic began with dissent? After all, dissent is a “crucial institution for challenging unjust hierarchies and for promoting progressive change.”³¹⁹ Do we recall Henry David Thoreau's insistence that the law is not necessarily just and that sometimes disobedience is more just?³²⁰ Or Martin Luther King, Jr.'s “Letter from Birmingham Jail,” in which he argued that having too much respect for majoritarian law is counter to

317. See Leti Volpp, *Civility and the Undocumented Alien*, in *Civility, Legality, and Justice in America* 69, 93 (Austin Sarat ed., 2014) (“Coming out constructs oneself as a political agent . . .”).

318. *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting).

319. Steven H. Shiffrin, *Dissent, Injustice, and the Meanings of America*, at xii (1999).

320. See Henry David Thoreau, *On the Duty of Civil Disobedience*, in *The Civil Disobedience Handbook: A Brief History and Practical Advice for the Politically Disenfranchised* 12, 13 (James Tracy ed., 2001) (1849) (“The only obligation which I have a right to assume is to do at any time what I think right.”).

good citizenship?³²¹ Not so many years ago, Harvard Professor Henry Louis Gates talked back to an officer who suspected Gates, who had just entered his own home, of being a burglar.³²² “Why, because I’m a black man in America?” Gates asked.³²³ Gates demanded the officer’s name and badge number, and the officer arrested Gates for being “disorderly.”³²⁴ I mention this incident not only as further evidence of a citizen talking back and refusing to be “good”—at least refusing to be “good” in the way the Court seems to insist—but also because of Gate’s poignant words from years before his arrest. Although Gates uses the term “critique,” one could easily substitute “talking back.” Years earlier, Gates wrote, “[C]ritique can also be a form of commitment, a means of laying a claim. It’s the ultimate gesture of citizenship. A way of saying: ‘I’m not just passing through, I *live* here.’”³²⁵

All of this reminds me of the dissenting citizens who have posted videos of their police interactions on YouTube.³²⁶ The student who refuses to roll down her car window for the police.³²⁷ The man who tells the police who are insisting on searching his apartment to get a warrant.³²⁸ The airline passenger telling the TSA authorities, “If you touch my junk I am going to have you arrested.”³²⁹ The man, stopped for walking through a residential neighborhood with a firearm, demanding to know why officers are stopping him if carrying a firearm is not a crime and if

321. See Martin Luther King, Jr., Letter from Birmingham Jail (Aug. 1963), http://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf [<http://perma.cc/9EKL-5PU7>].

322. See, e.g., Abby Goodnough, Harvard Professor Jailed; Officer Is Accused of Bias, N.Y. Times (July 20, 2009), <http://www.nytimes.com/2009/07/21/us/21gates.html> (on file with the *Columbia Law Review*).

323. Id.

324. Id.

325. Henry Louis Gates, Jr., Editorial, What Is Patriotism?, 253 *Nation* 75, 91 (1991).

326. See, e.g., B tha King of Games McKean, Police State Why Are Your Hands in Your Pockets, YouTube (Nov. 27, 2014), http://www.youtube.com/watch?v=9_wLTmnKP5I (on file with the *Columbia Law Review*) (documenting police questioning after being labeled suspicious for “walking in the cold”); End the Fed, Police Encounter, YouTube (Jan. 12, 2014), <http://www.youtube.com/watch?v=zyZrIF6ah8k&t=> (on file with the *Columbia Law Review*) (documenting an encounter with police following a complaint); John Smith, Lakewood, Colorado P.D. Police Officer Lies About Terry Stop, YouTube (May 11, 2014), <http://www.youtube.com/watch?v=lh9VzrAfw4g> (on file with the *Columbia Law Review*) (documenting questioning by Colorado police officers).

327. justD4R, Police Officer Smashes Student’s Car Window After Girl Refuses to Roll It Down!, YouTube (Sept. 21, 2013), <http://www.youtube.com/watch?v=MvQJKfJOako> (on file with the *Columbia Law Review*).

328. VIDEO: Man Refuses to Let Cops Search House Without Warrant, Films Police Despite Protests, LiveLeak (Sept. 11, 2014), http://www.liveleak.com/view?i=21e_1410480562 (on file with the *Columbia Law Review*).

329. CNN, CNN: John Tyner to TSA Security ‘Don’t Touch My Junk,’ YouTube (Nov. 17, 2010), <http://www.youtube.com/watch?v=Laxmx4cE3aE> (on file with the *Columbia Law Review*).

the Second Amendment means anything.³³⁰ There are hundreds of videos like these, citizens engaged in “sousveillance,” the term Steve Mann coined to describe the act of “[observing] or recording by an entity not in a position of power or authority over the subject of the veillance.”³³¹ The citizens are black and white, Hispanic and Asian, men and women, conservatives and liberals. Of course, there are the videos too of the individuals who were not thinking of cameras or of their interactions being documented. Instead they may have thought only that something was not right, and that they had been passive, docile, obedient subjects for too long, and that it was time to ask why and how come. Videos like the one of Sandra Bland. Or Eric Garner. Or still more recently, the video of a black man, Larnie Thomas, being arrested in Minnesota for walking on the shoulder of the road, even though there was no place else to walk because the sidewalk was officially closed due to construction.³³² In the video, Thomas can be seen and heard arguing with the police officer.³³³ And even though, following public uproar, the police dismissed the charges, the city still blames Thomas for being “belligerent” and not obeying orders.³³⁴ I think too of the Black Panthers, who in the 1960s armed themselves with firearms (asserting their rights under the Second Amendment) and with law books and watched the police, all to say that rights mattered.³³⁵ All of these citizens insisted on dialogue rather than monologue. And all were engaged in dissent. Political scientist Austin Sarat might even add that they were engaged in a type of dissent traceable to Socrates, agitating not so much for destruction but for something better.³³⁶ Sarat’s observation bears

330. MLive, Grand Rapids Open Carry, YouTube (Mar. 5, 2015), <http://www.youtube.com/watch?v=Znco5BrWOLo> [<http://perma.cc/CB6V-272U>]; see also LibertyIsForEveryone, Open Carry—Arguing with Police in Madison Heights, MI, YouTube (Oct. 7, 2013), <http://www.youtube.com/watch?v=p1WIeV68Eeo> (on file with the *Columbia Law Review*).

331. Steve Mann, Veillance and Reciprocal Transparency: Surveillance Versus Sousveillance, AR Glass, Lifelogging, and Wearable Computing, 2013 IEEE Int’l Symp. on Tech. & Soc. 1, 3.

332. See Nina Golgowski, Citation Dropped Against Black Man Accused of Walking in Middle of the Street, Huffington Post (Oct. 18, 2016), http://www.huffingtonpost.com/entry/citation-dropped-against-man-in-street_us_58062403e4b0b994d4c152f9?section=§ion=us_black-voices [<http://perma.cc/NY6V-M38U>].

333. Citizen 7101, Edina Police Incident 10/12/16, YouTube (Oct. 12, 2016), <http://www.youtube.com/watch?v=djyysjn6vCg> (on file with the *Columbia Law Review*).

334. Golgowski, *supra* note 332.

335. See Robert L. Allen, Black Awakening in Capitalist America: An Analytic History 82 (1969) (“Whenever police harassed ghetto residents, Panthers would arrive on the scene bearing rifles and shotguns. The Panthers also habitually carried with them law books from which they could quote the appropriate section of the legal code being violated by the police.”); Bridgette Baldwin, In the Shadow of the Gun: The Black Panther Party, the Ninth Amendment, and Discourses of Self-Defense, *in* In Search of the Black Panther Party 67, 69 (Jama Lazerow & Yohuru Williams eds., 2006).

336. See Austin Sarat, Terrorism, Dissent and Repression, *in* Dissent in Dangerous Times 1, 8–9 (Austin Sarat ed., 2005) (characterizing Socrates’s ideal of an Athenian

repeating: “The patriot loves an idealized version of the nation, while the dissenter is moved by an idealized version of a world of yet-to-bes.”³³⁷

Finally, what happens when we put Bland in the same sentence as Dollree Mapp of *Mapp v. Ohio*,³³⁸ who famously said “no” when officers barged into the house she owned and demanded to search her house?³³⁹ When Mapp insisted, “I want to see the search warrant,” the officers responded by flashing a sheet of paper, which Mapp snatched and placed in her bosom.³⁴⁰ The officers snatched it back, arrested her for being “belligerent,”³⁴¹ and proceeded to conduct a warrantless search of her house.³⁴² But in saying “no,” in being “belligerent,” Mapp set off a chain of events that resulted in the “most important search-and-seizure decision in history,”³⁴³ one that made the exclusionary rule binding on the states.³⁴⁴ All of this, after all, falls under what Professors Lani Guinier and Gerald Torres call “demosprudence,” or action instigated by “ordinary people,” to change “the people who make the law and the landscape in which that law is made.”³⁴⁵ All of this is what Martin Luther King, Jr., called “present[ing] our very bodies as a means of laying our case before the local and national community.”³⁴⁶ My hope is that what happens

citizen as “the critic whose dissent helped prevent an all-too-easy slide from thoughtlessness to injustice”).

337. *Id.* at 8.

338. 367 U.S. 643 (1961).

339. See Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court’s Criminal Procedure “Revolution,”* in *Criminal Procedure Stories* 45, 47 (Carol S. Steiker ed., 2006). Mapp was eventually arrested for being “belligerent.” *Id.* at 48. For more on the *Mapp* case, see generally I. Bennett Capers, *Unsex the Fourth Amendment*, 48 U.C. Davis L. Rev. 855, 861–65 (2015) (describing the *Mapp* decision in the context of gender-related aspects of the Fourth Amendment).

340. Carolyn N. Long, *Mapp v. Ohio: Guarding Against Unreasonable Searches and Seizures* 8 (2006).

341. *Mapp*, 367 U.S. at 644–45.

342. See Long, *supra* note 340, at 13, 17 (“The report summarized the police action and search of the home, including Mapp’s reluctance to admit police into the house without a search warrant . . .”). No warrant was produced at trial, nor did the prosecutor attempt to explain the absence of a warrant. *Id.* at 18–19. More than twenty years later, the sergeant admitted that in fact the police did not have a warrant. *Id.* at 13.

343. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1368 (1983).

344. Though even here race matters. As Shawn Ossei-Owusu has observed, there is a reason why there have been several books and a well-known film, *Gideon’s Trumpet*, about Clarence Earl Gideon, the white defendant who insisted on his right to an attorney in *Gideon v. Wainwright*. Suffice to say, barring any unforeseen commercial intervention, there will probably be no award winning books or movies about Dollree Mapp, Ernesto Miranda, or John Terry. Shaun Ossei-Owusu, *The Sixth Amendment Façade: On the Historical (In)Significance of the Right to Counsel* 37 (unpublished manuscript) (on file with the *Columbia Law Review*).

345. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2748–50 (2014).

346. King, *supra* note 321, at 1.

when we place Bland in a continuum of dissenters is this: We begin to question citizenship talk that chills democratic dissent, and we long for an interstitial space in which all citizens can call into question the supposed moral legitimacy of state power.

Imagine a citizenship talk that celebrates rights, equality, and dissent.³⁴⁷ First, with respect to rights, consider the benefits that would accrue if criminal procedure opinions—rather than treating the Fourth, Fifth, and Sixth Amendments solely as regulatory limitations on government behavior vis-à-vis individuals—also treated them—in practice and in the language in the opinions—as positive rights to be independently valued and enjoyed by citizens. Consider the benefits that would accrue if the Court—again in practice and in its language—stressed the importance of individuals knowing and benefiting from their rights. Rather than a decision like *Schneckloth*, in which the Court held that officers need not advise individuals that they have a right to refuse consent,³⁴⁸ the decision would have reached the opposite conclusion and stressed the importance of citizens being made aware of and feeling free to exercise their rights. Rather than a decision like *United States v. Mendenhall*, in which the Court found no Fourth Amendment violation when police waylaid Sylvia Mendenhall at the Detroit Airport, asked her a series of questions, “asked” her to come with them to a private room, and then strip-searched her for drugs,³⁴⁹ the Court would have recognized that, at a minimum, the police should have advised Mendenhall that she was not under arrest and that she was indeed free to disregard their questions and leave. Rather than a decision like *Devenpeck v. Alford*, in which the Court stated that informing an arrestee of the basis for his arrest is not constitutionally required,³⁵⁰ the Court would have recognized that a seizure is unreasonable under the Fourth Amendment without it. Or consider a case like *Davis v. United States*, in which the Court found no Sixth Amendment violation even though officers continued to question Robert Davis after he stated, “Maybe I should talk to a lawyer,” because his statement was not assertive enough.³⁵¹ A decision that stressed the importance of individual rights would have, at a minimum, required that officers ask Davis clarifying questions and readvise him of his right to

347. I do not mean to suggest that the Court is the only possible locus of change. However, given that my focus has been on citizenship talk originating with the Court, my analysis here begins with what the Court can do to change.

348. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973).

349. 446 U.S. 554, 557–58 (1980) (disregarding Fourth Amendment claims in which the DEA officers interviewing the plaintiff never told her she was not under arrest and the plaintiff complied with their requests).

350. 543 U.S. 146, 155 (2004) (“While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required.”).

351. 512 U.S. 452, 462 (1994) (“The courts below found that petitioner’s remark to the NIS agents—“Maybe I should talk to a lawyer”—as not a request for counsel, and we see no reason to disturb that conclusion.”).

remain silent and right to counsel. Instead, the decision reached the opposite conclusion, stating, “[W]e decline to adopt a rule requiring officers to ask clarifying questions. If the suspect’s statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”³⁵²

Now add to this language that valorizes equality. For too long, the Court has read equality as outside the purview of the criminal procedure amendments. As the Court put it in *Whren*, the case that gave its imprimatur to pretextual traffic stops, equal protection is a matter for “the Equal Protection Clause, not the Fourth Amendment.”³⁵³ In doing so, the Court adopted a worldview in which rights are “hermetically sealed units whose principles must not contaminate one another.”³⁵⁴ The effect is something “akin to constitutional rights segregation.”³⁵⁵ But none of this is inevitable or preordained. As Professor Akhil Amar, Professor Andrew Taslitz, and I have separately argued elsewhere, it makes textual sense to read the criminal procedure amendments as incorporating the equality concern that animates the Fourteenth Amendment’s Equal Protection Clause.³⁵⁶ Indeed, one of the concerns of the Fourteenth Amendment was to render a dead letter various antebellum laws that gave officials free license to target blacks for searches and seizures. Certainly, the Warren Court read the Fourth, Fifth, and Sixth Amendments against the backdrop of the Fourteenth Amendment’s Equal Protection Clause.³⁵⁷ Imagine how such an emphasis on equality under the law could change the outcomes, not only in cases like *Whren*,

352. *Id.* at 461–62. Nor would rights-focused opinions need to end here. Imagine opinions that read the Bill of Rights as imposing reciprocal obligations on the police. We have all heard the stories, or experienced ourselves, police–citizen interactions in which officers refuse to answer the simplest of questions. Does it really make sense that officers should have the power to stop an individual for commission of a traffic infraction and yet not have the obligation to answer the driver’s question, “What infraction?” Or that an officer should have the authority to forcibly stop someone based on reasonable suspicion that that person is engaged in criminal activity, and yet ignore that person’s question, “What criminal activity?” This is what I mean by rights enhancing.

353. *Whren v. United States*, 517 U.S. 806, 813 (1995). For a cogent critique of *Whren*, see Tracey Maclin, *Race and the Fourth Amendment*, 51 *Vand. L. Rev.* 333, 340 (1998) (“In *Whren* the Court repeats its earlier mistakes . . . by neglecting racial concerns when constructing Fourth Amendment rules that govern police–citizen interactions.”).

354. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 *U. Chi. Legal F.* 163, 193.

355. Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 35.

356. Taslitz, *supra* note 248, at 12; Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1266 (1992); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 *Harv. L. Rev.* 757, 805–10 (1994); Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 36–37.

357. Capers, *Rethinking the Fourth Amendment*, *supra* note 16, at 6–12.

but also cases like *Pennsylvania v. Mimms*,³⁵⁸ or *Maryland v. Wilson*,³⁵⁹ or *Atwater v. Lago Vista*,³⁶⁰ each of which vested the police with almost unfettered discretion to engage in unequal treatment. I should add one more thing in suggesting that the Court's criminal procedure citizenship talk embrace notions of equality. This language should emphasize something more radical than equality between citizens (whatever their race, income, or status), but equally true: that the citizen and the police—in terms of citizenship rights—are equals.

Finally, and perhaps most importantly, imagine if citizenship talk in criminal procedure opinions recognized the value of dissent. Right now, the message from Court opinions is that citizens should want to assist the police, should want to cooperate, should want to come forward with any information they know about themselves or others. These messages do not stand alone. Implicit in these messages about good citizenship are messages about bad citizenship—messages that, as we have seen, chill not only the exercise of rights but also democratic dissent. Imagine opinions that allow room for citizens, including black and brown citizens, to talk back. That allow room for individuals to be oppositional, to question authority, and to challenge the law itself, without fear of repercussion. To be clear, I am not suggesting language that would give individuals the right to physically resist arrest or to disobey a lawful order. But I am suggesting that individuals should, in general, have the right to speak, or not speak, as they choose. To be “uppity” and “belligerent” and oppositional. To “take a knee,” as NFL players and others have recently done to protest racialized policing.³⁶¹ To even say, in the immortal words

358. 434 U.S. 106, 111 & n.6 (1977) (granting officers unfettered discretion, under the Fourth Amendment, to order drivers out of the vehicle following a legitimate traffic stop).

359. 519 U.S. 408, 414–15 (1997) (extending this discretion to permit police to order passengers out of the vehicle).

360. 532 U.S. 318, 350 (2001) (giving the Court's imprimatur to officer's discretion as to whether to issue a summons or make an arrest, when both are permitted by the offense).

361. For an interesting discussion of the phenomenon of NFL players kneeling during the national anthem, and the backlash, see generally Jelani Cobb, *From Louis Armstrong to the N.F.L.: Ungrateful as the New Uppity*, *New Yorker* (Sept. 24, 2017), <http://www.newyorker.com/news/news-desk/from-louis-armstrong-to-the-nfl-ungrateful-as-the-new-uppity> [<http://perma.cc/D7WE-ZZ66>]. It has not been lost among people of color and others that when white Americans protest peacefully, even if they are Nazis and anti-Fascists or walking alongside them, the President of the United States deems those white Americans “very fine people,” Full Text: Trump's Comments on White Supremacists, ‘Alt-Left’ in Charlottesville, *Politico* (Aug. 15, 2017), <http://www.politico.com/story/2017/08/15/full-text-trump-comments-white-supremacists-alt-left-transcript-241662> [<http://perma.cc/7SDX-DN3W>], and yet when a black American football player protests peacefully by kneeling during an anthem, the President deems him a “son of a bitch.” Aric Jenkins, *Read President Trump's NFL Speech on National Anthem Protests*, *Time* (Sept. 23, 2017), <http://time.com/4954684/donald-trump-nfl-speech-anthem-protests/> [<http://perma.cc/VLT8-46E4>].

of Jay-Z, “you gon’ need a warrant for that.”³⁶² To say, in the immortalized words of Eric Garner, “Every time you see me, you want to mess with me. I’m tired of it. It stops today.”³⁶³ And to not have to worry about having to say, moments afterwards, “I can’t breathe.”³⁶⁴

CONCLUSION

For too long the Court’s citizenship talk in criminal procedure cases has gone unnoticed and unremarked upon. The goal of this Essay has been to surface this talk—especially the talk about what it means to be a good citizen vis-à-vis the police, and to demand an account. The goal, too, has been to make an argument: Quite simply, there is something troubling about citizenship talk that encourages citizens to cede their rights of citizenship, those constitutional protections we have under the Fourth, Fifth, and Sixth Amendments. There is also something disconcerting about citizenship talk that chills dissent. There is certainly something problematic about citizenship talk that furthers racial inequality in its burdens.

The solution I have proposed—imagining a more pluralistic model of good citizenship to be embraced by the Court, imagining a space that at least tolerates if not welcomes dissent and opposition, and that valorizes rights and equality—may not be a surefire cure-all to the problems I have identified. But at least it begins a conversation about a problem that has until now gone unnoticed.

362. Jay-Z, 99 Problems, *on* The Black Album (Def Jam Records 2003).

363. Susanna Capelouto, Eric Garner: The Haunting Last Words of a Dying Man, CNN (Dec. 8, 2014), <http://www.cnn.com/2014/12/04/us/garner-last-words/> [<http://perma.cc/7924-4HBY>].

364. *Id.*

